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[1] Appointed, took office May 6, 1942.

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TAYLOR v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 18187.

Supreme Court of California.
April 28, 1942.

1. Injunction 🔑231

Since there is no appeal from an order made in a contempt proceeding for violation of a temporary restraining order, it may be reviewed upon certiorari if it is in excess of jurisdiction. Code Civ.Proc. § 1222.

2. Injunction 🔑231

On certiorari to review order in contempt proceedings for violation of a temporary restraining order, reviewing court may consider evidence which was before trial court to determine jurisdictional question, and may annul an order by which trial court divested itself of jurisdiction if order is not justified by the evidence. Code Civ.Proc. § 1222.

3. Injunction 🔑148(1)

A written order granting a temporary restraining order, and declaring that plaintiff "shall" post bond, was sufficiently complied with by a bond posted after hearing of order to show cause at which court ordered bond to be filed, and before the written order, where language of bond posted was prospective.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

4. Injunction 🔑231

A person for whose protection a temporary restraining order was granted was entitled to institute a certiorari proceeding to annul superior court's order refusing to hear a contempt proceeding for alleged violation of order, where affidavit filed in contempt proceeding bore caption of civil action in which the order was granted, notwithstanding that affidavits were not made by person for whose protection the order was granted but by his employee. Code Civ. Proc. §§ 1069, 1222.

◆

In Bank.

Proceeding by J. Hartley Taylor to review an order of the Superior Court of Los Angeles County dismissing orders directed to Frederic A. Clarke and his attorneys to show cause why they should not be punished for contempt of court and discharging alleged contemners.

Order annulled.

Brooks Gifford and William E. Fox, both of Pasadena, for petitioner.

Himrod & Parks and J. H. O'Connor, Co. Counsel, all of Los Angeles, for respondent.

J. N. Hastings, of Los Angeles, for Girard F. Baker and Eldon V. Soper.

EDMONDS, Justice.

Upon affidavits made by L. N. Dechene, the Superior Court issued an order directing Frederic A. Clarke and his attorneys to show cause why they should not be punished for contempt of court because of acts assertedly committed in violation of a preliminary injunction. Later a second order to show cause issued, based upon a further affidavit of Dechene. When the matter came on for hearing, each of the orders to show cause was dismissed and the alleged contemners discharged upon the ground that the injunction could not be enforced because of the failure to comply with its requirement concerning the filing of a bond.

The present controversy is the outgrowth of an action brought by the petitioner to establish the existence of a partnership with Clarke, and to secure an accounting and declaratory relief. In the course of that litigation, he obtained from the respondent court a temporary restraining order, an order to show cause why a receiver should not be appointed and an injunction pendente lite. On April 24th, which was the return date of the order to show cause, a hearing was had and the court made the following order as shown by its minutes: "Injunction is granted; bond fixed at $1000.00. Restraining order is to remain in force until April 25, 1940, at 5 p. m." On the same day, the petitioner filed a bond in which a corporate surety agreed that in the event the injunction applied for should issue, it would indemnify the party enjoined for any damages not exceeding $1,000, as he might sustain thereby if the court finally decided that the plaintiff was not entitled thereto.

The minute order was followed by one in writing made on April 25, 1940, in which the court enjoined Clarke and his attorneys from withdrawing certain funds of the business in controversy. This order also provided "that the Plaintiff shall post a surety bond in the sum of $1000.00 to indemnify defendant." Another provision was "that the temporary restraining order previously made herein on the 18th day of April, 1940, shall remain in full force and effect until the 25th day of April, at 5 o'clock p. m."

The contempt proceeding was instituted by the filing of an affidavit made by one L. N. Dechene, an accountant employed by the petitioner. By this affidavit, Dechene charged that Clarke and his attorneys had violated the injunction by withdrawing funds and disposing of certain equipment in violation of its terms. By an amended affidavit, Dechene charged the commission of the same acts, and also that Eldon V. Soper and Gerard F. Baker had each filed an affidavit in the contempt proceeding which contained statements known by them to be false and untrue. An order to show cause issued upon this second affidavit.

When the matter came on for hearing, all of the charges made by Dechene had been answered in counter affidavits made by the alleged contemners. At that time counsel for Clarke, Soper and Baker objected to the introduction of any evidence upon the ground that the affidavits did not state facts sufficient to constitute a cause of contempt. The trial court sustained the objection, but upon the ground that no bond had been filed as required by the order granting a preliminary injunction.

[1, 2] As there is no appeal from an order made in a contempt proceeding, it may be reviewed upon certiorari if it is in excess of jurisdiction. Code Civ.Proc. § 1222; Commercial Bank of Spanish America v. Superior Court, 192 Cal. 395, 220 P. 422; Tripp v. Tripp, 190 Cal. 201, 211 P. 225; Otis v. Superior Court, 148 Cal. 129, 82 P. 853; Pennell v. Superior Court, 87 Cal.App. 375, 262 P. 48; Abbott v. Abbott, 24 Cal.App. 475, 141 P. 939. And in passing upon the question of the trial court's jurisdiction, the reviewing court may consider the evidence which was before it for the purpose of determining that issue. Bridges v. Superior Court, 14 Cal.2d 464, 485, 94 P.2d 983; McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691; Hotaling v. Superior Court, 191 Cal. 501, 506, 217 P. 73, 29 A.L.R. 127; Titcomb v. Superior Court, 220 Cal. 34, 29 P.2d 206. The converse is also true, and where the evidence does not justify an order by which a trial court divests itself of jurisdiction to hear and determine the matter, the order may be annulled on certiorari. So it has been held that, where the disobedience of an injunction issued by the court is made to appear, and the court in effect erroneously sustained a demurrer to the affidavits of the party for whose benefit the injunction had issued, the order should be annulled. Goodall v. Superior Court, 37 Cal. App. 723, 174 P. 924.

[3] Assuming that the written order of April 25th was necessary to make the injunction effective the filing of the surety bond by the petitioner on April 24th following the hearing of the order to show cause, at which time the court ordered the injunction to issue and a bond to be filed, was a sufficient compliance with its terms. Although by that order the court declared that the plaintiff "shall post a bond of $1000.00 to indemnify defendant," the prospective language of the bond filed the previous day furnished adequate protection to those against whom the injunction ran. Yellen v. Fidelity & Casualty Co. of New York, 115 Cal.App. 434, 1 P.2d 1019; Carter v. Mulrein, 82 Cal. 167, 22 P. 1086, 16 Am. St.Rep. 99.

[4] Answering another point urged on behalf of the respondent court, as the petitioner is the person for whose protection the injunction was granted, he is a party beneficially interested in the ruling complained of within the requirements of section 1069 of the Code of Civil Procedure, and not a stranger to the record. Goodall v. Superior Court, supra. The affidavits

bore the caption of the civil action, and the fact that they were made by Dechene, an auditor employed by the petitioner to examine the books and records of the business whose ownership is in dispute, does not deprive the petitioner of the right to question the order by writ of certiorari.

The respondent court therefore exceeded its jurisdiction in refusing to hear and determine the issues presented by the affidavits of Dechene and the alleged contemners.

The order is annulled.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 228

FOOD AND GROCERY BUREAU OF SOUTHERN CALIFORNIA, Inc., v. GARFIELD.

L. A. 17877.

Supreme Court of California.
April 28, 1942.

1. **Trade-marks and trade-names and unfair competition** 🔑68(2)

The practice of merchants in issuing trading stamps with the purchase of articles is merely a method of discounting bills in consideration for the immediate payment of cash, and the issuance of such stamps does not constitute a "gift" or transfer of property without consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

2. **Trade-marks and trade-names and unfair competition** 🔑68(2)

As affecting validity of drug store proprietor's practice of issuing trading stamps to customers, fact that proprietor conducted his business on an all cash basis did not preclude him from giving a cash discount. Gen.Laws 1937, Act 8781, § 3.

3. **Trade-marks and trade-names and unfair competition** 🔑68(2)

As affecting validity of drug store proprietor's practice of issuing trading stamps to customers, practice did not lose its character as a "cash discount" merely because certain customers did not take advantage of offer and request stamps. Gen.Laws 1937, Act 8781, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Cash Discount".

4. **Trade-marks and trade-names and unfair competition** 🔑68(2)

As affecting validity of drug store proprietor's practice of issuing trading stamps to customers, practice did not lose its character as a "cash discount" because a customer could not redeem stamps until he had accumulated 500 of them or because the number of stamps issued was increased on a particular day. Gen.Laws 1937, Act 8781, § 3.

5. **Trade-marks and trade-names and unfair competition** 🔑68(2)

A drug store proprietor's practice of issuing trading stamps having a cash value of two mills and redeemable for one dollar in cash or $1.25 in merchandise when presented in aggregate amounts of $50 face value did not constitute the making of a "gift" of one dollar in cash or $1.25 in merchandise in violation of unfair practices act but constituted the giving of a "discount" in consideration of paying cash. Gen.Laws 1937, Act 8781, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Discount".

6. **Trade-marks and trade-names and unfair competition** 🔑68(2)

Where issuance of trading stamps by drug store proprietor did not constitute the making of a gift in violation of statute prohibiting the giving away of any article for purpose of injuring competitors or destroying competition, it was immaterial that proprietor may have had an intent to injure competitors or destroy competition by issuance of stamps. Laws 1937, Act 8781, § 3.

7. **Trade-marks and trade-names and unfair competition** 🔑68(2)

Only if issuance of trading stamps resulted in sale of articles could plan of issuing stamps be held a violation of statute prohibiting the giving away of any article for purpose of injuring competitors or destroying competition. Laws 1937, Act 8781, § 3.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the Food and Grocery Bureau of Southern California, Incorporated, against Harold B. Garfield to enjoin defendant from issuing trading stamps to his customers. From an order granting a preliminary injunction, defendant appeals.

Reversed.

See, also, 18 Cal.2d 174, 114 P.2d 579.

Desser & Rau, of Los Angeles, for appellant.

Cupp, Hunt, & Henderson, Cupp & Cupp, J. Wesley Cupp, and Marvin Freeman, all of Los Angeles, for respondent.

EDMONDS, Justice.

The Food and Grocery Bureau of Southern California, a trade association, brought an action against the appellant, who is the proprietor of nine retail drug stores, to enjoin him from issuing trading stamps to his customers. The appeal is from an order granting a preliminary injunction. Pending a determination of the respective rights of the parties, this court issued a writ of supersedeas. Food and Grocery Bureau, etc., v. Garfield, 18 Cal.2d 174, 114 P.2d 579.

The complaint includes three causes of action. By the first, it is alleged that the appellant, in addition to handling the usual articles offered for sale in a drug store, stocks many articles customarily sold by retail grocery stores, including cigars, candy, chewing gum, matches, toothpicks and can openers; that in each of the trade areas in which one of the appellant's stores is located, there are retail drug stores and food and grocery stores and markets which are operated in competition with the appellant's business. Since 1932 the appellant has conducted what he terms as the "Mid-City Drug Profit Sharing Stamp Plan" whereby "Cash Discount" trading stamps are issued with purchases. These stamps, the association charges, have a cash value of two mills, one stamp being given with each ten-cent purchase, except on "Double Stamp Days" when two stamps are given with each such purchase. When presented in aggregate amounts of $50, face value, the stamps are redeemable for $1.00 in cash or $1.25 in merchandise.

Other allegations of the complaint are that the appellant widely advertises his stamp plan and, as a result, he has induced many persons who had not been his customers to make purchases of merchandise at his stores. Indeed, the appellant's practice of giving stamps was adopted by him for the purpose of injuring competitors and destroying competition in the various areas in which his stores are located, and as a direct and proximate result of this practice, several of the appellant's competitors have been injured.

In the second count, the association charges that the appellant is using the "Multiple Dividend Plan" for the purpose of stimulating trade. By the last count, the appellant is said to be selling merchandise below cost for the purpose of destroying competition.

Upon the filing of this complaint and a supporting affidavit, the superior court issued a temporary restraining order and an order to show cause why a preliminary injunction should not be granted. Upon the return day, the court considered the verified pleadings and the affidavits filed by the respective parties and made the order which is now under attack. However, as the second cause of action was dismissed by the association before the court made its determination and the order does not refer to any of the acts specified in the third cause of action, the question for decision concerns only the validity of the preliminary injunction insofar as it prohibits the use of trading stamps in the manner specified by the complaint.

By the appellant's answer, which was before the superior court at the time it made the order appealed from, he denies that he is a competitor of any of the retail food and grocery stores referred to in the complaint. He asserts that his cash discount or trading stamp plan is a reasonable business method for the purpose of inducing cash purchases by patrons, and that the plan is not used for the purpose of injuring competitors or destroying competition. More specifically, he denies that his use of these stamps has caused any of the trade of his competitors to be diverted to him.

As an affirmative defense, the answer alleges that the appellant has built up a large and valuable customer good will by his trading stamp system; that his competitors were and are using various competitive merchandising plans and giving concessions and articles of value to their customers which were countenanced by respondent; and that the respondent's laches is a bar to the action.

With its verified complaint, the respondent filed the affidavit of G. M. Stanton in which the affiant stated that he had received trading stamps with merchandise purchases at each of several of the appellant's stores. Subsequently, the respondent filed the affidavit of Harold Smith, the owner of a drug store near one of those operated by the appellant, in which he avers that the appellant's trading stamp plan has injured his business. According to his affidavit, Smith believes that some of his former customers are patronizing the appellant's store in order to obtain trading stamps.

In opposition to the demand for a preliminary injunction, the appellant filed affidavits in which he stated that he had used trading stamps for more than eight years; that his plan is a system for giving cash discounts to patrons for the purpose of inducing cash purchases and as an advertising medium; that he had ascertained from several of his alleged competitors mentioned in the complaint that the use of their names as injured competitors was not authorized by them; that in all localities where his stores are located there are other drug stores and food markets, all of which give premiums, redeemable coupons and other merchandise for value; and that the respondent had not proceeded against any of these competitors.

The appellant attacks the order granting a preliminary injunction as an abuse of discretion, contending that the issuance of trading stamps does not constitute the giving away of a product for the purpose of injuring competitors or destroying competition within the meaning of section 3 of the Unfair Practices Act. Stats.1935, p. 1546, as amended; Deering's Gen.Laws, Act 8781. He maintains that he issues stamps, not as a gift, but either as an advertising feature or as a cash discount given in consideration of the immediate payment of cash by the individual customer.

But assuming they do amount to a gift, he asserts, the complaint and the accompanying affidavits are nevertheless insufficient to charge a violation of the statute since they fail to show that his trading stamp plan was either adopted or conducted with the intent to injure competitors or destroy competition. And in this regard he challenges as both inapplicable and unconstitutional the presumption of such intent found in section 5 of the act which reads: "In all actions brought under the provisions of this act proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition." The appellant further contends that, in any event, the trial court abused its discretion in granting the preliminary injunction, since the facts stated in the complaint, the answer and the supporting affidavits show no damage or threat of damage to the respondent or its members by the continued operation of his stamp plan, but, on the other hand, reveal that great damage will result to him should his present operations be prohibited. He also insists that the respondent has been guilty of laches and is estopped to maintain the action, since the undisputed facts clearly show that for eight years it voiced no disapproval of his plan and also has acquiesced without objection in the practice of other retail drug stores in the vicinity of giving concessions and things of value to their customers.

The respondent denies that the appellant's trading stamps are issued as cash discounts. It contends that the scheme involves the making of a gift, the object of which is to induce persons to patronize his stores. Asserting that the complaint and affidavits in support thereof are entirely sufficient to show an intent upon the part of the appellant to injure competitors through the operation of his stamp plan, the association relies upon the presumption of intent, included in the statute as both applicable and constitutional. With respect to the argument of laches and estoppel, the respondent urges that it has not delayed unreasonably in bringing the action, nor has the appellant suffered any prejudice by the delay.

The appellant does not contend that the legislature is without power constitutionally to prohibit the issuance and use of trading stamps, and it may be noted, the United States Supreme Court has sustained the validity of anti-trading stamp legislation. Rast v. Van Deman & Lewis Co., 240 U.S. 342, 36 S.Ct. 370, 60 L.Ed. 679, L.R.A. 1917A, 421, Ann.Cas.1917B, 455; Tanner v. Little, 240 U.S. 369, 36 S.Ct. 379, 60 L.Ed. 691; Pitney v. Washington, 240 U.S. 387, 36 S.Ct. 385, 60 L.Ed. 703. But he asserts that the issuance of trading stamps, at least in the manner adopted by him, is not embraced within the prohibitive ban of section 3 of the Unfair Practices Act, reading as follows: "It shall be unlawful for any person engaged in business within this State, to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition * * *."

Concededly, the Unfair Practices Act, supra, makes no reference to trading stamps. To support the respondent's position, therefore, it is necessary for him to show either that the plan conducted by the appellant amounts to the giving away of a product for the purpose of injuring competitors or destroying competition, or that by its use he sells products below cost. But the association does not assert that the appellant's issuance of trading stamps resulted in the sale of any commodities below cost, and the affidavits filed by it do not include any facts indicating that sales below cost were accomplished by the use of stamps. Of interest in this connection, is the written opinion of the trial judge, presented in the respondent's brief, which discloses beyond question that the order granting the preliminary injunction was based solely upon the theory that the stamp plan constituted the making of a gift of a product with the intent to destroy competition.

[1] It is well settled by the decisions of this court, as well as those in other jurisdictions, that the practice of merchants in issuing trading stamps with the purchase of articles is merely a method of discounting bills in consideration for the immediate payment of cash. Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L.R.A.,N.S., 588, 3 Ann.Cas. 878; Ex parte West, 147 Cal. 774, 82 P. 434; Ex parte Hutchinson, C.C., 137 F. 950; Sperry & Hutchinson Co. v. Temple, C.C., 137 F. 992; Lawton v. Stewart Dry Goods Co., 197 Ky. 394, 247 S.W. 14, 26 A.L.R. 686; Hewin v. City of Atlanta, 121 Ga. 723, 49 S.E. 765, 67 L.R.A. 795, 2 Ann.Cas. 296; Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 30 N.E.2d 269, 131 A.L.R. 1254; Winston v. Beeson, 135 N.C. 271, 47 S.E. 457, 65 L.R.A. 167; State v. Lothrops-Farnham Co., 84 N.H. 322, 150 A. 551; State v. Holtgreve, 58 Utah 563, 200 P. 894, 26 A.L.R. 696. The respondent impliedly concedes that a cash discount is not a gift, which is a transfer of property without consideration, but it argues that the appellant's plan is not a true cash discount.

[2] In the first place, the respondent asserts, the record is devoid of any allegation by the appellant that he does any credit business, and it follows, therefore, that since all of his customers pay cash, he cannot by means of trading stamps be said to be inducing any of them to pay cash rather than to buy on credit. This argument is fallacious. The fact that the appellant conducts his business on an all-cash basis does not preclude him from giving a cash discount. On the contrary, the cash discount is even more vital to the all-cash store than to the cash and credit store because the proprietor of the former has staked his entire enterprise upon the ability to attract cash trade and has been willing to forego the patronage of those consumers who buy their goods upon credit.

[3] The respondent next contends that the appellant's trading stamps are given only to those customers who ask for them, and a bona fide cash discount in commercial practice is given to all purchasers meeting the cash payment condition. It is apparent, however, that the plan does not lose its character as a cash discount merely because certain purchasers do not take advantage of the offer and request stamps.

[4] The plan is also attacked by the respondent as not being a cash discount because the customer cannot redeem the stamps until he has accumulated 500 of them. If the appellant were in fact making cash discounts by means of trading stamps, says the association, he would redeem the stamps when the amount evidenced thereby equaled the value of one cent, and on a fifty-cent cash sale would accept only forty-nine cents in payment. Substantially the same plan was upheld by this court in Ex parte Drexel, supra, as a method of allowing discounts on cash payments.

The respondent also complains because the appellant has "double stamp days" on which he issues to the customer twice the usual number of trading stamps. Bona fide cash discounts are not arbitrarily doubled on certain days, it is contended. But a trading stamp may retain its character as a cash discount even though the number given by the merchant is increased on a particular day.

Finally, the respondent urges, the appellant advertises his stamp as "free," and this circumstance, it is maintained, is inconsistent with a legitimate cash discount plan. But the advertisement upon which this claim is made shows that the stamps are given "free" only upon the making of a ten-cent purchase from the appellant. The purchase is the prerequisite to obtaining the stamp and furnishes the consideration for the distribution of stamps to those customers asking for them.

[5] It must be concluded, therefore, that the trading stamp plan adopted by the appellant does not constitute the making of a gift of $1.00 in cash or $1.25 in merchandise but is a discount given the customer in consideration of his paying cash.

[6, 7] Since the stamp is not the gift of a product within the meaning of section 3 of the act, it is immaterial that the appellant may have had an intent to injure competitors or destroy competition by its issuance. Only in the event that the issuance of the stamp resulted in the sale of the article or articles with which it was purchased could the plan be held a violation of section 3. And since neither the complaint nor the affidavits charge that by the use of trading stamps the appellant is selling merchandise below cost in violation of the Unfair Practices Act, supra, the order appealed from must be reversed.

It is so ordered.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

WEST KEY NUMBER SYSTEM

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20 Cal.2d 286

ROGERS v. WARDEN et al.

L. A. 17882.

Supreme Court of California.

April 30, 1942.

1. Mines and minerals 🔑54(4)

Where complaint in action to cancel a deed alleged that defendants represented that plaintiff had no right in certain lots, the mineral rights of which were owned by plaintiff, and that they induced execution of a deed to remove a technicality in one defendant's title but actually to secure title to the mineral rights, allegations of false representation constituted an allegation of an actionable "statement of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Statement of Fact".

2. Mines and minerals 🔑54(4)

A widow unaccustomed to handling business matters and with no knowledge that she possessed any interest in lots of which she owned the mineral rights was justified in relying on representations that she had no right in the lots, and that defendants wanted her to sign a quitclaim deed to remove a technicality in the title of one defendant so that the lots would be marketable without making an independent investigation.

3. Deeds 🔑70(2)

The fact that an investigation would have revealed the falsity of a misrepresentation would not alone bar recovery in an action to set aside a conveyance on ground of fraudulent misrepresentation.

4. Fraud 🔑17

Though one may be under no duty to speak, if he undertakes to do so he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated, and if he speaks at all he must make a full and fair disclosure.

5. Mines and minerals 🔑54(4)

Where defendants undertook to tell plaintiff why they wanted a quitclaim deed from her to lots of which plaintiff owned the mineral rights, defendants were under duty to disclose the facts within their knowledge relating to plaintiff's right to the lots and the true reason why they were seeking the deed, notwithstanding nonexistence of a confidential relationship between the parties.

6. Mines and minerals 🔑54(4)

In action for cancellation of deed on ground of fraud complaint alleging that plaintiff owned mineral rights in certain lots, that defendants knowingly and falsely represented that plaintiff had no interest therein with the intention of inducing plaintiff to rely upon such statements, and that deed was sought to correct a technicality in one defendant's title, that all such representations were falsely made to induce plaintiff to execute a conveyance and to defraud her of valuable mineral rights was not demurrable.

* * *

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Gertrude C. Rogers against C. P. Warden, and others for cancellation of a deed and for punitive damages. From a judgment dismissing her petition, plaintiff appeals.

Reversed, with directions.

Earl Oakley and Franklin B. Hansen, both of Los Angeles, for appellant.

J. Everett Brown, of Los Angeles, for respondents.

GIBSON, Chief Justice.

This is an appeal from a judgment dismissing an action after the court had sustained without leave to amend a general demurrer to plaintiff's third amended complaint.

The complaint alleges that the plaintiff, a widow without business experience, was the owner in fee of the mineral rights in two described lots; that she did not know that she was the owner of these rights; that the defendants, knowing of her inexperience and ignorance, entered into a conspiracy to cheat and defraud the plaintiff and to secure her interest in the lots for defendants C. P. Warden and Grace P. Warden. It is alleged that pursuant to the conspiracy defendants Schmitt and C. P. Warden represented to her that C. P. Warden was the owner of the lots; that they were of little or no value and that large amounts of taxes were outstanding upon them; that the plaintiff had no right in or to the lots or any part of them; and that defendants wanted her signature to a quitclaim deed covering the lots for the sole purpose of removing a technicality in the title of C. P. Warden so that the lots would be marketable. The complaint alleges that each of these representations was false and was known by the defendants to be false when made and was made to induce the plaintiff to execute a conveyance of the mineral rights in the lots thereby defrauding her of such rights.

It is also alleged that the defendants intentionally failed to disclose to the plaintiff that she was the owner of the mineral rights in the lots which were of a value exceeding $2,000, that the lots were potentially capable of producing minerals, that bonus moneys had been offered to landowners for mineral leases on adjoining properties, and that adjacent lands in the same tract had been leased for mineral development; that each of the undisclosed facts was unknown to the plaintiff; and that she made no independent investigation. It is further alleged that relying on defendants' representations, the plaintiff, on July 1, 1939, without consideration, executed and delivered a quitclaim deed of her interest in the lots to defendant W. H. Warden, a "dummy" for defendants C. P. Warden and Grace P. Warden, and that plaintiff did not discover the falsity of the representations made to her until shortly prior to the time of filing this action. Plaintiff asks cancellation of the deed, a declaration that she is the owner in fee of the mineral rights pertaining to the lots, and judgment against all the defendants for punitive damages.

This case is controlled by our decision in Seeger v. Odell, 1941, 18 Cal.2d 409, 115 P.2d 977. In that case the complaint alleged that the plaintiffs, an elderly couple, were the owners of a lot subject to a mortgage which one of the defendants had foreclosed; that in order to induce plaintiffs to refrain from paying the mortgage indebtedness or from exercising their equity of redemption and to induce them to join in leasing the land to one of the defendants for the purpose of drilling for oil, the defendants falsely represented to the plaintiffs that the lot had been sold under execution to satisfy a money judgment previously secured in another action against the plaintiffs; and that relying upon this representation and without investigation of the records, the plaintiffs entered into the lease and allowed one of the defendants to buy in the property at the foreclosure sale without attempting to pay the mortgage debt or exercise the equity of redemption. We held that under the circumstances of that case plaintiffs' failure to make an investigation to determine if their property had in fact been sold under execution was not fatal to their cause of action, and that the representation that a levy of execution and sale of the property had occurred was, if false, a statement of fact for which an action would lie. The case of Robins v. Hope, 57 Cal. 493, principally relied upon by defendants herein, was overruled to the extent that it holds that an owner of realty is conclusively presumed to know the state of the title to his land.

[1-3] The false representation alleged in this case that plaintiff had no right in the lots is an actionable statement of fact of the same character as that made in the Seeger case. It was alleged to have been made with knowledge of its falsity and with the intention of inducing plaintiff to rely upon it and that plaintiff did rely thereon.

It cannot be said that the plaintiff, a widow unaccustomed to handling business matters and with no knowledge that she possessed any interest at all in the lots, was not justified in relying on the alleged representations without making an independent investigation. We said in the Seeger case, supra, 18 Cal.2d page 414, 115 P.2d page 980: "The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar * * * recovery. * * *"

[4, 5] In addition to positive misstatements of fact coming within the rule of the Seeger case, fraud in the form of the suppression of material facts is alleged in this case. Defendants contend that the record does not show any confidential or fiduciary relation between the plaintiff and the defendants and that in the absence of such a relation the defendants were under no obligation to disclose facts known to them. But the rule has long been settled in this state that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a full and fair disclosure." Sullivan v. Helbing, 66 Cal.App. 478, 483, 226 P. 803, 805; Pohl v. Mills, 218 Cal. 641, 654, 24 P. 2d 476; American Trust Co. v. California Western States Life Ins. Co., 15 Cal.2d 42, 65, 98 P.2d 497. When the defendants undertook to tell the plaintiff why they wanted a deed from her, they were under a duty, even in the absence of a confidential relationship, to disclose the facts within their knowledge relating to her rights in the lots and the true reason why they were seeking the deed.

[6] Although the facts forming the background of the defendants' fraud are not set forth as completely as might be desired, the allegations of the complaint contain all the elements of actionable fraud and, if true, are sufficient to establish a right to equitable relief. This being so, the trial court erred in sustaining a general demurrer.

The judgment is reversed, with directions to the trial court to overrule the demurrer.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 273

PEOPLE v. WILLIAMS et al.

Cr. 4389.

Supreme Court of California.
April 29, 1942.

As Modified May 12, 1942.

1. Homicide ⚿237

Evidence sustained decision against accused on his plea of not guilty of first-degree murder, by reason of insanity.

2. Criminal law ⚿938(1)

In prosecution for murder committed during attempted robbery, wherein accused testified that he lay in wait for purpose of robbery and struck victim, denial of new trial, on ground of newly discovered evidence that victim's death was not caused by blow with hatchet as contended by the people, was not error under the evidence.

3. Homicide ⚿253(1)

Evidence sustained conviction of one accused for first-degree murder committed during attempted robbery, but was insufficient to sustain conviction of another accused.

4. Homicide ⚿18(5)

A killing committed by accused in perpetration of a robbery constitutes "murder in the first degree" regardless of whether the killing was intentional.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in the First Degree".

5. Criminal law ⚿752½

Where accused who was convicted of first-degree murder stated that he hid in cafe for purpose of robbery and struck cafe owner whose death resulted, and did not state what the testimony of codefendants if taken on behalf of accused would have been, overruling of codefendants' motion for discharge before closing of evidence for prosecution, which would have permitted codefendants to testify for accused, was not error, even though trial court subsequently acquitted codefendants because of absence of evidence tending to connect them with commission of the crime, and in acquitting them did not consider testimony offered in defense. Pen. Code, § 1100.

6. Criminal law ⚿517(1)

The voluntary confession of an accused is admissible against him.

7. Criminal law ⚷522(3)

Physical mistreatment of an accused destroys voluntary nature of an alleged confession and renders it inadmissible.

8. Criminal law ⚷1169(12)

In prosecution for first-degree murder, record established that prosecution failed to prove that typewritten statement purporting to be confession was the record of accused's conversation or that the statement was voluntarily made, and therefore admission of the statement was prejudicial error.

9. Constitutional law ⚷266

Where accused contended that purported confession was obtained from him by mistreatment, and the prosecution failed to prove that purported confession was an accurate record of accused's conversation or was voluntarily made, "due process of law" required reversal of conviction of accused who was given the death sentence.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

◆

In Bank.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Isaac Williams and T. J. Elie, also known as Roland Helaire, were convicted of first-degree murder, and they appeal.

Affirmed as to defendant Elie and reversed and remanded for new trial as to defendant Williams.

Isaac Williams and T. J. Elie in pro, per., A. P. Coviello and E. A. Mosk, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

In accordance with the provisions of section 1239 of the Penal Code, the judgments by which T. J. Elie, also known as Roland Helaire, and Isaac Williams were convicted of the crime of murder in the first degree and sentenced to death are before the court for review.

These appellants and two women, Cordie Mae Jackson and Lillian Miller, were charged with the killing of Sokotare Okita, a Japanese who conducted a small restaurant and bar known as the Williams Cafe, on lower Fifth Street in Los Angeles. Williams was also charged with the prior conviction of a felony, which he denied. Upon trial by the court, sitting without a jury, the women were found not guilty. Elie, who had entered the additional plea of not guilty by reason of insanity, was then tried upon that issue and found sane.

On the morning of April 18th, when Ruth Lucero, a waitress, came to work, she found the restaurant door locked. After there was no response to her knock, she called the police department. Two officers, assigned to investigate, broke in the door and found the dead body of Okita lying on the bed in a small room where he slept on the premises. His purse was missing and the cash register was empty. According to the autopsy report: "The cause of death was concussion of the brain * * * there were multiple abrasions and contusions about the face and forehead * * * the skull is unusually thick and hard. It is not broken. * * *"

Elie and Williams have apparently spent many evenings on East Fifth Street. They were well known to Officers Bain and Kopytek, who worked that police beat. Lillian Miller visited the cafe sometimes once or twice a week. She, Elie and Williams are negroes. Cordie Mae Jackson, who is the fourth person charged with the crime, worked as Okita's barkeeper. She is a white woman.

The testimony of Officer Bain indicates the kind of a place Okita conducted. He said: "I very seldom saw the old fellow (Okita) when he was not bandaged. * * * He was beat up all the time." These injuries, Bain explained, were received in many fights and brawls that went on around there.

The two officers passed the Williams Cafe at intervals of about two hours. On the night of April 17th, Bain testified, he saw all four of the defendants. Elie was the first one he encountered. At that time, about nine o'clock, Elie was on Fifth Street with Henry Williams, another negro. Lillian Miller was seated at the bar in Okita's Cafe; Cordie Mae Jackson was behind the bar, and Okita, known as "Pop," was farther back. At that time Okita wore a bandage around his head which covered his left eye. After looking in at the cafe, the officers walked west and continued their rounds. Later that night, probably about eleven o'clock, Bain saw Williams on East Fifth Street and talked with him He also saw Elie about the same time, still with Henry Williams.

The testimony of Officer Kopytek, Bain's companion, placed Elie, Isaac Williams, Lillian Miller and Cordie Mae Jackson in the Williams Cafe at the time of their nine o'clock round. Cordie Mae Jackson was behind the bar and she and the three others "were all talking together." The officer stated that he saw Elie on the street later that night.

Aside from this testimony, the only evidence which placed the appellants and their companions at Okita's Cafe on the night of the crime came from Alfred Watson. As a witness for the prosecution, he stated that at 2:30 o'clock on the morning of April 18th, he was standing on East Fifth Street, three-quarters of a block from Okita's place of business. There were no lights in the cafe. At that time, he said, Elie, Isaac Williams, Lillian Miller and Cordie Mae Jackson came out of the cafe and went west on Fifth Street.

This witness admitted that he did not know any of the four defendants by name, but that he had seen them all "up and down the street." As they came out of the cafe, he said, he looked at them "long enough to kind of see who they was" and then went home.

In summing up the evidence which had been presented, the trial judge characterized the testimony of Watson as unworthy of belief. "This unfortunate negro," he said, "has either told the court the truth or else is a confirmed perjurer, whose ulterior motive in testifying as he has is unknown to the court. Now, in analyzing his testimony the court wonders how he can be so positive under the lighting conditions that he experienced, and his short acquaintance with the girls involved, so as to enable him to state positively that those are the girls who were there. Aside from this meager identification, he has been impeached on many other points, all of which the court must take into consideration in weighing the value of his testimony." Because of the insufficiency of the evidence, the court concluded, the girls would be acquitted.

As Watson saw all four of the defendants from the same place and under the same circumstances, the trial judge undoubtedly considered his testimony to be equally unreliable as to Elie and Isaac Williams. But Elie not only made several statements to the police, in each of which he stated that he hid in the cafe for the purpose of robbing Okita and fought with the Japanese when discovered, but he admitted those acts as a witness upon his own behalf. As to Isaac Williams, the prosecution relied upon asserted confessions he made to police officers. Williams, however, not only testified that he never made such confessions but he told of a course of mistreatment at the hands of the officers of the Los Angeles Police Department which, unfortunately, is strikingly similar to the complaints of other defendants as related in court at too frequent intervals. Moreover, he positively stated that he did not agree to participate in the robbery of Okita and was not present when the crime was committed.

Edward J. Romero, one of the investigating officers, testified that in the afternoon of April 18th, he questioned Cordie Mae Jackson at the police station. According to him, she said that Elie, Isaac Williams and Lillian Miller were at the cafe when it closed shortly after midnight, and that when he asked her if she knew of anyone who could have killed Okita she first said she did not. "How about Elie and how about Ike?," he then inquired, he said, and she replied: "Well, get them and you might get the right ones." Lillian Miller was then found on Fifth Street and questioned, but both women were released.

Elie was arrested the next morning at his work and taken to the Detective Bureau in the City Hall. According to the record, he was questioned by police officers on that day and the two succeeding ones. Romero, as the principal witness for the prosecution, testifying concerning what he termed the "first conversation," quoted Elie as telling a story which included him and his codefendants as participants in the crime. This confession, said Romero, commenced with the plan which they made to commit the robbery and continued with the account of Elie's lying in wait until the Jap owner was asleep, the entrance of Williams and the two women, the brutal slaying of the victim with a hatchet, the placing of a woman's coat to throw suspicion elsewhere, and finally, their departure, together.

The escape, as related by Elie, said Romero, in his further testimony, was made as follows: "* * * it was around three o'clock in the morning when they left there; that they went outside and got into Lily Miller's car; that they drove from there east on Fifth Street and they finally went up on Kohler Street near a gypsy place and he stated that Williams threw the hatchet in this gypsy's yard; that after that they drove him on home over on Morgan Avenue. The next day he went to work, * * * and that Henry Williams came over to * * * where he was working, and that Henry Williams and he got in a car; while they were driving by 20th and Maple Avenue that he threw the * * * tobacco pouch used as a money bag by Okita into a culvert." Romero said that the pouch was found in the place described by Elie.

But after giving this stirring recital of the crime, Romero said: "No, this was not the first conversation." He then referred to a typewritten statement which he said was the transcript of a confession taken from Elie the morning he was arrested. A stenographer was present at that time, said Romero. In this account of the crime, Elie said that he and Isaac Williams planned to rob Okita but that he, Elie hid in the cafe and, after some time came out of his hiding place to get the money. "The cat knocked a bottle down off the sink. * * * Papa got up to see what made the noise. * * * He had a hatchet in his hand. * * * He hit at me with the hatchet and I pushed him back on the bed. We had a little scuffle. I took the hatchet away and struck him with it * * * five times. * * * He was out and I just took his change, about $15 or something in the billfold he had."

Elie's explanation of why Williams was not with him when the crime was committed is shown by these questions and his answers to them:

"Q. How did it happen you pulled it by yourself? A. There was no chance for me and him to get in the back together so I got a chance to get in the back myself so I stayed until they closed.

"Q. Did Ike know you were back there? A. I do not think he does.

"Q. You have not seen him since? A. No."

But, in later testimony, Romero was not certain that a stenographer had reported this conversation and he also referred to another "first conversation" between him and Elie in which Elie, when charged with the murder, stated that neither Henry Williams, Ike Williams nor the two women had anything to do with it. "I did it myself," Romero quoted Elie as saying. In giving the details of the crime, Romero testified, Elie said "that he went into the cafe by himself and hid out, and after Okita had closed the place an hour or so * * * that he waited back there in the dark * * * he started to go to the room, and the cat * * * made some noise. He says that woke up the Jap; that the Jap opened the door with a hatchet in his hand; that he struck the Jap and took the hatchet away from him and struck the Japanese with the hatchet over the head; that afterwards he took the money out of the Japanese's pocket and that he left, and that he was by himself."

In connection with these conversations, Romero said that Lillian Miller and Cordie Mae Jackson were brought into the Detective Bureau during the questioning of Elie on the third day, and each of them stated that Elie's statements concerning them were untrue.

Isaac Williams was arrested on April 20th and questioned by the police officers at the City Hall that evening. Romero produced an unsigned typewritten statement which he said was the record of a confession taken from Williams at that time by means of questions asked by Captain Edwards in the presence of himself and Kyako Kay Komai and Elfreda Stein, two stenographers employed by the Police Department.

According to this statement, the appellant Williams with Henry Williams and Elie, who is referred to as T. J., discussed the proposed robbery of Okita. Henry Williams declined to participate in it and left the others. Isaac Williams went to a place next door but returned to the Okita cafe about midnight. By that time Elie had hidden in the back room. Continuing the confession, according to the transcript, Isaac Williams said that he, Lillian Miller and Cordie Mae Jackson left the cafe when Okita closed it, but returned in an hour. All three of them then entered by using Cordie Mae Jackson's key.

"Lillian and myself goes clean to the back," the statement quotes Williams as saying. "Cordie Mae stops at the kitchen. * * * T. J. tells me, motions to me there he is. Before he said that I done look inside the door. I seen Jap Papa sitting knees down in the bed. * * * T. J.

pushed an ax over to one side with his foot. My statement was in asking had he killed the old man. * * * He said yes. * * * I was being scared. I started to run. * * * Cordie Mae was trying to get the money from the bucket in the kitchen. * * * We all goes out * * * and gets in the car. We drove away. When we got to Seventh Street I asked about my part of the money. Lillian said, 'You wait, you got plenty of time, you are in a hurry for your money.'"

Although Romero testified that this statement was given under no promise of reward or immunity and that no force or violence was used in obtaining it, Williams told a graphic story of mistreatment by the officers. He said that he was arrested by two officers, one of whom said, "'I wants to know about killing that Jap?' * * * I said, I ain't killed no Jap. About that time I happened to look around and the other one hauled off and hit me." Continuing his testimony, Williams said he still had "the place" where he was struck. He was then taken to the City Hall and turned over to Officer Meza, who in turn turned him over to Captain Edwards. Another officer was present at the time.

When he refused to admit that he killed Okita, said Williams, Captain Edwards "hauled off kicking me in my stomach." Later, Detective Barnes "hit me with his fist in the mouth as hard as he could. * * * Then an officer came over and stomped on me, kicked me with both feet. * * *"

At that time, Williams testified, he said: "Do you think that is going to make me tell a story on myself?" Detective Barnes replied: "Well, we have a man you will tell your story to and that is the big bad wolf." Captain Edwards telephoned and in a few minutes Romero appeared. At that time, Williams said, he was handcuffed to a chair. When Romero came, he told him, "Every time you say no, you didn't kill any Jap, I am going to hit you three licks."

Then Detective Barnes used a billy on him, Williams told the court, until the blood came. "Another tall policeman came in * * * and * * * walks over and gets two napkins and said 'Wipe off your face.'" And as he reached for the napkins, said Williams, this policeman hit him in the face. "They whipped me pitifully; pretty near done kill me, but I still tell them nothing. * * * So they had me, beat me, they all beat me good, and there was blood all over my coat just like it is now." Showing his coat to the trial judge, Williams said, "* * * that is blood; and here is some more blood right here on my trousers, down there. I ain't got the shirt, because they tore my shirt clean off."

The record shows some corroboration of this testimony. Romero reluctantly admitted that when Williams was questioned, "he had a small cut inside of his lip," but he denied that blood was coming from it. Of even more significance is the testimony of a clerk who was acquainted with Williams. He stated that he saw Williams at the Okita cafe during the investigation of the murder. Williams was then in the custody of Officers Romero and Meza. He had one eye "almost completely closed," said this witness; the other one was "very much closed," and his mouth was swollen.

Of considerable significance in this connection is Romero's testimony concerning the officers who were present at the time Williams was being questioned in the Detective Bureau. In denying that Officer Slager was there he said, "I didn't see Slager that night at all." He was then asked, "Isn't it true * * * [that] when Officer Slager came into the room there and saw Isaac Williams in your custody * * * he walked up to Isaac Williams and he told you, * * * 'Why, I know that eight ball' and he hit Isaac Williams in the mouth with his right fist?" Romero replied: "I was answering the telephone when I heard one word spoken as 'eight ball' and that is all. No one struck anybody. Somebody said something about 'eight ball' and there was no one near him at any time." But when confronted with the transcript of his testimony given at the preliminary examination, Romero admitted that he had then answered a question as to whether Slager was present during the questioning of Williams by saying: "Yes, sir, he came in there and noticed Ike Williams. He says, 'I know that eight ball' and walked out again."

Romero's testimony was likewise contradictory as to Officer Meza. At the trial Romero stated positively that Meza was not present at any time while he had Isaac Williams in custody. But it appears that at the preliminary examination he stated to the contrary and said Meza was with him for from one to one and one-half hours.

The testimony of Williams included a story of extraordinary circumstances surrounding the taking of his statement. After the officers stopped beating him, he said, Kyako Kay Komai, the Japanese, "and a white woman came out, and the white woman had a typewriter there and the Jap woman had a paper, and she sits at the table, and the white woman sits here by the typewriter and * * * then Captain Edwards said, 'I am going to read something here.' He read something about that long [indicating] to her. After he read it the Jap woman here didn't say nothing. So Romero had a piece of paper about that long [indicating], with a lot of stuff all wrote down—I didn't tell him to put in on there—so the Jap woman couldn't write the stuff, and the white woman said she couldn't write the stuff. The white woman told him to let her practice by writing it on the typewriter. He said, 'No, I will give you this, and you can type it out before you go to bed.' I didn't see the white woman and I didn't see the Jap woman do anything. That was all that was said."

Romero's version of what took place shows an utter indifference to the rights of a prisoner being examined by police officers, if not more. He was asked if Elfreda Stein took down any notes of the confession. His answer was, "Yes, I believe she did." Continuing, he said that Mrs. Stein was "trying to type—see how fast she could take on the typewriter while the other girl took down the actual statement * * *. She started to and then quit and she listened in on the conversation." In answer to the question, "You say she started to type something down while you were questioning Ike Williams?," Romero explained: "She was taking down the actual questions and answers as far as she could go, and then she quit and listened in. In other words, she was trying to practice in taking statements while the other girl actually took the statement in shorthand."

Kyako Kay Komai, the "other girl," when called to identify the statement, said that she was called in to take the questioning of Williams by Captain Edwards. Romero and Mrs. Stein were also there. She also stated that she had her shorthand notes of the questions asked and the answers given to them at that time. But when she was asked whether she had transcribed those notes, she said that Mrs. Stein had written the confession from notes made by the latter.

Following his conviction, Elie was tried upon his plea of not guilty by reason of insanity, and he now contends that the decision that he was sane at the time of the commission of the crime "was against the evidence."

[1] In support of his plea, Elie proved that in 1937 he disappeared from his home in Louisiána and, when located, was sent to an insane asylum, from which he escaped. Witnesses testified to acts tending to show that he had been irrational at subsequent times. But three alienists, appointed by the court, testified that he was sane and they based their opinions upon examinations of and conversations with him. From the record, it is apparent that Elie is a negro of low mentality, but there is abundant evidence to support the trial judge's determination that he was sane when Okita met his death.

[2] Elie and Williams each moved the court for a new trial upon the ground that newly discovered evidence which could be presented by the testimony of physicians would show Okita's death was not caused by the blow of a hatchet. No affidavits in support of the motion were filed, although counsel stated the evidence he believed he could produce. But as Elie stated on the witness stand, as well as in the confessions which were presented in evidence by the officers, that he lay in wait to rob Okita, the amount of brutality used by him, or Isaac Williams, if in fact Williams was with him, would not affect the degree of the crime although it would undoubtedly be taken into consideration by the trial judge in fixing the sentence. Under the record presented, however, the court did not err in denying the motion for a new trial upon this ground.

As grounds for reversal of the judgment, Elie contends that the evidence is insufficient to support it and that his confessions to the officers and as a witness in his own behalf are so confused there is an absence of necessary proof to find him guilty of murder in the first degree. He places special emphasis upon the fact that, prior to the night of his death, Okita had engaged in numerous fights and brawls and, because of injuries resulting from them, was in such physical condition that almost any type of blow or even an accidental fall could have caused his death.

[3, 4] But this is a criticism of the evidence upon the basis of credibility. Although Elie's various stories of the crime varied in some details, he admitted in each of his statements to the officers, and also upon the witness stand, that he concealed himself in the cafe for the purpose of robbing Okita and that he carried out that purpose. It is true that in one version of the crime, he related facts tending to show a killing which was either unintentional or accidental, but as it was committed in the perpetration of a robbery, the offense is murder of the first degree. People v. Cook, 15 Cal.2d 507, 102 P.2d 752; People v. Perry, 14 Cal.2d 387, 94 P.2d 559, 124 A.L.R. 1123; People v. Arnold, 199 Cal. 471, 250 P. 168.

The appellant also complains of the ruling of the court upon the motion of Cordie Mae Jackson and Lillian Miller for their discharge under the provisions of section 1100 of the Penal Code, reading as follows: "When two or more persons are included in the same indictment or information, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant." The appellant contends that as there was no evidence offered after this motion was made tending to connect the two women with the commission of the crime, and the trial judge acquitted them upon the ground that the evidence was insufficient to establish their guilt, that the ruling constitutes prejudicial error. In support of the court's ruling, the attorney general calls attention to evidence offered by Cordie Mae Jackson and Lillian Miller in their defense, to the effect that they left the cafe shortly after twelve o'clock of April 17th and drove to Lillian Miller's home, where Cordie Mae Jackson left them. This evidence also showed that they were not at the cafe at any time later that night.

[5] As has been stated, the trial judge acquitted the two women upon the ground that there was no evidence tending to connect them with the commission of the crime except that of the witness Alfred Watson, which he stated was unworthy of belief, and the record indicates that the testimony offered in defense was not considered. But in view of Elie's consistent statements that he hid in the cafe for the purpose of robbery and struck Okita down when discovered, and also because he did not state what the women's testimony would have been, there was no error in the court's ruling.

The appeal of Isaac Williams presents three principal questions for decision. The first of these is whether there is sufficient evidence to sustain the judgment against him. The second question also relates to the evidence, for he contends that the court committed prejudicial error in admitting the testimony concerning the asserted confessions made by him. He also argues that he was prejudiced by the ruling of the court in denying the motion to dismiss the charges against the two women.

The attorney general concedes that unless the testimony of Alfred Watson can be considered as against Williams when it was not worthy of belief as against the two women who were jointly charged with him, then there is no evidence whatever establishing his guilt except the testimony of Officer Romero that he had confessed to the crime. And although Romero denied categorically that he had used any force or violence upon Williams while he was in custody, Williams testified that during the questioning Captain Edwards hauled off and kicked him in the stomach, Detective Barnes hit him in the mouth and a tall policeman, who inferentially was Officer Slager, after offering to give him a napkin with which to wipe his face, struck him. Moreover, Romero's contradictions and uncertainties cast grave doubt upon the truthfulness of his testimony. His admission that Williams had a cut on his lip should not pass unnoticed, and from the testimony of the citizen as to Williams' physical condition, it is difficult to believe that the police officers' conduct was what it should have been.

But if, considering all of the evidence, the trial judge was privileged to determine that Romero told the truth concerning his treatment of Williams and what occurred during the times he was present at the questioning, the testimony of Williams to the effect that Captain Edwards, Detective Barnes and the tall policeman mistreated him stands undisputed in the record. Neither one of these policemen was called upon to testify although each was charged with the most reprehensible conduct of which an officer may be guilty. The mistreatment by police officers of a person arrested and charged with crime cannot be justified under any circumstances, and not only brings discredit upon the department of which they are members but also breeds widespread disrespect for the administration of justice. It certainly has no place in a democracy.

There is other evidence concerning the taking of Williams' statement which is most astounding. This comes from Romero and concerns the work of the stenographers who were present to report the conversation. It would be expected that in an investigation of a murder by officers of a metropolitan police department, the accused would at least have the benefit of a competent stenographer to record his conversation at that time. But Romero admits that one of the stenographers "was trying to practice in taking statements." And he and the other stenographer directly contradicted each other in identifying the typewritten statement of what purported to be the confession of a murder made by one who was under arrest and in the custody of police officers.

[6, 7] The voluntary confession of one accused of crime is properly admissible against him. But any physical mistreatment of the accused destroys the voluntary nature of such a statement and renders it worthless in a court of justice. Courts should be no less vigilant in protecting an accused from the effect of a statement extorted by the means of force than in upholding the use of a confession made freely and voluntarily. And the guilty as well as the innocent are entitled to the protection of officers of the law and to a fair trial.

[8] Williams, who is shown by the record as a colored man of little education, was brought to the Detective Bureau in the City Hall and handcuffed to a chair. With no one to assist or counsel him, he was at the mercy of these policemen. They may not have mistreated him to the extent that he claims, but the prosecution failed to prove either that the typewritten statement purporting to be his confession was the record of his conversation or that his admissions were voluntarily made. The court therefore committed prejudicial error in admitting the testimony concerning his asserted conversation at that time.

[9] The principles concerning the use of confessions have been followed in many cases. People v. Borello, 161 Cal. 367, 119 P. 500, 37 L.R.A.,N.S., 434; People v. Loper, 159 Cal. 6, 112 P. 720, Ann.Cas. 1912B, 1193; People v. Wilson, 61 Cal. App. 611, 215 P. 565; People v. Quan Gim Gow, 23 Cal.App. 507, 138 P. 918. But one sentence used by the Supreme Court of the United States succinctly states the rule of decision which is applicable to this case insofar as Williams is concerned. It said: "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." White v. State of Texas, 310 U.S. 530, 533, 60 S.Ct. 1032, 1034, 84 L.Ed. 1342. See, also, Chambers v. State of Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; Brown v. State of Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682.

The judgment as to the appellant Elie and the order denying him a new trial is affirmed; because of the insufficiency of the evidence the judgment against the appellant Williams is reversed and the cause as to him remanded for new trial.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

* * *

ARTUKOVICH v. ASTENDORF et al. *
L. A. 18179.

Supreme Court of California.

May 1, 1942.

Rehearing Granted May 28, 1942.

1. Statutes 🔑181(2), 212

Statutes should be given a reasonable interpretation consistent with dictates of justice, and the Legislature's intention will not be presumed to include harsh or absurd consequences unless language is so clear as to admit of no doubt. Civ.Code, § 3542.

2. Constitutional law 🔑70(1)
Statutes 🔑228

Statutes, although general in terms, are deemed to have been enacted with full recognition of well-established rules of law and the settled public policy of the state, and a construction of them as containing exceptions in conformity with such rules of law or public policy does not amount to "judicial legislation".

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Legislation".

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* Subsequent opinion 131 P.2d 831.

3. Counties 🔑213

The statute requiring that a claim against a county be presented to board of supervisors before suit may be brought on the claim is not applicable to minors of such immaturity as to be mentally incapable of complying with its terms. Pol.Code, § 4075.

4. Automobiles 🔑230

A minor's cause of action against a county for injuries sustained through negligence of a county employee while driving an automobile owned by county did not depend upon the act of minor's parents in giving the statutory notice to county of a claim for injuries, and negligence of parents in omitting to give required notice of claim to county could not be imputed to minor. Vehicle Code § 400, St.1935, p. 152; Pol.Code, § 4075.

5. Counties 🔑213

The purpose of the statute requiring that a county be given notice of a claim against it before action may be brought on the claim is to protect counties against fraud arising out of stale claims. Pol.Code, § 4075.

6. Counties 🔑213

The statute requiring that a claim against a county be presented to board of supervisors before an action may be brought on the claim cannot be construed as requiring that to be done which claimant is incapable of doing. Pol.Code, § 4075.

7. Infants 🔑2

It is the legislative policy of California to protect the rights of minors.

8. Counties 🔑224

Whether the particular infant plaintiff has reached the age of understanding to comply with statute requiring that a claim against a county be presented to board of supervisors before an action may be brought on the claim is a "question of fact" which should be determined by jury. Pol.Code, § 4075.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

9. Counties 🔑222
Pleading 🔑225(1)

In 16-year-old infant's action against a county for personal injuries, where infant had failed to present a claim against county as required by statute before commencement of action, an allegation that infant was of such immature age and lacked sufficient mental capacity to be able to comply with statute was essential, but it was error to sustain a demurrer to complaint without giving infant an opportunity to amend by alleging such facts. Pol.Code, § 4075.

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In Bank.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Action by Jerry Artukovich, Junior, a minor, etc., against Fred O. Astendorf, and the County of Los Angeles, for damages for personal injuries sustained while being transported in a county truck driven by Fred O. Astendorf. From a judgment of dismissal following the sustaining of a demurrer of defendant county, without leave to amend, plaintiff appeals.

Reversed with directions.

For prior opinion, see, Cal.App., 117 P.2d 378.

J. M. Sinclair, of Los Angeles, and A. D. Orme, of Pasadena, for appellant.

Jennings & Belcher and Stevens Fargo, all of Los Angeles, for respondent.

EDMONDS, Justice.

The appellant is suing the County of Los Angeles for damages assertedly sustained because of personal injuries received in an automobile accident. According to the complaint, he presented no claim in conformity with the provisions of the Political Code, and in ruling upon a demurrer, the Superior Court held that, because of such allegation, no cause of action was stated. The appellant now attacks the judgment of dismissal, subsequently entered in favor of the county, upon the ground that the claim statute does not apply to a minor.

The action is one authorized by section 400 of the Vehicle Code, St.1935, p. 152, which imposes upon a county liability for the negligence of any employee driving an automobile owned by it while acting within the scope of his employment. The complaint alleges that the appellant, while a ward of the juvenile court, was being transported to a forest camp in a county truck driven by Astendorf, a deputy probation officer of the county; that Astendorf drove the truck in such a negligent manner as to cause it to overturn; and that as a result of the accident, the appellant was severely injured. The county relies upon section 4075 of the Political Code, enacted prior to section 400 of the

Vehicle Code, which provides that "all claims against any county * * * whether such claim be founded upon contract * * * or upon any act or omission of the county or any officer or employee thereof * * * shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim * * *."

Courts are not in agreement concerning the application to minors of statutes requiring the filing of claims as a prerequisite to suit against public corporations. In several decisions of the District Court of Appeal, it has held that minors are bound by such statutes. Phillips v. County of Los Angeles, 140 Cal.App. 78, 35 P.2d 187; Myers v. Hopland U. E. School Dist., 6 Cal.App.2d 590, 44 P.2d 654; Carpenter v. Eureka Casualty Co., 14 Cal.App.2d 533, 58 P.2d 682. And this view apparently represents the weight of authority. Baker v. Town of Manitou, 8 Cir., 277 F. 232; City of Birmingham v. Weston, 233 Ala. 563, 172 So. 643, 109 A.L.R. 970; Peoples v. City of Valparaiso, 178 Ind. 673, 100 N.E. 70; Palmer v. City of Cedar Rapids, 165 Iowa 595, 146 N.W. 827, Ann.Cas. 1916E, 558; Dechant v. City of Hays, 112 Kan. 729, 212 P. 682; Thomas v. City of Coffeyville, 145 Kan. 588, 66 P.2d 600; Madden v. City of Springfield, 131 Mass. 441; Davidson v. City of Muskegon, 111 Mich. 454, 69 N.W. 670; Szroka v. Northwestern Bell Tel. Co., 171 Minn. 57, 213 N. W. 557, 59 A.L.R. 404; Schmidt v. City of Fremont, 70 Neb. 577, 97 N.W. 830; Hurley v. Town of Bingham, 63 Utah 589, 228 P. 213; Robinson v. City of Memphis, 171 Tenn. 471, 105 S.W.2d 101; see cases collected in 31 A.L.R. 619; 59 A.L.R. 411; 109 A.L.R. 975; McQuillan, Municipal Corporations, 2d Ed., vol. 6, sec. 2893. These decisions proceed upon the theory that where a statute is general in terms, containing no exception in favor of minors, it must be presumed that the legislature intended no such exception and none may be engrafted upon the statute by the courts under the guise of judicial interpretation.

[1, 2] But this conclusion is reached only by ignoring the more fundamental rules of statutory construction. Statutes should be given a reasonable interpretation consistent with the dictates of justice, and courts have adhered to the rule that the legislature's intention will not be presumed to include harsh or absurd consequences unless the language is so clear as to admit of no doubt. Civ.Code, sec. 3542; San Joaquin & Kings River Canal & Irr. Co. v. Stevinson, 164 Cal. 221, 128 P. 924; Uhl v. Badaracco, 199 Cal. 270, 248 P. 917; Helping Hand Home v. County of San Diego, 26 Cal.App.2d 452, 79 P.2d 778; 23 Cal.Jur. 722. Furthermore, statutes, although general in terms, are deemed to have been enacted with full recognition of well-established rules of law and the settled public policy of the state (23 Cal.Jur. 784 et seq.), and a construction of them as containing exceptions in conformity with such rules of law or public policy, does not amount to judicial legislation.

From time immemorial the legal status of infants has been recognized as singular, and because of their tender years and lack of understanding the law has refused to hold them to the same accountability as adults. In many situations comparable to the present one, special exceptions in favor of infants have been made by the legislature and the courts. For example, statutes of limitations do not run against the claim of an infant until he attains his majority. Secs. 328, 352, 1272, Code Civ.Proc. An infant cannot be guilty of laches. 21 C. J., Equity, 241, cases cited n. 65; 30 C.J.S., Equity, § 122, cases cited n. 3. The doctrine of estoppel has no application to minors. Estate of Hill, 67 Cal. 238, 7 P. 664. A minor under the age of 18 years cannot make a contract relating to real property, sec. 33, Civ.Code, and many other agreements entered into by an infant may be disaffirmed by him either before his majority or within a reasonable time thereafter. Sec. 34, Civ.Code. And children under the age of 14 are deemed incapable of committing crimes in the absence of clear proof that at the time of committing the act charged against them, they were aware of its wrongfulness. Sec. 26, Pen.Code.

Accordingly, a strong minority of courts have taken the position that, in view of the various exemptions from liability accorded infants by the law, the legislature, in enacting statutes requiring the presentation of claims or notice as a condition precedent to suits against municipal corporations, did not intend by its general language to include a class of persons which the law recognizes as lacking responsibility. By certain of these decisions, all minors, irrespective of age and without regard to their physical and mental capacity, have been exempted from the operation of such statutes. McDonald v. City of Spring Valley, 285 Ill. 52, 120 N.E. 476, 2 A.L.R. 1359; Doerr v. City of Freeport, 239 Ill.App. 560; Costello v. City of Aurora, 295 Ill.App. 510, 15 N.E.2d 38. Other courts have extended the exception only to those infants of tender years who do not possess sufficient intelligence and understanding to be able to comprehend and comply with the requirements of the statute. Lazich v. Belanger, 111 Mont. 48, 105 P.2d 738; City of Tulsa v. Wells, 79 Okl. 39, 191 P. 186.

Still a third view is taken by the New York courts. In that state, as a matter of law, the statutory requirement of notice is not enforced against an immature infant of 10 years of age or less. But it is applied to the cause of action of a minor over 16 years of age, and it is for the jury to determine whether a minor between the ages of 10 and 16 has sufficient mental and physical capacity to be able to comply with the statute. Murphy v. Village of Fort Edward, 213 N.Y. 397, 107 N.E. 716, Ann.Cas.1916C, 1040; Russo v. City of New York, 258 N.Y. 344, 179 N.E. 762; Yablonsky v. City of New York, 128 Misc. 469, 219 N.Y.S. 121; Adonnino v. Village of Mount Morris, 171 Misc. 383, 12 N.Y.S. 2d 658; Briggs v. Village of Peekskill, Co. Ct., 16 N.Y.S.2d 873. See, also, the A.L.R. notes heretofore cited.

[3, 4] Under the reasoning of the decisions following the minority doctrine, section 4075 of the Political Code, when considered in connection with the rules of law excepting infants from the legal responsibility imposed upon adults, must be held inapplicable to minors of such immaturity as to be mentally incapable of complying with its terms. The requirement of notice to the city authorities presupposes the existence of an individual capable of giving it. There are numerous cases holding that the failure to give notice or to file a claim as required by statute, does not bar recovery against the city for negligence when the injured person is unable to act within the statutory period by reason of physical or mental inability, and particularly when the inability arises from the very act of negligence for which the city is sought to be held responsible. Under such circumstances, the requirement of notice is excused pending the existence of the disability. Webster v. City of Beaver Dam, C.C., 84 F. 280; City and County of Denver v. Taylor, 88 Colo. 89, 292 P. 594, 72 A.L.R. 833; Randolph v. City of Springfield, 302 Mo. 33, 257 S.W. 449, 31 A.L.R. 612; Forsyth v. City of Oswego, 191 N.Y. 441, 84 N.E. 392, 123 Am.St.Rep. 605; Williams v. Village of Port Chester, 72 App.Div. 505, 76 N.Y.S. 631; Terrell v. City of Washington, 158 N.C. 281, 73 S.E. 888; 31 A.L.R. 619; contra, Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580; Wicklund v. Plymouth E. School Dist., 37 Cal.App.2d 252, 99 P.2d 314. To hold the statute applicable to minors who have not reached the age of understanding, or to those mentally unable to comprehend the requirements of the statute, would in effect result in depriving them of the right of action given them by the statute. Section 4075 of the Political Code by its terms, makes no provision for the filing of a claim by a person on behalf of another and, if it did, an infant has no power to appoint an agent. § 33, Civ.Code. The parent is the natural guardian of the child, as such, but he has no control over the minor's property. However, assuming that the parent or guardian of the minor is empowered to file the claim in his behalf, the cause of action should not depend upon the act of a parent, guardian or self-constituted next friend. Indeed, the negligence of the parents in omitting to give the required notice cannot be imputed to the child. Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 15 A.L.R. 401; 19 Cal.Jur. 662.

[5-8] The purpose of the statutes requiring the giving of notice is to protect the municipality against fraud arising out of stale claims. This purpose is not served by a strict enforcement of the statute against those incapacitated from giving notice within the time specified, and the statute may not be reasonably construed as requiring that to be done which the claimant is wholly incapable of doing. Therefore, in accordance with the legislative policy of this state to protect the rights of minors generally, section 4075 of the Political Code should be interpreted as inapplicable to infants mentally and physically unable to comprehend or comply with its terms. Whether or not the particular infant plaintiff has reached the age of understanding to comply with the statute is a question of fact which should be determined by the jury in connection with the other issues presented in each case. Phillips v. County of Los Angeles, supra; Myers v. Hopland U. E. School Dist., supra, and Carpenter v. Eureka Casualty Co., supra, insofar as they are contrary to this conclusion, are disapproved.

[9] The complaint discloses that appellant was 16 years of age at the time of the commencement of the action, but it contains no allegation that he was of such immature age and lacked such mental capacity as to be unable to know or take cognizance of the requirements of the law, or to comply with the statutory mandate concerning the filing of a claim with the county. This allegation is essential to the statement of a cause of action. However, the appellant should have been afforded an opportunity to supply this deficiency, and it was error for the trial court to sustain the demurrer without leave to amend.

The judgment is reversed with directions to the Superior Court to permit the appellant to amend his complaint, if he be so advised.

CURTIS, CARTER and TRAYNOR, JJ., concurred.

20 Cal.2d 234

PAGE v. WASHINGTON MUT. LIFE ASS'N et al.

L. A. 18139.

Supreme Court of California.

April 28, 1942.

Rehearing Denied May 28, 1942.

1. Insurance 🔑146(3)

Forfeitures, particularly in insurance contracts, are not favored, and, if reasonably possible in light of circumstances, courts will determine that a forfeiture has not occurred or that a waiver or estoppel exists.

2. Insurance 🔑388(4)

A past course of conduct of acceptance by insurer of payments of premiums after the grace period may establish a "waiver" by insurer of the right to declare a forfeiture for failure to pay premiums at stipulated time, or insurer may be "estopped" from asserting forfeiture where insured has been reasonably led to believe that payments made within a reasonable time after grace period will be acceptable.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Waiver".

3. Insurance 🔑392(1)

Under the circumstances, the acceptance of delinquent premium payments on life policy by insurer was not alone sufficient to prevent insurer from asserting a forfeiture of policy for nonpayment of premiums.

4. Insurance 🔑388(3)

When an insurer, after knowledge of any default for which it might terminate a policy, enters into negotiations which recognize the continued validity of policy, the right to claim a forfeiture for such default is "waived", and a waiver may be implied from acts of parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

5. Insurance 🔑679

Where reinsurer, after assuming a mutual life association's life policies, sent an assumption rider to an insured showing that premiums were increased from $12 per year plus death assessments to $24 per month, and reinsurer accepted payment of premiums after expiration of period of grace and ignored beneficiary's request for information concerning amount of premiums until after expiration of such period and gave no notice of cancellation of policy, reinsurer "waived" its right to declare a forfeiture of policy for nonpayment of premiums.

6. Insurance 🔑586

Ordinarily, the interest of a beneficiary in a life policy, wherein insured reserves a right to change beneficiaries, is only an "expectancy".

See Words and Phrases, Permanent Edition, for all other definitions of "Expectancy".

7. Insurance 🔑686

A beneficiary under a life policy wherein insured reserved a right to change beneficiaries could enforce policy against reinsurer which claimed that policy had been forfeited for nonpayment of premiums, where insured was indebted to beneficiary, and beneficiary had paid premiums, and reinsurer had accepted such payments and had corresponded with beneficiary concerning policy.

8. Appeal and error 🔑907(3)

In an appeal on the judgment roll, all reasonable inferences must be indulged to support judgment.

9. Insurance ⚷679

A reinsurer under a life policy which had otherwise waived its right to declare a forfeiture of policy for nonpayment of premiums could not avoid liability on policy on ground that there could be no waiver because insured was uninsurable and that reinsurer was not aware thereof at time of waiver, where there was no showing that insured was not insurable.

In Bank.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by Edna Mae Page against Washington Mutual Life Association, a corporation, and another, on a life insurance policy. From a judgment for plaintiff, defendant Physicians Life Insurance Company, a corporation, appeals on the judgment roll.

Affirmed.

For prior opinion, see 116 P.2d 663.

John L. Flynn, of Los Angeles, for appellant.

W. P. Wood and M. W. Young, both of Los Angeles, for A. Caminetti, Jr., Insurance Com'r.

Henry O. Wackerbarth and Isador Gralla, both of Los Angeles, for respondent.

CARTER, Justice.

Defendant and appellant Physicians Life Insurance Company, doing an insurance business under the stipulated premium plan, appeals from a judgment for plaintiff as beneficiary in a life insurance policy; the appeal is on the judgment roll alone. Default judgment was entered against defendant Washington Mutual Life Association, a mutual benefit association doing business on the assessment plan.

On December 15, 1928, the last-mentioned defendant issued a policy of life insurance for $3,000 to and on the life of Frank F. Pratt; his wife, Anna G. Pratt, being named beneficiary. It was provided therein that membership quarterly dues of $3.00 on the 15th day of March, June, September and December were to be paid by the insured. Death assessments also were to be paid. The policy provided that it would be forfeited if the dues and assessments were not paid within fifteen days from the date of mailing of a notice by the insurer requesting payment of the amount specified in the notice. Pursuant to the reserved right in the policy, the beneficiary was changed to plaintiff on November 17, 1936. All of the payments required to be made by insured were paid up to and including the one due on June 15, 1937, for the quarter ending September 15, 1937; all death assessments levied were paid to and including July 31, 1937.

On July 1, 1937, the Washington Mutual Life Association entered into an agreement with appellant whereby the latter received all of the assets of the association and assumed all of its liabilities including insurance policies then in force issued by the former, and reinsured all of said policies subject to the terms and conditions thereof, except that the reinsurance would be governed by an attached assumption rider. Appellant covenanted with the association's insured and the beneficiaries under their policies to carry out the provisions of said policies subject to such assumption rider, and also assumed an obligation in favor of the beneficiaries "with the same effect, as if such claim or claims might or could be enforced against said Washington Life, except as such claim or claims may be modified or changed by the terms of the attached Assumption Rider."

The assumption rider provided that its retention by a policy holder or payment of a premium call in August, 1937, shall constitute an acceptance by the policy holder; that the insured agrees to pay a monthly premium, payable on the first of each month, the first being due on August 1, 1937, and the amount being determined by the age of the insured according to a certain schedule, and in addition such assessments as are necessary to maintain a legal reserve; that notice of the stipulated premium due is given and accepted by acceptance of the rider; that twenty days' grace in the payment of premiums is allowed.

An assumption rider was mailed to the insured on or prior to August 1, 1937 (but none was mailed to and no information concerning the same was given to plaintiff, beneficiary). Accompanying the rider was a letter from the appellant welcoming the insured as a new member of appellant and stating that "a Rider issued by this Company is enclosed which, of course, you will preserve and attach to your present certificate. The payment of your premium and subsequent premiums, after this date, will constitute your acceptance of this Rider"; that "Premium notices will be mailed to you direct from the Home Office of the Company, at San Francisco, California." Also enclosed was a statement of the premium reading "This is to remind you that your premium will be due and payable as specified below. Receipt will not be returned unless requested. Your check is a receipt. Important: Please return this notice with your remittance. Amount Due $24.00 Payable Aug. 1, 1937 Policy No. 2615 Continues your Policy in force to September 1, 1937. Send Payment Now! Do Not Lay This Aside—This Is Important to You and Yours." In reply to the foregoing the insured wrote to appellant on August 18, 1937, as follows:

"In regard to W. Mu. Ins. Co. policy we have not been able to determine just how much insurance we will be able to carry as yet. It will depend on how much money we can spare or we may be able to raise which we will not find out about for a few days." On September 16, 1937, plaintiff went to the home of the insured and saw for the first time the statement of premium due which had accompanied the assumption rider of August 1, 1937, and learned of the merger, but the insured, due to illness, was unable to give plaintiff any information concerning the same. Plaintiff took the statement and attempted to locate the Washington Mutual Life Association in Los Angeles, but its offices were vacant. She then sent a money order for $24 to appellant at San Francisco, air mail and special delivery, enclosed with a letter giving her telephone number and address and stating: "Enclosed please find money order for $24,00 to pay on policy of Frank F. Pratt, no. 2615. I am the beneficiary in this policy and have paid on it many times. We do not understand this change and I do not wish to drop this policy as Mr. Pratt has a paralyzed wife. Please let me know how and when to pay at once." Appellant received the letter and money order on September 16, 1937, and accepted the latter in payment of the August premium. On September 17, 1937, plaintiff sent a money order for $12 to appellant air mail and special delivery accompanied by a letter stating: "Enclosed please find $12.00 which I hope is the correct amount as payment from Sep. 1-37 to Oct. 1-1937 on the policy of F. F. Pratt. On the 16 I mailed $24.00 to pay up to September 1-37. Please advise me if there is a error in this amount." The letter and money order were received by appellant on September 18, 1937. On September 23, 1937, plaintiff learned for the first time that appellant had an office in Los Angeles and that by calling there she could ascertain the correct amount of the premium and upon consulting that office she was informed that the premium was $24 per month. She immediately sent $12 to appellant at San Francisco enclosed with a letter stating: "After making an inquiry in regard to Mr. Pratts Policy No. 2615 Washington Mutual, I find out the payments are $24.00 per month. I inclosed $12.00 to balance on the month of Sep. So far I haven't had a reply from Sep. 16 and 17th, 1937 letters. Would like to know if we are fully paid and covered in case of death." The insured gave her a copy of the assumption rider a few days after September 23, 1937. Her letter of September 23rd was received by appellant on September 24, 1937. The first communication she received from appellant was after September 23, 1937, being a letter of that date stating: "We are in receipt of your remittance of $24.00 to pay August 1st premium on policy 2615 F. F. Pratt, also $12.00 to apply on the September premium.

"Since the premium is $24.00 per month it will be necessary for you to remit an additional $12.00 to complete the payment. The grace period has expired on the above payments, and it will be necessary for Mr. Pratt sign the enclosed application for reinstatement.

"Kindly have the enclosed application signed and return with remittance of $12.00." No notice of cancellation of the policy was given by appellant. The application for reinstatement was never signed. On September 25, 1937, plaintiff advised appellant by mail that the insured could not execute the reinstatement application and requested the return of the $48 she had sent. The money was refunded on September 29, 1937. Plaintiff wired defendant on October 1, 1937, to hold money until further notice, and on the same day returned the money to appellant. The insured died on October 21, 1937, and plaintiff's demand for payment of the policy was refused. Appellant wrote to plaintiff on November 5, 1937, stating that the policy had lapsed because the premium due September 1, 1937, was not paid and returned all sums to plaintiff; the latter's counsel thereafter returned them to appellant. The insured was indebted to plaintiff and the latter had paid the premiums on the insurance policy for four years. On two occasions, once in 1936 and June, 1937, the Washington

Mutual Life Association had accepted premium payments after the grace period had expired.

The court found that the policy had not lapsed and that strict performance with respect to time of payment of premiums had been waived. Appellant contends the policy lapsed for failure to pay premiums.

[1] The general principles with relation to forfeiture of the benefits under insurance policies have been recently stated by this court. Forfeitures, particularly in insurance contracts, are not favored. Bittinger v. New York Life Ins. Co., 17 Cal.2d 834, 112 P.2d 621. And if reasonably possible in light of the circumstances, the courts will determine that a forfeiture has not occurred or that a waiver or estoppel exists. Knarston v. Manhattan Life Ins. Co., 124 Cal. 74, 56 P. 773; Huber v. New York Life Ins. Co., 18 Cal.App.2d 269, 63 P.2d 318.

[2-5] With those rules in mind we turn to the particular circumstances presented in and the principles applicable to the case at bar. It is clear that a past course of conduct of acceptance by the insurer of payments of premiums after the grace period may establish a waiver by the insurer of the right to declare a forfeiture for failure to pay premiums exactly at the stipulated time, or the insurer may be said to be estopped to assert the forfeiture where the insured may be said to have been reasonably led to believe that payments made within a reasonable time after the grace period would be acceptable. Nelson v. National Guaranty Life Co., 131 Cal.App. 669, 21 P.2d 1022; Vinther v. Sunset Mut. Life Ins. Co., 11 Cal.App.2d 118, 53 P.2d 182; Turner v. Redwood Mutual Life Ass'n, 13 Cal.App.2d 573, 57 P.2d 222. However, we are not disposed to hold that the acceptance of delinquent premium payments alone was sufficient under the facts of this case to prevent the assertion of a forfeiture, as only two of such payments were accepted by appellant's predecessor, and it is doubtful if such conduct would be binding as a waiver or estoppel against appellant; but there are other significant circumstances present which when combined with the acceptance of late payments establish a situation in which considerations of equity and justice demand that the forfeiture be not enforced. Having in mind the acceptance of late payments of premiums prior to the merger of appellant and Washington Mutual Life Association, we find that after the merger the assumption rider was sent to the insured, and under it the premiums were increased from *$12 per year,* payable quarterly, plus death assessments under the original policy, to *$24 per month,* payable monthly under the assumption rider. The covenants of the merger agreement were with the beneficiaries of the policies as well as the insured and former insurer. Although the assumption rider stated that it constituted notice of the time and amount of the premiums payable, the original contract of insurance provided: "Failure on the part of the Member to pay any annual dues or to pay any quarter annual dues or to pay any death assessments within fifteen days from the date of mailing, by the Secretary to the Member, of *notice* requesting the payment of the amount specified in such notice, shall forfeit all rights of said Member. * * *" And the letter from appellant which was sent to the insured with the assumption rider, stated: *"Premium notices* will be mailed direct from the Home Office of the Company, at San Francisco, California." However, no premium notice was given to the insured of the premium due September 1, 1937. When receiving the assumption rider and the letters from appellant and Washington Mutual Life Association, it is apparent that the insured was somewhat confused with reference to where he stood in regard to his insurance, especially in view of the great increase in the fixed premium to be paid. This is evidenced by his letter of August 18, 1937, to appellant expressing uncertainty as to the amount of the insurance he could carry. It should also be observed that under the insured's policy with the Washington Mutual Life Association, the court found that he was paid up to July 31, 1937, as far as death benefits were concerned, and to September 15 as to quarterly dues. The grace period of fifteen days provided for in that policy extended the times to August 15 and September 30, 1937, respectively. Naturally the sudden demand for greatly increased premiums to be paid even before the expiration of the period of coverage which was then paid for, would be confusing. That communication may fairly be said to have been the commencement of negotiations with reference to his policy and the payment of the premiums. The rule is thus stated in Spiegelman v. Metropolitan L. Ins. Co., 21 Cal.App.2d 299, 301, 68 P.2d 1006, 1007:

"Nevertheless, it is well settled that, when an insurance company, after knowledge of any default for which it might terminate a policy, enters into negotiations which recognize its continued validity, the right to claim a forfeiture for such default is waived; and a waiver may be implied from the acts of the parties. Murray v. Home, etc., Ass'n, 90 Cal. 402, 27 P. 309, 25 Am.St.Rep. 133; Knarston v. Manhattan Life Ins. Co., 124 Cal. 74, 56 P. 773; Faris v. American, etc., Co., 44 Cal. App. 48, 185 P. 1035." See, also, Bryson v. National Travelers Cas. Co., 206 Cal. 475, 274 P. 957. Thereafter appellant made no further demand for the premium, but on September 16, 1937, plaintiff, beneficiary, sent $24, the premium due August 1, 1937, it being twenty-seven days after the expiration of the grace period on August 20, 1937. That premium was accepted by appellant, and in addition to the uncertainty existing in the insured's mind of which it had been advised by his letter of August 18, 1937, was specifically requested by plaintiff for information with respect to the amount of premium necessary and that the beneficiary was paying the premiums. It ignored that request although it knew that the grace period for the premium due on September 1, 1937, would expire in a few days. On the next day, September 17, 1937, plaintiff sent $12, which would be half of the September premium, and again requested that she be advised of the correct amount of premium payable. Appellant kept that $12, and did not communicate with either the insured or the plaintiff until September 23, 1937, three days after the grace period, when it wrote an ambiguous letter. It may be inferred therefrom that appellant considered the policy still in force. It had received the $12, one-half of the premium for September, and stated: "Since the premium is $24.00 per month it will be necessary for you to remit an additional $12 *to complete the payment.*" (Emphasis added.) The only payment to be completed was the September premium. While it was also stated that the grace period had expired and an application for reinstatement should be signed, nothing was said about the policy having lapsed; nor was any demand made for interest on the overdue premium payment or for evidence of insurability to which appellant was entitled under the reinstatement clause in the policy. On the same date as appellant's letter, but before plaintiff had received it, she sent the $12 and appellant retained it.

[6, 7] Appellant contends that plaintiff had no standing to demand any consideration from it because her interest in the policy was only a mere expectancy as she was a beneficiary in a policy in which the insured reserved the right to change the beneficiary. The interest of a beneficiary in such a policy is ordinarily only an expectancy. Here the trial court found that the insured was indebted to her and she had many times paid the premiums on the policy and that "* * * the plaintiff herein was, on November 17, 1936, and for many months prior thereto, a person to whom the said Frank F. Pratt is and was under a legal obligation for the payment of money, of which the death or illness of Frank F. Pratt might delay or prevent payment or performance, and in this regard the Court further finds that for many months prior and subsequent to November 17, 1936, the plaintiff loaned and advanced many sums of money to the said insured Frank F. Pratt in order to defray the living expenses of the said Frank F. Pratt and his wife, and for more than four years last past the plaintiff had paid the quarter annual dues and death assessments levied against the said Frank F. Pratt under said Washington Mutual Life Association policy No. 2615." Appellant accepted plaintiff's payment of the August premium after it was due and corresponded with her in regard to the policy. Inasmuch as plaintiff had paid the premiums many times before, and as she took the statement of the premium from the insured that had been sent to him by appellant and paid it, we believe it may be reasonably inferred that the insured knew plaintiff was acting on his behalf and consented thereto. She was also acting to protect her interest as a creditor; as we have seen appellant by its negotiations with plaintiff accepted her in that role. Cases of this character must each be decided upon its particular facts.

[8] We are satisfied that the combination of all of the circumstances here presented compel an affirmance of the judgment especially in light of the rule that in an appeal on the judgment roll all reasonable inferences must be indulged to support the judgment. It is true that upon her request the $24 September premium was returned to plaintiff but it was thereafter returned to appellant; she was under a mistaken belief as to her rights that the right

to declare a forfeiture had in fact been waived and therefore a reinstatement was not necessary. See Spiegelman v. Metropolitan Life Ins. Co., supra.

[9] Appellant asserts that there could have been no waiver because the insured was uninsurable and it did not know of it at the time the waiver is claimed to have occurred, citing Schick v. Equitable Life Assur. Soc., 15 Cal.App.2d 28, 59 P.2d 163, but there is no showing here that the insured was not insurable. The most that appears is that he was ill in the middle part of September. From all that appears, the illness may have been a mere minor temporary condition which would have no effect on his insurability. It does not appear that he died of the same illness the next month.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, HOUSER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 247

PEOPLE v. AMICK.

Cr. 4401.

Supreme Court of California.

April 28, 1942.

1. Criminal law 🔑878(3)

The statute providing that verdict of acquittal on one or more counts shall not be deemed an acquittal of any other count means that each count in indictment or information charging a separate offense must stand upon its own merit and that verdict of either conviction or acquittal of one charge has no effect on other separate counts which are contained therein. Pen.Code, § 954.

2. Homicide 🔑16

"Manslaughter", like murder, can be committed with any instrumentality or means known to the ingenuity of man. Pen. Code, § 192.

See Words and Phrases, Permanent Edition, for all other definitions of "Manslaughter".

3. Automobiles 🔑344

"Negligent homicide" can only be committed as specified in provision in Vehicle Code relating thereto, and by means of an automobile. Vehicle Code, § 500, St.1935, p. 173.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligent Homicide".

4. Automobiles 🔑344

The provision in Vehicle Code relating to negligent homicide in operation of automobile defined a crime different from any of the crimes which had been defined in any of the various provisions of the Penal Code. Vehicle Code, § 500, St.1935, p. 173.

5. Criminal law 🔑5

The legislature may make laws defining what breaches of public peace shall be punishable, specify various degrees of same crime, and require different measures of punishment for each.

6. Criminal law 🔑808½

In trial for negligent homicide committed while operating automobile in negligent manner, trial court need not do more than state law to jury in language of applicable statutes specifying lesser degree of punishment for homicide committed in doing unlawful act not amounting to felony while operating vehicle or driving in negligent manner than for homicides otherwise committed in doing such acts or without due caution and circumspection. Vehicle Code, § 500, St.1935, p. 173; Pen.Code, § 192.

7. Automobiles 🔑356

What amounts to lack of due caution and circumspection in cases of involuntary manslaughter, committed in doing lawful acts or driving of vehicle in negligent manner within statute declaring person causing another's death by such driving guilty of negligent homicide, are questions for jury to decide according to particular facts. Vehicle Code, § 500, St.1935, p. 173; Pen.Code, § 192.

8. Criminal law 🔑878(3)

Under statute providing that verdict of acquittal of one or more counts shall not be deemed to be an acquittal of any other count, acquittal of defendant on count charging manslaughter did not require acquittal of defendant on count charging negligent homicide committed while driving truck in negligent manner, since crimes charged were

not identical. Pen.Code, §§ 192, 954; Vehicle Code, § 500, St.1935, p. 173.

* * *

In Bank.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Herbert M. Amick was convicted for negligent homicide, and he appeals.

Affirmed.

For prior opinion, see 118 P.2d 490.

W. C. Dorris, C. Fleharty, Jr., and R. W. Henderson, all of Bakersfield, for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Thos. Scott, Dist. Atty., and Norbert Baumgarten and Harold Leddy, Deputy Dist. Attys., all of Bakersfield, for respondent.

PER CURIAM.

A petition for hearing was granted in this case after decision by the District Court of Appeal, Fourth District, affirming a judgment of conviction of the defendant on a charge of negligent homicide. § 500, Vehicle Code, St.1935, p. 173. After further consideration of the appellant's contentions, we have concluded that the opinion prepared by Mr. Justice Griffin of that court correctly states the law applicable to the facts and the proceedings involved. 118 P.2d 490. We therefore adopt that opinion as the opinion and decision of this court. Said opinion is as follows:

"Appellant was charged in an amended information as follows: Count 1, with the crime of manslaughter in that he did, on the 28th day of May, 1941, feloniously and without malice, kill Albert Briggs and Fred McKinney, human beings. In the second count he was charged with violating section 480 of the Vehicle Code, St.1935, p. 170, (so-called 'hit and run' section); and in count 3 with violating section 500 of the Vehicle Code (negligent homicide) in that he did on May 28, 1941, feloniously drive an automobile in a negligent manner, and in a manner constituting the commission of an unlawful act not amounting to a felony, thereby injuring Albert Briggs and Fred McKinney, who died as a proximate result of the injuries.

"After a plea of not guilty as to each count appellant went to trial which resulted in a verdict of not guilty as to the first and second counts and guilty as to the third count. A new trial was denied. Appellant was sentenced upon the third count. This appeal followed.

"A brief résumé of the facts shows that on May 28, 1941, appellant was employed by the WPA at a location known as the Blue Mountain Project, a few miles northeast of Woody in Kern County. He was a truck driver and the truck that he drove was a Dodge 1½ ton flat rack truck with a stake bed and stake sides. On the day mentioned appellant took the truck to Bakersfield at about 8:30 a. m. He had at least four bottles of beer while in Bakersfield. He returned to the project at about 3 p. m. There was evidence that he was intoxicated at that time. His driver's license and chauffeur's license had been previously revoked in December, 1940, but this was not known to the WPA officials due to Amick's misstatements to them. About 3:25 p. m. the truck was loaded with 17 workmen seated on seats in the rear of the truck when the appellant drove away from the site towards Woody. The highway is about 17 feet wide with a steep grade and has many curves about a mile and a half east of Woody. While proceeding at a rate of from 35 to 45 miles an hour the appellant came around a curve in the road, driving on the wrong side of the highway and in the path of another truck which was going in the opposite direction up the grade. As the appellant thus proceeded, he collided with the other truck and at the time of the collision the evidence convincingly shows that he was driving at an excessive rate of speed in violation of section 510 of the Vehicle Code, St. 1935, p. 176; that he was also driving under the influence of intoxicating liquor, in violation of section 502 of the Vehicle Code, St.1935, p. 174; that he was driving on the wrong side of the highway on a mountain road, in violation of sections 525 and 597 of the Vehicle Code, St.1939, p. 2197, St. 1935, p. 194; and that he was also guilty of reckless driving in violation of section 505 of the same code, St.1939, p. 2107. There was also evidence that the appellant was driving in a negligent manner, which negligence might have been the violation of any of the foregoing sections or may have consisted of independent acts testified to at the trial. As a result of the collision six of the men on the truck were seriously injured and two others, Albert Briggs and Fred McKinney, received injuries from which they soon died.

"The sole point raised by appellant is that the verdict acquitting him of manslaughter is inconsistent with the verdict of guilty of negligent homicide, since both charges grew out of the same act which resulted in the death of the same individuals; that an acquittal upon a count in an information charging manslaughter is inconsistent with a conviction on another count charging homicide in the same information and amounts to a complete acquittal of the accused. In support of the contention appellant cites People v. Andursky, 1925, 75 Cal.App. 16, 241 P. 591, where it was held that where a defendant was charged in one count of an information with the crime of rape alleged to have been committed upon a female of the age of 15 years and in a second count of the same information, charging him with a violation of the Juvenile Court Act, St.1915, p. 1225, where it was alleged, among other things, that the defendant, on the same day charged in the first count, induced her to remain away from her home and usual place of abode and induced her to go with him to a room in a rooming house and there occupied the same bed with her and there accomplished acts of sexual intercourse with her, and the same evidence was relied on to convict on both counts, a verdict finding the defendant guilty on the first count and not guilty on the second count was inconsistent and conflicting, and insufficient to support a conviction.

"People v. Day, 1926, 199 Cal. 78, 248 P. 250, People v. Coltrin, 5 Cal.2d 649, 661, 55 P.2d 1161; and People v. Hickman, 31 Cal.App.2d 4, 11, 87 P.2d 80, are also cited. It is argued that in view of the above-cited authorities 'that the two essential elements of the crime of negligent homicide, namely, "in the commission of an unlawful act not amounting to a felony" or "driving a vehicle in a negligent manner" are contained in the crime of involuntary manslaughter, and that the jury by rendering a verdict of not guilty upon the manslaughter count, and rendering a verdict of guilty upon the negligent homicide count, rendered an inconsistent verdict, and the defendant is entitled to an acquittal upon both counts.'

"It should be noted that the Andursky and Day cases were decided in 1925 and 1926 respectively. In 1927, the legislature amended several sections of the Penal Code relating to pleading of various crimes (Stats.1927, p. 1042.) There was added to the last sentence of section 954 the following: 'A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.' We might well assume that the decision in the first two above-mentioned cases prompted or had considerable to do with the legislative determination to amend section 954 as above quoted. The remaining cases cited by appellant were however, decided subsequent to that amendment, each of which quotes from or refers to the case of People v. Day, supra, to the effect that where a person is convicted on one count of an information and acquitted on another he is entitled to an acquittal on both counts if both counts state precisely the same offense. Both of these recent cases do not discuss the 1927 amendment to section 954. The reference to the Day case in each of these later cases might be considered "inappropriate," for in the Coltrin case the court held that abortion and murder were two separate and distinct crimes and that there is no common basis on which they may rest as the same offense. Similarly in the Hickman case the court held that an acquittal of grand theft as charged in count 3 and a conviction of attempt to commit grand theft as charged in count 2 were not inconsistent verdicts, as the two crimes were not identical. The rule contended for by appellant might possibly apply if he had been acquitted of count 1 and thereafter a new and different information was filed charging him with negligent homicide and he was again placed on trial.

"In People v. Day, supra, 199 Cal. page 83, 248 P. page 252, it was said:

" 'This is the test used to determine the validity of a plea of once in jeopardy interposed to a subsequent indictment after an acquittal or conviction upon one indictment. Of course, no plea of twice in jeopardy or former acquittal was or could have been made by the defendant in this action, inasmuch as she was tried but once. It should be noted, however, that all of the rules applicable to a plea of once in jeopardy do not have application to a determination of whether the offenses stated in different counts of an indictment are identical.'

[1] "We believe the effect of the amendment of section 954 of the Penal Code in 1927 was given careful consideration in the case of People v. Ranney, 123 Cal.App. 403, 11 P.2d 405, 406, where a

similar argument was presented. It was there said:

"'The disposition of one count had no bearing upon the verdict with respect to other counts, regardless of what the evidence may have been. Each count must stand upon its own merit. The amendment to section 954 of the Penal Code conclusively settles this controversy adversely to the contention of the appellant. That section provides for the charging of "two or more different offenses of the same class of crimes or offenses, under separate counts." That section, as amended in 1927, then provides that, "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." This language clearly means that each count in an indictment or information, which charges a separate and distinct offense must stand upon its own merit, and that a verdict of either conviction or acquittal upon one such charge has no effect or bearing upon other separate counts which are contained therein. * * * There are no authorities to the contrary in other jurisdictions where a statute exists similar to the California law above quoted.'

"The appellate department of the Superior Court in People v. Horowitz, 131 Cal.App., Supp., 791, 19 P.2d 874, had occasion to consider this same argument. At page 793 of 131 Cal.App., Supp., at page 874 of 19 P.2d appears the following:

"'Appellants' most strongly urged argument is that the dismissal of the second count was an acquittal on that charge and that, as an acquittal, it is so inconsistent with the finding of guilt under count I that the latter cannot stand. * * * Authorities could be cited which would seem to support a reversal. People v. Andursky, 1925, 75 Cal.App. 16, 241 P. 591; People v. Puppilo, 1929, 100 Cal.App. 559, 280 P. 545. But we find more persuasive cases recognizing that such inconsistent verdicts may be caused, not by the confusion, but the mercy of the jury, of which the appellant can neither complain nor gain further advantage. [Citing cases.] Moreover, probably to avoid the result of those cases which interpret inconsistent verdicts as acts of stupidity rather than acts of leniency, section 954, Penal Code, was amended in 1927 so that it now reads,' (as above quoted) 'We conclude that even if the dismissal be regarded as an acquittal, that is no reason why the judgment of conviction, based on ample evidence, should be reversed.'

"The effect of the 1927 amendment to section 954 of the Penal Code was recognized and commented upon in the recent case of People v. Derenzo, 46 Cal.App.2d 411, 115 P.2d 858. In that case the Court held that since, under section 954 of the Penal Code, the verdict of acquittal of one or more counts of an information is not to be deemed an acquittal of any other count, a dismissal of a count of receiving stolen property, if it be regarded as tantamount to an acquittal, is not a bar to conviction on counts of robbery and burglary, which are wholly separate and distinct offenses.

[2, 3] "It might be well to point out in passing that appellant was not charged with involuntary manslaughter, but with manslaughter, which under section 192 of the Penal Code could be either voluntary or involuntary so long as the act was committed without malice. Manslaughter, like murder, can be committed with any instrumentality or means known to the ingenuity of man, whereas, negligent homicide can only be committed as specified in section 500 of the Vehicle Code and by means of an automobile.

[4-7] "Our Supreme Court in People v. Beckhard, 1939, 14 Cal.2d 690, 96 P.2d 794 (all justices concurring), has definitely held that by the enactment of section 500 of the Vehicle Code the legislature defined a crime different from any of the crimes which had been defined in any of the various provisions of the Penal Code. The purpose of the enactment of section 500 of the Vehicle Code was reviewed in People v. Pociask, 1939, 14 Cal.2d 679, 686, 687, 96 P.2d 788, 792. It was there said:

"'It is within the function of the legislature to make laws defining what breaches of the public peace shall be made punishable. Accordingly it may specify various degrees of the same crime and require a different measure of punishment for each. It is apparent that by the enactment of section 500 of the Vehicle Code the legislature has specified a lesser degree of punishment when the homicide is committed in the doing of an unlawful act not amounting to a felony while operating any vehicle, or while driving in a negligent manner, than is meted out in the cases of homicides otherwise committed in the doing of an unlawful act not amounting to felony or without due caution and circumspection. Sec. 192, Pen.Code. When the legislature has so spoken and the court has stated the law to the jury in the language of the applicable statutes, it is not required to do more. People v. Fowler, [178 Cal. 657, 174 P. 892]; People v. Anderson [58 Cal.App. 267, 208 P. 324]. Therefore, what may amount to a lack of "due caution and circumspection" in cases of involuntary manslaughter committed in the doing of a lawful act, or what may constitute the driving of a vehicle "in a negligent manner", are questions to be decided by the jury according to the particular facts in each case guided by appropriate instructions from the court. The practical difficulties of obtaining a conviction in automobile homicide cases arising under section 192 of the Penal Code may have been the incentive for the enactment of section 500 of the Vehicle Code. That is, in order to foster greater care in the operation of such dangerous instrumentalities, the legislature may have afforded a means by which appropriate punishment may be imposed upon all who have caused death through a breach of duty of due care in such operation.'

[8] "Therefore the two crimes of involuntary manslaughter and negligent homicide are not identical." Furthermore and in any event, "under section 954 of the Penal Code as amended, the acquittal on count 1 does not necessarily result in an acquittal on count 3. People v. Kirsch, 204 Cal. 599, 269 P. 447."

The judgment and order denying a new trial are affirmed.

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20 Cal.2d 306

PEOPLE v. HOYT et al.

Cr. 4368.

Supreme Court of California.

April 30, 1942.

Rehearing Denied May 28, 1942.

1. Indictment and Information 🔑159(1)

Under statute, an indictment charging three separate offenses could be amended by adding the statement that the offenses were connected together in their commission. Pen.Code, §§ 954, 1008.

2. Criminal law 🔑511(2)

Under Penal Code, evidence corroborating accomplice must tend, at least slightly, to implicate defendant with commission of offense, though entitled to little weight alone, but more than mere suspicion is required. Pen.Code, § 1111.

3. Criminal law 🔑511(2)

Evidence to corroborate an accomplice is insufficient if it takes direction and tends to connect defendant with offense charged only when read in conjunction with testimony of admitted accomplice.

4. Conspiracy 🔑47
Homicide 🔑250
Robbery 🔑24(1)

Evidence corroborative of an alleged accomplice was sufficient to support conviction of three of the four defendants of offenses of robbery, conspiracy to rob, and murder of a grocery store proprietor.

5. Criminal law 🔑510½

Flight is a factor tending to connect an accused with commission of an offense within rule requiring corroboration of testimony of an accomplice.

6. Criminal law 🔑511(3)

"Corroboration" of testimony of an accomplice need not be by direct evidence, but entire conduct of defendant may be looked to for corroborating circumstances, and if, from those circumstances, his connection with the crime may be fairly inferred, the corroboration is sufficient.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroboration".

7. Criminal law 🔑510½

Written statements signed by three of defendants, each confessing his guilt and detailing his part in crime, would serve to corroborate testimony of an alleged accomplice.

8. Criminal law 🔑535(2)

The corpus delicti may be sufficiently proved by testimony of an accomplice to warrant introduction of admissions or confessions of defendants.

9. Criminal law 🔑518(1)

A confession of one of defendants was not rendered involuntary by reason of failure initially to apprise such defendant of his right to counsel, of his right to remain silent if he desired, and that his statements might be used against him.

10. Conspiracy 🔑47
Homicide 🔑250
Robbery 🔑24(1)

Evidence was insufficient to support conviction as to one of the four defendants on charges of robbery, conspiracy to rob, and murder of grocery store proprietor, where there was no corroboration of testimony of an alleged accomplice as to such defendant's participation in the robbery and murder, and such defendant did not, like the other participants, flee city following commission of crimes and he denied accusatory statements.

11. Criminal law 🔑510½

Mere fact that the family of one of defendants had repaid a loan some time prior to robbery of his creditor was not a circumstance "corroborative" of testimony of an alleged accomplice.

12. Criminal law 🔑878(3)

In prosecution for conspiracy to commit robbery, robbery and murder, the jury in returning its verdict of guilty of conspiracy did not exhaust its power to pass upon the remaining counts, since the crimes involved are separate and distinct offenses.

13. Criminal law 🔑872, 986

The order in which verdicts are read and in which judgments are pronounced is not material.

14. Criminal law 🔑200(6), 1209

The defendants could be convicted of two or more separate offenses arising out of same transaction, such as criminal conspiracy, robbery, and murder, where each was stated in a separate count and the offenses differed in their elements and one was not included in the other, as against defendants' contention that trial court by imposing sentence on all three counts violated state Constitution and Penal Code relative to placing a person twice in jeopardy and imposing two punishments for one act. Pen. Code, § 654; Const. art. 1, § 13.

15. Criminal law 🔑29

A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their elements and one is not included in the other.

16. Homicide 🔑354

In absence of a recommendation of life imprisonment in verdict of guilty of murder, trial court has no alternative but to impose the death penalty.

17. Criminal law 🔑863(2)

In murder prosecution, trial court's action, in response to a juror's inquiry as to life imprisonment, of defining the expression and stating that "what is done later by the authorities is none of our concern", was not error on ground that the language suggested to jury that sentence of life imprisonment would carry with it the possibility of a parole and cause jury to return verdicts of guilty on murder count without recommendation as to punishment.

18. Criminal law 🔑720(6)

A district attorney in course of his argument to jury may draw reasonable inferences from the evidence.

19. Criminal law 🔑730(1)

The question of whether district attorney prejudicially overstepped the bounds of propriety in closing argument to jury in castigating the defendants, singly and as a group, was a matter largely within the discretion of the trial court.

20. Criminal law 🔑1166½(6)

A departure from order prescribed by Penal Code for exercise of peremptory challenges was not ground for reversal, in absence of a showing of prejudice to defendants' substantial rights. Pen.Code, § 1088.

21. Jury 🔑131(8)

In murder prosecution, permitting district attorney to ask prospective jurors on voir dire examination whether, in event they were "satisfied beyond all reasonable doubt and to a moral certainty that five defendants would be guilty of murder in the first degree", they had any conscientious scruples against the infliction of the death penalty as to the defendant that did not actually participate in the killing, was proper, under the circumstance. Pen.Code, § 1074, subd. 8.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Barzen Hoyt, Delmar Arnold, Arthur Frazier, and Sylvio Tosi were convicted of conspiracy to commit robbery, robbery and murder, and they appeal.

Affirmed as to defendants Hoyt, Arnold, and Frazier, and reversed as to defendant Tosi.

Henry J. Kleefisch, Belli & Leahy, Melvin M. Belli, and Raine Ewell, all of San Francisco, for appellants.

Earl Warren, Atty. Gen., David K. Lener and Ward Sullivan, Deputy Attys. Gen., and Matthew Brady, Dist. Atty., and John J. McMahon and Harmon D. Skillin, Asst. Dist. Attys., all of San Francisco, for respondent.

PER CURIAM.

An indictment containing three counts jointly charged the defendants Barzen Hoyt, Delmar Arnold, James Lacey, Arthur Frazier and Sylvio Tosi with conspiracy to commit robbery, robbery, and murder. Each was also charged with a prior conviction of felony. Demurrers were interposed alleging that more than one offense was charged, that it did not appear that the offenses were connected in their commission, and that they were not offenses of the same class. Upon motion, the indictment was permitted to be amended on its face by adding to counts two and three, "and said acts and crimes were connected together in their commission." Thereupon the demurrers were overruled, and to each count as amended the defendants pleaded not guilty. Hoyt, Lacey and Tosi also admitted a prior conviction as charged, but Arnold and Frazier denied the accusation. At the inception of the trial, Lacey changed his plea to one of guilty and testified as a witness for the prosecution. The jury found Hoyt, Arnold, Frazier and Tosi guilty as charged. Accordingly, they have been sentenced to imprisonment on the first and second counts, and to death on the third count, the verdict referable to the latter count being without recommendation. From the judgments and order denying a new trial they have prosecuted this appeal.

[1] Section 954 of the Penal Code permits the statement in separate counts of "two or more different offenses connected together in their commission * * *." The indictment as amended alleged the sequence and interconnection of the crimes charged. The amendment was authorized by section 1008 of the Penal Code. As stated in People v. Mareck, 17 Cal.App.2d 278, 280, 61 P.2d 972, 973, "No change was made in the character of the crimes charged, the purpose and effect of the amendment being to set forth in specific terms that the various offenses were all connected with their commission and were part of the same act."

Lacey's testimony may be summarized as follows: On October 28, 1940, at about 4 o'clock p. m., Lacey, Arnold and Frazier called upon Tosi at his soda fountain and grocery store in San Francisco. Tosi knew Arnold and Lacey but not Frazier. Shortly after they arrived at the store, a boy about fifteen years of age entered, went to the rear counter (where Lacey and his companions were sitting) and ordered a sandwich from Tosi. The boy, according to Lacey, then moved to the front of the store as directed by Tosi because "he [Tosi] had some business to talk." The four men resumed their discussion. Following Lacey's inquiry as to the possibility of robbing some "worthwhile" place in the neighborhood and the rejection of Tosi's recommendation of a bank "at the corner" because it "would be too tough," Tosi suggested the Ferrari grocery store a few blocks away, where the proprietor always kept considerable money on hand—at least four or five hundred dollars. About thirty minutes later, Lacey, Arnold and Frazier left, stating they would return that evening at 8 o'clock. The three then went in Lacey's automobile to "case" the Ferrari store and after agreeing that it "looked all right," they left to discuss their plans further in Arnold's hotel room. En route they had some drinks, and Frazier persuaded the others that they needed a "tough guy," "a fellow who has a lot of nerve and would go all the way," to help. After leaving Arnold, Lacey drove Frazier to the latter's residence, where Frazier found Hoyt and introduced him to Lacey as the needed "tough guy." They then returned to Arnold's room, where Hoyt met Arnold for the first time, and the four conversed before again proceeding to Tosi's store.

When they arrived at Tosi's store at approximately 8:30 p. m., a woman (Anne Beidenbach) was talking to Tosi. She was joined by a man (James Quine, her brother) and the two entered into a political discussion. Lacey and his three companions sat at one of the counters near the front of the store. Lacey introduced Hoyt to Tosi, who thereupon served the four with food and drink, reviewed with them the arrangements and invited them to return after they had "pulled the job." At about 8:50 o'clock p. m. the four left, Hoyt stopping to pin a campaign button on the dress of the Beidenbach woman. The man (identified as her brother) already had left the premises.

Hoyt, Lacey, Arnold and Frazier proceeded to the Ferrari store. They agreed that Lacey should remain in the automobile, Frazier should act as the "lookout," and Hoyt and Arnold should enter the store. They parked the car about half a block away and waited some minutes until three men who were at the store had departed. At approximately 9 p. m., Hoyt and Arnold entered, and Frazier and Lacey assumed their posts. A short time later, Hoyt and Arnold returned to the car, where Lacey and Frazier were waiting, and Hoyt said, "Let's get out of here quick." Lacey wanted to return to Tosi's store, but Hoyt and Arnold demurred, saying they wanted "to clean up," adding that Ferrari had put up such a battle they had to hit him repeatedly on the head—Hoyt with a blackjack and Arnold with the butt of his pistol—with the result that Ferrari bled profusely, spattering their clothes.

Lacey drove to a nearby oil station, where Hoyt and Arnold "cleaned up." The four returned to downtown San Francisco, Hoyt and Arnold meanwhile complaining about the "bum steer" Tosi had given them on the money to be found at the Ferrari store, as they had only secured $53 and a check. Lacey drove to Hoyt's hotel, where Hoyt and Arnold changed their clothes and rejoined the other two. The four left for Sacramento, where they stayed that night. The next day they drove to Portland, Oregon, where they remained until October 31, 1940, when they returned to San Francisco.

The robbery victim, David Ferrari, died twenty-four hours after the assault from the effect of blows upon his head. After Hoyt, Lacey, Arnold and Frazier returned from Portland, Oregon, Hoyt and Frazier left San Francisco for the southern part of the state—Hoyt going to Long Beach, where he was later apprehended by the police, and Frazier going to Los Angeles, where he was subsequently arrested. Arnold was ultimately located by the police in Reno, and after making a statement he was returned to San Francisco. Lacey was arrested in Oakland. Tosi did not leave the city, but remained at his store until placed under arrest. The several arrests occurred at various times during the first two weeks of November, 1940.

[2] All four appellants challenge the sufficiency of the evidence, contending that the verdicts rest upon the uncorroborated testimony of Lacey, the prosecution's principal witness, and by his own admission an accomplice. Section 1111 of the Penal Code provides that: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." People v. Yeager, 194 Cal. 452, 473, 229 P. 40, 49, states that : "To corroborate an accomplice the evidence need not establish the actual commission of the offense, nor extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight."

[3] It is settled in this state, however, that the corroborative evidence is insufficient if it "takes direction and tends to connect the appellants with the offenses charged only when interpreted by and when read in conjunction with the testimony of the admitted accomplice." People v. Shaw, 17 Cal.2d 778, 800-809, 112 P.2d 241, 253; see, also, People v. Davis, 210 Cal. 540, 293 P. 32; People v. Kempley, 205 Cal. 441, 456, 271 P. 478; People v. Morton, 139 Cal. 719, 724, 73 P. 609; People v. White, 35 Cal.App.2d 61, 69, 94 P.2d 617. The recent Shaw case, supra, 17 Cal.2d at page 803, 112 P.2d at page 254, quotes with approval the following from the Morton case, supra, 139 Cal. at page 724, 73 P. 609: "Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with the view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no *inculpatory* evidence there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him."

[4] Tested by the rule as announced and applied in the foregoing cases, our examination of the record herein discloses that there is ample evidence corrobora-

tive of the accomplice Lacey tending to connect Hoyt, Arnold and Frazier with the commission of the offenses of which they stand convicted. Applying the same test, we are equally satisfied, however, that there is no adequate corroborative evidence tending to connect Tosi with the offenses.

Directing attention first to the corroborative evidence tending to connect Hoyt, Arnold and Frazier with the crime, reference need only be made to the fact that they were seen together and with Lacey not only prior to but immediately after commission of the offenses. The oil station attendant testified to the visit of the three, with Lacey, to his station and to their use of the washroom. Lacey's testimony that he then drove the others to Hoyt's hotel in downtown San Francisco, where Hoyt and Arnold changed their blood-spattered clothes, was corroborated by one Stalcup, Hoyt's roommate. This witness testified that he was awakened about 10:30 o'clock on the night of October 28, 1940, when Hoyt and Arnold entered the room; that Hoyt told of the grocery store holdup on San Bruno Avenue and of the proprietor's resistance, necessitating Hoyt's bludgeoning of the grocer with the blackjack; that he gave Hoyt and Arnold some clothing; and that the clothes left in the room were bloodstained. Stalcup also identified the blackjack, which had been put in evidence, as one he had seen Hoyt making in their room prior to October 28th.

The pathologist for the coroner testified that his examination of the blackjack and the gun, the latter having been deposited in a "hock shop" by Arnold subsequent to the crimes, were marked with human blood in sufficient quantity to be placed within a blood group, which classification corresponded with that of the deceased's blood. The autopsy surgeon testified that the short, ragged lacerations found on deceased's head were caused by blunt instruments of the type of the blackjack and gun in evidence.

[5, 6] It is significant, too, that Hoyt, Arnold, Frazier and also Lacey fled from San Francisco on the night of the robbery. Flight is a factor tending to connect an accused with commision of an offense. People v. Mazzola, 99 Cal.App. 682, 685, 279 P. 211; People v. Nikolich, 93 Cal.App. 356, 358, 269 P. 721; see other authorities in 8 Cal.Jur. 180, sec. 257. The corroborative circumstance of flight was noted in People v. Rice, 29 Cal.App.2d 614, 620, 85 P.2d 215, 219, where it is said that "corroboration need not be by direct evidence, but the entire conduct of the defendant may be looked to for corroborating circumstances and if, from those circumstances, his connection with the crime may be fairly inferred, the corroboration is sufficient."

[7-9] Subsequent to arrest, Hoyt, Arnold and Frazier each signed a written statement confessing his guilt and detailing his part in the crimes. Such statements also serve to corroborate the testimony of the accomplice Lacey. In People v. Frazer, 80 Cal.App. 464, 468, 252 P. 633, 634, it is said that "the corpus delicti may be sufficiently proved by the testimony of an accomplice to warrant the introduction of admissions or confessions of the defendant." The free and voluntary nature of the statements was testified to by the police officers present when they were taken. Hoyt's challenge that his statement or confession was improperly admitted in evidence because initially he was not apprised of his right to counsel, of his right to remain silent if he desired, and that his statements could be used against him, lacks merit. The contention is answered in People v. Booth, 72 Cal.App. 160, 236 P. 987, and in People v. Ramirez, 113 Cal.App. 204, 298 P. 60, wherein it is held that such matters do not render the statement involuntary and inadmissible.

What has been said establishes that within the settled rule the record abounds in evidence corroborative of the accomplice Lacey and tending to connect Hoyt, Arnold and Frazier with the commission of the crimes.

[10] This is not true, however, as to the appellant Tosi. In our opinion, as to him there is no substantial evidence to corroborate the testimony of the accomplice Lacey within the rule announced in the Shaw, Davis, Kempley and Morton cases, supra. At no time did Tosi confess his guilt or admit participation in any way in the commission of the offenses. Nor as to him is there any corroborative element of flight present, as with the others charged. Nor do we find corroborative evidence of guilt flowing from any failure on Tosi's part to answer or deny accusatory statements directed at him prior to trial. It appears from the testimony of Officer Corrasa that upon being informed that some of the others had accused him of "putting the finger on the holdup of the Ferrari grocery store," Tosi "denied about being implicated in this here holdup at the

grocery store." Officer McCann also testified that Tosi stated to him that he "had nothing to do with it," and "that he was going to get counsel." A deputy district attorney, who talked with the five men prior to presentation of the matter to the grand jury, testified that Tosi repeatedly stated that: "I stand on my constitutional rights that I don't have to answer any questions without the presence of my lawyer."

The testimony of the Spencer boy that on the afternoon of October 28, 1940, he saw three men sitting at the counter in the Tosi store but did not hear any of their conversation, standing alone, does not connect Tosi with the crimes. As pointed out in the Shaw case, supra, "without the interpretation and direction furnished by the testimony of the accomplice," the boy's testimony no more tends to connect Tosi with the commission of the crimes than the subsequent appearance of the group at the oil station tends to connect the attendant there with participation therein. In other words, if we "eliminate from the case the evidence of the accomplice," as required by the authorities, so far as Tosi is concerned the presence of the group in his store is as consistent with his innocence as with his guilt.

This is equally true as to the testimony of the man and woman who also saw the group at Tosi's store. Without the interpretation and direction furnished by Lacey's testimony, this asserted corroborative evidence from Tosi's standpoint could as well have described a proper and innocent visit of the group. And, furthermore, the woman (Mrs. Beidenbach), a witness for the prosecution, testified that she was in the store when the group entered; that after serving them coca cola Tosi "left those young men and came over and spoke to me"; that he then went in the kitchen, lit a cigarette and stood in the kitchen door and talked to her; that her brother (James Quine) came in and they "got in a friendly argument on account of politics"; that Tosi stayed in the kitchen door "most all the time that [the men] were in the store"; that Tosi went back where the men were seated, once, she thought, to collect for the coca colas, but that he did not stay or engage in any conversation with them "because she didn't see any of them talking"; that Tosi "didn't stand there and talk to them"; that her brother then left and the other men left above five minutes later; that Tosi "never said goodbye to anybody"; that she stayed in the store for about five minues after the men left; and that at about 9 p. m., Tosi came upstairs and visited with her and her husband until about 11:45 p. m., listening to the radio.

[11] The only other evidence which it is claimed corroborates the testimony of Lacey is that some time prior to the robbery the Tosi family had repaid a loan to Ferrari, the deceased, and that an inference may be drawn therefrom that Ferrari, to Tosi's knowledge, possessed money. The mere establishment of the robbery should not tend to connect the former debtor or his family with the crime because they were aware of the creditor's possible possession of the money.

When on the stand in his own defense, Tosi testified that he was on parole from San Quentin; that he worked in his father's store from 7 o'clock in the morning until 9 at night; that Lacey, whom he knew, came to the store on the afternoon of October 28, 1940, with two men whom he did not know, although he thought he had seen one in San Quentin; that he served the group with coca cola and "hot dogs"; that he talked with Lacey alone, of friends and about the approaching election; that the group left in about fifteen minutes; that nothing was said about a return visit and he was surprised when Lacey returned later in the evening with his same two companions (Arnold and Frazier) and with Hoyt, whom Tosi did not know; that he again took their orders and served them; that Mrs. Beidenbach and her brother were in the store at the time and a general discussion of politics ensued; that Ferrari's name was not mentioned during either visit of the men; that they left before Mrs. Beidenbach; and that he shortly thereafter closed the store and went upstairs to listen to the election speeches on the radio. He explained his original denial to a police officer that the group had been at his store on the day mentioned "because Lacey was an ex-convict, and I didn't want to tell him I knew Lacey, and that Lacey was in the store, because that would be violating my parole." It is not at all improbable that his prior conviction and then existing parole status may have prompted Tosi to originally deny knowing or seeing the group on the day of the robbery—though in retrospect the impropriety of such a course is readily apparent. We are of the view, as stated above, that as to Tosi the judgment and order must be reversed because of insufficiency of the evidence, the record being destitute of corroborative evidence within the meaning of the authorities.

[12-15] There is no merit in the contention that the jury upon returning its verdict on count one exhausted its power to pass upon the remaining two counts, and that by imposing sentence on all three counts the court violated section 13 of article I of the Constitution and section 654 of the Penal Code relative to placing a person twice in jeopardy and imposing two punishments for one act. The order in which verdicts are read and in which judgments are pronounced is not material. People v. Degnen, 70 Cal.App. 567, 577, 234 P. 129. The cited constitutional and code provisions relate to second jeopardy and double punishment for the same offense. People v. Coltrin, 5 Cal.2d 649, 660, 55 P. 2d 1161. The crimes of criminal conspiracy, robbery and murder here involved are separate and distinct offenses. The test is the identity of the offenses as distinguished from the identity of the transactions from which they arise. A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their elements and one is not included in the other. People v. Martin, 114 Cal.App. 392, 300 P. 130; People v. Venable, 25 Cal.App.2d 73, 74, 76 P.2d 523.

[16] Contrary to the appellants' contention, it is now settled in this state that in the absence of a recommendation of life imprisonment in the verdict referable to the murder count, the trial court had no alternative but to impose the death penalty. People v. Perry, 14 Cal.2d 387, 392, 94 P. 2d 559, 124 A.L.R. 1123.

[17] After retiring to deliberate, the jurors returned to court and stated that they desired to know "If a defendant is convicted of murder in the first degree and given life imprisonment, is he subject to parole?" The court said: "You have nothing to do with that." One of the jurors then asked for "a definition of life imprisonment," to which the court replied: "All I can tell you is it is imprisonment in the penitentiary for the period of natural life. *What is done later by the authorities is none of our concern.*" The appellants urge that the italicized language suggested to the jury that the sentence of life imprisonment would carry with it the possibility of parole and caused the jury to return verdicts of guilty on the murder count without recommendation as to punishment. The court's remarks are not susceptible of the construction assigned to them. The jury was instructed that if it convicted the defendants of murder in the first degree, the law permitted it to fix the penalty at death or life imprisonment, and that should the verdict be "guilty of murder in the first degree, without any recommendation, the law will impose the death penalty." The challenged language did no more than advise the jury that after its assessment of the penalty its duty was ended. The court's remarks were entirely proper. People v. Ramos, 3 Cal.2d 269, 273, 44 P.2d 301; People v. Bruno, 49 Cal.App. 372, 376-379, 193 P. 511.

[18, 19] Nor do we find anything of a prejudicial character in the conduct of the prosecuting attorney. Many of the matters complained of are trivial and such as frequently occur in the trial of contested cases. Some of the remarks in the closing argument castigated the appellants, singly or as a group, but in so doing counsel cannot be said to have transcended the rules of propriety. Reasonable inferences may be drawn from the evidence by counsel in the course of argument. People v. Burdg, 95 Cal.App. 259, 269, 272 P. 816. Moreover, the question whether counsel prejudicially overstepped the bounds of propriety is a matter largely within the discretion of the trial court. People v. Mayes, 113 Cal. 618, 621, 622, 45 P. 860; People v. Hanks, 35 Cal.App.2d 290, 302, 303, 95 P.2d 478.

[20, 21] The final contention concerns the impanelment of the jury. It is urged that the trial court improperly allowed a departure from the order prescribed by section 1088 of the Penal Code for the exercise of peremptory challenges. The assignment is unavailing in the absence of a showing of prejudice to appellants' substantial rights. People v. Hickman, 204 Cal. 470, 481, 268 P. 909, 270 P. 1117; People v. Troutman, 187 Cal. 313, 320, 201 P. 928. Certain of the appellants also object to the scope of interrogation pursued by prosecuting counsel in the course of the voir dire examination wherein on occasions a prospective juror was asked whether in the event he was "satisfied beyond all reasonable doubt and to a moral certainty that five defendants would be guilty of murder in the first degree," he had "any conscientious scruples against the infliction of the death penalty as to the defendant that

didn't actually participate in the killing of Ferrari?" Under the circumstances existing at the time, the query was permissible and an answer in the affirmative furnished sufficient basis for the court's allowance of a challenge for cause. Penal Code, § 1074, subd. 8.

What has been said sufficiently disposes of all contentions requiring discussion. From a consideration of the whole record, it is our opinion that as to the appellants Hoyt, Arnold and Frazier, no prejudicial error was committed in the rulings of the court and that all questions of fact involved were submitted to the jury under proper instructions.

For the reasons herein stated, the judgments and the order denying motions for a new trial are affirmed as to appellants Hoyt, Arnold and Frazier. As to the appellant Tosi, the judgment and order denying new trial are reversed.

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20 Cal.2d 254

SAN JOAQUIN GINNING CO. v. McCOLGAN, Bank and Corporation Franchise Tax Commissioner.

L. A. 17846.

Supreme Court of California.

April 29, 1942.

Rehearing Denied May 28, 1942.

1. Taxation 🔑535

Language of statute prohibiting refund of franchise taxes paid where cessation of business or corporate existence is pursuant to reorganization, consolidation, or merger and defining reorganization is language of "exemption", even though portion thereof partakes of the form of a taxing provision, and terms reorganization, merger, and consolidation in relation to exemptions, abatements, and refunds should be liberally construed. Gen.Laws 1937, Act 8488, § 13(j, k).

See Words and Phrases, Permanent Edition, for all other definitions of "Exemption".

2. Taxation 🔑535

A corporation to be entitled to refund of portion of franchise taxes paid on theory that corporation had been dissolved was required to show that change effected by statutory dissolution and liquidation was in reality a change of substance, and if procedure adopted effected change only in form of corporate structure, there was only a "reorganization", "consolidation", or "merger" within statute prohibiting refund. Gen.Laws 1937, Act 8488, § 13(j, k).

See Words and Phrases, Permanent Edition, for all other definitions of "Consolidation", "Merger" and "Reorganization".

3. Taxation 🔑535

Under statute prohibiting refund of franchise taxes paid where cessation of business or corporate existence is pursuant to reorganization, consolidation, or merger and defining reorganization as a mere change in identity, form, or place of organization, however effected, or a merger or consolidation, consolidation or merger as a form of reorganization is not restricted to statutory consolidation or merger, in absence of appropriate language of limitation. Gen.Laws 1937, Act 8488, § 13(j, k).

4. Corporations 🔑1

For tax purposes, the Legislature may disregard corporate form.

5. Taxation 🔑535

Under statute prohibiting refund of franchise taxes paid where cessation of business or corporate existence is pursuant to reorganization, consolidation, or merger, omission of express declaration that merger or consolidation should include transfer by one corporation to another of its voting stock or properties does not impel conclusion that the Legislature intended to exclude elements of a de facto merger or consolidation from the meaning of reorganization. Gen. Laws 1937, Act 8488, § 13(j, k).

6. Taxation 🔑535

Under statute prohibiting a refund of franchise taxes paid where cessation of business or corporate existence is pursuant to reorganization, consolidation, or merger, and defining reorganization as a mere change in identity, form, or place of organization, however effected, or a merger or consolidation, language is sufficiently broad to include as a "reorganization" any transaction which does not substantially change continuity of interest. Gen.Laws 1937, Act 8488, § 13(j, k).

7. Taxation 🔑535

Where subsidiary corporation filed required certificates of dissolution and on payment of all its debts transferred balance of

its assets to parent corporation in return for stock which was thereupon canceled, and same interests were represented by same stockholders before and after transfer, there was a "reorganization" within statute, and subsidiary was not entitled to recover portion of franchise taxes paid on theory that it had been dissolved. Gen.Laws 1937, Act 8488, § 13(j, k).

8. Statutes ⚷230

Where statute prohibiting refund of franchise taxes paid because of cessation of business or corporate existence pursuant to reorganization, consolidation, or merger before amendment defined reorganization as a mere change in identity, form, or place of organization, amendment including within definition distribution in liquidation of a corporation's business or property to a corporation stockholder was not a legislative declaration that something was added to definition but merely clarified definition. Gen. Laws 1937, Act 8488, § 13(j, k); St.1939, p. 2948, § 13(j).

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In Bank.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the San Joaquin Ginning Company against Charles J. McColgan, as Bank and Corporation Franchise Tax Commissioner, etc., for refund of a portion of franchise taxes paid. From a judgment for plaintiff, defendant appeals.

Reversed.

Rehearing denied; TRAYNOR, J., not participating.

Earl Warren, Atty. Gen., and H. H. Linney and Valentine Brooks, Deputy Attys. Gen., for appellant.

Newlin & Ashburn and Ray J. Coleman, all of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff sued the defendant, as Bank and Corporation Franchise Tax Commissioner, for a refund of a portion of franchise taxes paid for the taxable year July 1, 1938, to June 30, 1939, on the theory that on October 27, 1938, it had voluntarily wound up its affairs and been dissolved. It recovered judgment for the sum of $3,644.62, which represented the proportion of the first installment of the tax paid by it for the months of the taxable year following dissolution. The defendant prosecutes this appeal from the judgment on the ground that the plan and procedure adopted by the plaintiff to effect a dissolution was in reality a reorganization or a merger of the plaintiff with its parent corporation. If it was such a reorganization or merger by virtue of the provisions of section 13 (k) of the Bank and Corporation Franchise Tax Act (Stats.1933, p. 869, as amended, Deering's Gen. Laws 1937, Act 8488), the plaintiff was not entitled to the refund.

On November 6, 1928, the people adopted section 16 of article XIII of the Constitution which imposed on corporations an annual tax measured by four per cent of their net income for the privilege of exercising their corporate franchises. In 1929 the legislature passed the Bank and Corporate Franchise Tax Act to carry into effect the provisions of that section. Stats.1929, p.19. The act of 1929 required the payment by corporations doing business in this state of a tax measured by net income, to be computed at the rate of 4 per cent upon the basis of net income for the next preceding fiscal or calendar year. A minimum tax of $25 was provided. Thus the tax imposed on the exercise of the corporate franchise during the first effective year (1929) under the act was measured by the percentage of net income for the preceding 1928 fiscal or calendar year. If a corporation was dissolved during the taxable year it was required to pay the tax only for the months of the taxable year prior to dissolution measured by the net income received during a similar proportion of the preceding year. Stats.1929, p. 1555. Thus a corporation, if deemed advisable, could be dissolved at the close of a fiscal year and thereby avoid payment of a franchise tax for the ensuing year, or it could be dissolved before the end of a taxable year and by virtue of the fact of dissolution obtain a refund of a proportion of the tax paid for that year. Reorganization, merger or consolidation of the dissolved company did not obviate those possible results under the act as it was drafted, and the results ensued whether tax avoidance was intended or was merely incidental to the main purpose of the dissolution. Thus inequalities in franchise tax levies resulted.

In 1931, Stats.1931, p. 1348, the legislature created the Tax Research Bureau consisting of the Governor, the director of finance and the board of equalization, whose duty it was to make a full and complete investigation of the actual operation of the systems of revenue, taxation and public finance of the state and its political subdivisions. It was also the duty of any corporation or individual to make reports to the bureau when requested to do so on matters consistent with the purposes of the act. Upon the basis of information thus obtained the bureau was required to report to the people and the legislature concerning matters of revenue, taxation, and public finance and to make recommendations thereon.

On December 1, 1932, the tax bureau made its report based on an analysis prepared at its request by Roger J. Traynor and Frank M. Keesling. The bureau's report contained the following statement: "The present provisions of section 13 relating to the computation of the taxes on banks or corporations which dissolve or withdraw from the State or which commence to do business in the State make no exception in the case of corporate reorganizations, consolidations and mergers. Hence, simply because of a change in the corporate structure by which a business is operated, the amount of taxes due the State for the privilege of operating that business in a corporate form will vary from what it would have been otherwise. Provision should be made for measuring the tax by the same income and allowing the same offsets had a reorganization, consolidation, or merger not occurred."

In 1933, Stats.1933, p. 869, the legislature amended certain sections of the Bank and Corporation Franchise Tax Act. Provisions of section 13 for payment of the tax by a reorganized, consolidated or merged corporation were amended and the term "reorganization" was defined to include, "(1) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred; or (2) a recapitalization; or (3) a mere change in identity, form or place of organization however effected." The same section was further amended to provide that a corporation which was dissolved during any year should pay a tax only for the months of the year preceding its dissolution, but that taxes levied under the act should "not be subject to abatement or refund because of the cessation of business or corporate existence of any bank or corporation pursuant to a reorganization, consolidation, or merger." The foregoing quoted provisions were retained in section 13 (h) and (m) respectively by the amendments of 1935. Stats. 1935, pp. 967, 969. By amendments in 1937, Stats.1937, pp. 2331, 2334, the definition of "reorganization" was included in subsection (j) and the words "or (4) a merger or consolidation" added thereto. The prohibition against refunds or abatements in cases of reorganizations, consolidations or mergers was retained as subsection (k). Until 1939 the act St.1939, p. 2934, provided that the basis for ascertaining the gain or loss from disposition or exchange of property should be determined in accordance with the provisions of sections 112 and 113 of the Federal Income Tax Law 1936, 26 U.S.C.A. Int.Rev.Acts, pages 855, 859.

With the foregoing legislative history as a background we turn to the merits of this case.

The facts are stipulated. They show that some time prior to the dates hereinafter mentioned the San Joaquin Cotton Oil Company acquired for cash all of the stock of the plaintiff, San Joaquin Ginning Company, both of which were organized under the laws of California. On September 14, 1938, the plaintiff filed its return for the taxable year July 1, 1938, to June 30, 1939. It reported a net income for the preceding fiscal year of $587,176.69, and a tax of $23,487.07 for the ensuing taxable year. It accompanied its return with a payment of $11,743.54, as the first installment of the reported tax. On October 26, 1938, the plaintiff, upon the vote of its sole stockholder and parent corporation, San Joaquin Cotton Oil Company, elected to wind up its affairs and for a voluntary dissolution pursuant to an agreed plan of liquidation. The plaintiff filed the certificate of dissolution required by law, and upon payment of all of its debts, the balance of its assets and property, with the exception of two leases which were cancelled, was turned over in kind to the parent corporation in return for the stock held by it which was thereupon cancelled. It was stipulated that thereafter the property was used by the parent corporation in the conduct of the same business operations formerly conducted by the plaintiff and with substantially the same patrons and customers. New leases with the same lessees were executed. The distribution of the assets did not alter the kind of business or operations formerly carried on by the plaintiff.

On January 11, 1939, the plaintiff, pursuant to section 13(k), filed its claim for a refund of the sum of $3,644.62, representing the proportion of the first installment computed for the portion of the taxable year which followed the plaintiff's dissolution. The claim was denied and the plaintiff brought this action to recover the claimed refund. As we have seen, section 13 (k), as it read at the time involved, prohibited any refund because of the cessation of business or corporate existence pursuant to a reorganization, consolidation or merger; and subsection (j) defined "reorganization" in part as a mere change in identity, form or place of organization however effected, or a merger or consolidation.

The plaintiff urges that the liquidating transaction between it and its parent corporation was nothing more than a dissolution and distribution of its assets to its sole stockholder. The defendant contends that it amounted to a reorganization as defined by subsections (3) or (4) of section 13(j). The plaintiff argues that a strict construction of the tax legislation should apply; therefore, that the provisions of section 13(j) and 13(k) refer only to statutory consolidations or mergers, and that reorganization is concerned with changes in the same corporate structure and not with a dissolution and distribution of assets to a corporation stockholder.

[1-3] The rule of strict construction invoked by the plaintiff is not applicable in resolving the meaning of the quoted portions of subdivisions (j) and (k) of section 13. The rule to be applied in the interpretation of the terms reorganization, merger and consolidation in relation to exemptions, abatements and refunds in the taxing provisions is the rule of liberal construction. And the language is language of exemption even though a portion thereof partakes of the form of a taxing provision. In order to prevail in its claim for refund the plaintiff must show that the change effected by the statutory dissolution and liquidation was in reality a change of substance as well as of form. If the procedure adopted effected a change only in the form of the corporate structure without any substantial change in the business operations and interests involved, it must be said to result only in a reorganization, consolidation or merger within the meaning and purpose of the provisions of the statute. The legislature provided that a reorganization included a mere change in identity, form or place of organization, however effected. It need not have used broader language to indicate its intention that such a change in identity or form effected by dissolution would disentitle the taxpayer to any refund or abatement which it otherwise would be allowed by virtue of dissolution proceedings. Also, in conformity with the legislative purpose, consolidation or merger as a form of reorganization is not restricted to statutory consolidation or merger in the absence of appropriate language of limitation.

[4] The Supreme Court of the United States in Burnet v. Commonwealth Improvement Co., 287 U.S. 415, 419, 53 S.Ct. 198, 77 L.Ed. 399, indicated that unusual cases may require disregard of the corporate form for tax purposes. The legislature for tax purposes may disregard the corporate form. McCreery v. McColgan, 17 Cal.2d 555, 110 P.2d 1051, 133 A.L.R. 800. The following cases lend further support to the conclusion that a liberal construction is appropriate in determining what is a reorganization, consolidation or merger and that a disposition or distribution of assets in liquidation or dissolution proceedings may be a reorganization, consolidation or merger: Pinellas Ice & C. S. Co. v. Commissioner, 287 U.S. 462, 53 S.Ct. 257, 77 L.Ed. 428; Helvering v. Minnesota Tea Co., 296 U.S. 378, 56 S.Ct. 269, 80 L.Ed. 284; Helvering v. Metropolitan Edison Co., 306 U.S. 522, at page 529, 59 S.Ct. 634, at page 638, 83 L.Ed. 957, where it was said: "We are of opinion that a transfer without valuable consideration, with the intent that the transferor shall, as the statute provides, cease to exist, made in accordance with the statute, has all the elements of a merger and comes within the principle that the corporate personality of the transferor is drowned in that of the transferee"; Le Tulle v. Scofield, 308 U.S. 415, 60 S.Ct. 313, 84 L.Ed. 355; Cortland Specialty Co. v. Commissioner of Internal Revenue, 2 Cir., 60 F.2d 937, 939, certiorari denied 288 U.S. 599, 53 S. Ct. 316, 77 L.Ed. 975, wherein it was stated: "Reorganization, merger, and consolidation are words indicating corporate readjustments of existing interests"; Ahles Realty Corp. v. Commissioner of Internal Revenue, 2 Cir., 71 F.2d 150, 151, certiorari denied Ahles Realty Corp. v. Helvering, 293 U.S. 611, 55 S.Ct. 141, 79 L.Ed. 701, where it was said: "A single transaction may not be broken up into various elements to avoid a tax," and it was concluded that liquidation proceedings

amounted to a reorganization; C. H. Mead Coal Co. v. Commissioner of Internal Revenue, 4 Cir., 72 F.2d 22, where the court stated that the legislative history of the reorganization provisions clearly demonstrated that the terms "merger" and "consolidation" were to be given a liberal interpretation to effectuate the legislative purpose; Minnesota Tea Co. v. Commissioner of Internal Revenue, 8 Cir., 76 F.2d 797, affirmed Helvering v. Minnesota Tea Co., 296 U.S. 378, 56 S.Ct. 269, 80 L.Ed. 284, where the court inquired into the administrative construction, the intent of Congress, and the broad purposes of the act in arriving at a conclusion that a transfer of corporate assets to another corporation for a consideration which was largely cash, followed by a distribution of cash to three individual stockholders, was a reorganization. Compare France Co. v. Commissioner of Internal Revenue, 6 Cir., 88 F.2d 917, certiorari denied 302 U.S. 699, 58 S.Ct. 18, 82 L.Ed. 540, which involved a liquidating transaction whereby the properties of one corporation were transferred to another corporation which owned all of the former's stock. The transaction for stock and cash sufficient to pay its indebtedness was held to be a sale and not a reorganization, for the purpose of imposing income tax on the realized gain; Helvering v. Leary, 4 Cir., 93 F.2d 826, wherein a claimed liquidation was held to be a reorganization because the continuity of interest was present; Helvering v. Schoellkopf, 2 Cir., 100 F.2d 415, 417 (involving the same transaction and corporations), where it was recognized that a reorganization may take place through liquidation of a parent or subsidiary corporation and that such a change—direct ownership of physical assets rather than ownership through a holding company—was within the intention of Congress, the court saying: "The underlying purpose of the exemptions in § 112 [26 U.S.C.A. Int.Rev.Acts, page 377] is to disregard corporate manipulations which do not substantially affect the shareholders' interest in the properties"; Commissioner of Internal Revenue v. Whitaker, 1 Cir., 101 F.2d 640 (also involved the same transaction and followed the decisions in other circuits to the effect that liquidation of one of the corporations did not prevent the reorganization from being within the statute); Commissioner of Internal Revenue v. Food Industries, 3 Cir., 101 F.2d 748, (again involving the same transaction, decided by a different circuit court of appeals to the same effect, the court noting that a given result at the end of a straight path is not made a different result because reached by following a devious path); Fisher v. Commissioner of Internal Revenue, 6 Cir., 108 F.2d 707, certiorari denied 310 U.S. 627, 60 S.Ct. 978, 84 L.Ed. 1398, where a claimed liquidation and dissolution resulting in absorption of one corporation by another, although not strictly a merger, was held to partake of the nature of merger within the definition of Pinellas Ice & Cold Storage Co. v. Commissioner, supra, and was therefore a reorganization.

[5, 6] The plaintiff contends that the foregoing cases should not be considered by this court. The language of section 13(j) defining reorganization was adopted in part from the Federal Income Tax Law. In this connection it is sufficient to note that section 112 of the Federal Revenue Act of 1928, 26 U.S.C.A. Int.Rev.Acts, page 379, from which the provisions of section 13(j) were patterned, defined reorganization as "(A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected." The federal law exempted corporations from reporting gain or loss on transfers which amounted to reorganizations as so defined. The purpose of the exemption was stated to be that where, pursuant to a plan, the interest of the stockholders of a corporation continued to be definitely represented in substantial measure in a new or different corporation, the exchange was to be treated as one not giving rise to present gain or loss to the extent of the continuity of interest. Groman v. Commissioner, 302 U.S. 82, 89, 58 S.Ct. 108, 82 L.Ed. 63. The history of the federal legislation disclosed that the object of the exemption was to postpone the taking of supposed gains or losses by virtue of exchanges which did not disturb the continuity of interest until the actual realiza-

tion of such gains or losses. C. H. Mead Coal Co. v. Commissioner of Internal Revenue, supra. Inasmuch as the device of exchange was often used to accomplish a deductible loss from income, and since in other cases the imposition of a tax on gain not realized was premature and oppressive, a liberal interpretation of "reorganization" was adopted. The cases cited reflect such a view. It is true that the California legislature did not adopt the language of the parenthetical phrase of clause (A) of the federal definition. The omission of an express declaration that merger or consolidation should include the transfer by one corporation to another of its voting stock or properties does not impel a conclusion that it was the legislative intention to exclude elements of a de facto merger or consolidation from the meaning of reorganization. The plaintiff attempts to distinguish the cases cited herein on the facts involved and the differences in the statutory provisions. It is not necessary further to analyze those cases or to note the points of difference. It is sufficient that the views expressed by the federal courts in respect to analogous, although not identical, legislation afford support for our conclusion as to the correct interpretation of language patterned after the federal act. See Union Oil Associates v. Johnson, 2 Cal. 2d 727, 735, 43 P.2d 291, 98 A.L.R. 1499. The appropriate rule of interpretation, where the meaning and application of language of exemption in the taxing statute is questioned, requires a holding that the language as adopted was sufficiently broad to include as a reorganization any transaction which did not substantially change the continuity of interest.

[7, 8] In the present case of continuity of interest after dissolution and so-called liquidation is beyond question. The same interests were represented in fact, if not in form, by the same stockholders before and after the transfer. Before the transfer and dissolution the stockholders of the parent corporation owned their interest in the subsidiary through the parent's holding of all the stock of the subsidiary. After the transfer their interest continued in the same measure as before through the direct ownership by the parent of the subsidiary's properties. No change of interest can be said to have occurred to warrant the conclusion that a reorganization within the language of the definition had not taken place. No special significance to the contrary may be accorded the fact that in 1939 (Stats. 1939, page 2948) the legislature amended section 13(j) to include expressly within the meaning of "reorganization," a distribution in liquidation by a corporation of all or a substantial portion of its business or property to a corporation stockholder. It is noteworthy that a mere dissolution and liquidation proceeding was not included in the federal definition of merger or consolidation (clause A), but that nevertheless in some of the cases above cited somewhat similar liquidation transactions were held to be reorganizations. We therefore observe that the inclusion of the quoted phrase in the 1939 statute did not necessarily amount to a declaration by the legislature that something was thereby added which was not within the language of the definition as theretofore in force. The foregoing observations are a sufficient basis from which to draw the conclusion that such a transaction was within the meaning of reorganization as theretofore defined by the legislature. The addition in 1939 of the specific type of transaction as constituting a reorganization was intended to clarify rather than to expand the definition of "reorganization." It has been held that if a certain class of taxpayers is resisting payment of taxes pursuant to a claimed construction of the taxing statute, the legislature in enacting an addition to the statute may very well be deemed to intend a clarification of its previous language rather than a change in the existing law. Union League Club v. Johnson, 18 Cal.2d 275, 115 P.2d 425.

The foregoing sufficiently answers all of the plaintiff's contentions.

The judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, and CARTER, JJ., concurred.

TRAYNOR, J., did not participate herein.

20 Cal.2d 896

GREAT WESTERN POWER CO. OF CALIFORNIA v. McCOLGAN, Bank and Corporation Franchise Tax Commissioner.

S. F. 16526.

Supreme Court of California.

April 29, 1942.

Rehearing Denied May 28, 1942.

Taxation ⇨535

Where subsidiary corporation effected a statutory dissolution and distributed its assets to its stockholders, and after liquidation and dissolution parent corporation continued to conduct subsidiary's business as theretofore conducted by subsidiary, there was a "reorganization" within statute, and subsidiary was not entitled to refund of a portion of franchise taxes paid on ground that it had been dissolved. Gen.Laws 1937, Act 8488, § 13(k).

See Words and Phrases, Permanent Edition, for all other definitions of "Reorganization".

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by the Great Western Power Company of California against Charles J. McColgan, as Bank and Corporation Franchise Tax Commissioner, etc., for refund of a portion of franchise taxes paid. From a judgment for plaintiff, defendant appeals.

Reversed.

Rehearing denied; TRAYNOR, J., not participating.

Earl Warren, Atty. Gen., and H. H. Linney and Valentine Brooks, Deputy Attys. Gen., for appellant.

Thos. J. Straub and John C. Wood, both of San Francisco, for respondent.

SHENK, Justice.

This case presents facts similar to those involved in the case of San Joaquin Ginning Co. v. McColgan, Cal.Sup., 125 P.2d 36, this day decided.

Pacific Gas and Electric Company owned all of the stock (with the exception of two per cent of the preferred stock) of the plaintiff, Great Western Power Company. The latter, by agreement with its principal stockholder, elected to dissolve on March 8, 1936. It effected a statutory dissolution and distributed its assets to its stockholders. After liquidation and dissolution, the Pacific Gas and Electric Company continued the conduct of the plaintiff's business in the same manner and with the use of the same properties as theretofore conducted by the plaintiff.

The plaintiff had paid its franchise tax for the taxable year 1936. It was dissolved on July 30, 1936. It commenced an action for a refund of five-twelfths of the tax. The plaintiff recovered judgment and the defendant appealed.

The questions to be determined are the same as those decided in the San Joaquin Ginning Company case. Those questions turn on whether the liquidation and dissolution of the plaintiff amounted to a reorganization, merger or consolidation within the meaning of section 13(k) of the Bank and Corporation Franchise Tax Act. Stats.1933, p. 869, as amended, Stats.1937, p. 2331. All of the contentions of the plaintiff are answered by our decision in San Joaquin Ginning Company v. McColgan, supra, and on the authority of that case the judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, and CARTER, JJ., concurred.

TRAYNOR, J., did not participate herein.

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20 Cal.2d 264

STATE COMPENSATION INS. FUND v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16650.

Supreme Court of California.

April 29, 1942.

1. Workmen's compensation ⇨1075

Where workman's compensation award holding two insurance carriers furnishing coverage for a general and special employer respectively jointly and severally liable therefor had become final, Industrial Accident Board was without jurisdiction to make an adjustment of liability as between the insurance carriers involving rights of contribution and reimbursement. St.1937, p. 265 et seq., § 3201 et seq.; p. 291, § 5300.

2. Workmen's compensation ⇨1086

The Industrial Accident Commission is a tribunal of limited jurisdiction with no

powers beyond those conferred upon it by constitutional provision authorizing the creation and enforcement of a complete system of workmen's compensation and legislation enacted pursuant thereto. St.1937, p. 265 et seq., § 3201 et seq.; p. 291, § 5300; Const. art. 20, § 21.

3. Workmen's compensation ⚷1075

Application for adjustment of liability as between two insurance carriers furnishing workmen's compensation coverage for a general and special employer respectively was not a "proceeding for the recovery of compensation", nor did it involve any "right or liability arising out of or incident thereto" within statute vesting Industrial Accident Commission with exclusive jurisdiction over such proceedings. St.1937, p. 291, § 5300; Const. art. 20, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding for the Recovery of Compensation" and "Right or Liability Arising Out of or Incident to Proceeding for Recovery of Compensation".

4. Workmen's compensation ⚷1075

An insurance carrier furnishing workmen's compensation coverage for a special employer of injured employee must resort to the ordinary courts established by Constitution for an adjustment of liability as between itself and insurance carrier for general employer to pay compensation award making both carriers jointly and severally liable therefor. St.1937, p. 265 et seq., § 3201 et seq.; Const. art. 6, § 1, art. 20, § 21.

5. Workmen's compensation ⚷1075

The fundamental object of state workmen's compensation system is the provision of a means for the prompt settlement of the employee's claim against his employer or the responsible insurance carrier, and Industrial Accident Commission has exclusive jurisdiction to determine any issues related to the enforcement of liability against insurance carrier for the payment of compensation to the employee. St.1937, p. 291, § 5300; Const. art. 20, § 21.

◆

In Bank.

Proceeding by the State Compensation Insurance Fund against the Industrial Accident Commission and Hans V. Hansen and others to review an order of the Industrial Accident Commission denying an application for an adjustment of liability as between petitioner and another insurance carrier furnishing workmen's compensation coverage for a general employer of injured employee.

Order affirmed.

Donald Gallagher and Edmund J. Thomas, Jr., both of San Francisco, for petitioner.

Everett A. Corten and Keith & Creede, all of San Francisco, for respondents.

CURTIS, Justice.

This is a proceeding to review an order of the Industrial Accident Commission denying an application for an adjustment of liability as between two insurance carriers furnishing workmen's compensation coverage for a general and special employer respectively.

There is no dispute as to the facts upon which this proceeding is predicated. An employee sustained injury in the course of his employment and was given an award. The general employer's carrier was Central Surety and Insurance Corporation, which received all compensation insurance premiums based on the earnings of said employee. The petitioner, State Compensation Insurance Fund, was the carrier for the special employer, whose payroll report did not include the injured workman's pay and whose corresponding premium payments to its carrier therefore did not cover this item. Upon authority of American Motorists Insurance Co. v. Industrial Acc. Comm., 8 Cal.2d 585, 67 P.2d 103, and Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., 8 Cal.2d 589, 67 P.2d 105, the two insurance carriers were held jointly and severally liable to the employee, and the respective employers were discharged. No question was raised by the parties interested as to the propriety of this award, but after it had become final petitioner applied to the commission for a "supplemental adjustment of obligations between carriers." The petitioner based its application upon the above mentioned disparity as to receipt of premiums by the carriers adjudicated responsible for the satisfaction of the award. Accordingly, it requested the commission to settle the respective rights of the insurance carriers in the premises by an appropriate order establishing the primary liability of the Central Surety and Insurance Corporation for all payments due the employee under his award and requiring that company to reimburse the petitioner for all monies it had expended or might thereafter expend as disability indemnity or otherwise in accord with the terms of said award. After a hearing on this matter, the commission made its order denying the application on the ground that it lacked jurisdiction to determine such dispute between the two insurance carriers. Following the denial of its petition for a rehearing, petitioner applied to this court for a review of the supplemental proceeding had before the commission and for the annulment of the aforementioned order.

[1] It is our opinion that the commission properly concluded that it is without jurisdiction to adjudicate a supplemental controversy involving rights of contribution and reimbursement between two insurance carriers jointly and severally responsible for the payment of a compensation award.

[2] It is well settled that the Industrial Accident Commission is a tribunal of limited jurisdiction, with no powers beyond those conferred upon it by section 21 of article XX of the state Constitution and the provisions of the Workmen's Compensation, Insurance and Safety Act, now codified in the Labor Code. (§ 3201 et seq., St.1937, p. 265 et seq.) That part of the section of the Constitution applicable to the consideration of the present situation reads as follows: "The Legislature is hereby expressly vested with plenary power * * * to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes * * * full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects * * * full provision for otherwise securing the payment of compensation; and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character * * *." Under this grant of power the legislature created the Industrial Accident Commission and vested it with exclusive jurisdiction over all proceedings "(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto. (b) For the enforcement against the employer or an insurer of any liability for compensation imposed upon him by this division [of the Labor Code] in favor of the injured employee, his dependents, or any third person. * * *" Labor Code, § 5300, St.1937, p. 291.

[3, 4] While petitioner concedes that the jurisdiction of the commission is limited to the settlement of disputes arising out of the relationship of the employer to his employee, it urges that once this status is established the commission has judicial power to determine any controversy whatsoever that may develop between parties in interest respecting the compensation awarded. Upon this basis the petitioner contends that its application for an adjustment of its obligation to make compensation payments falls within the scope and intent of the above quoted language of the constitutional provision referable to the insurance features of the "system of workmen's compensation" and the legislative enactment adopted in pursuance thereof. In support of its argument the petitioner first cites several decisions of this court wherein it was held that in determining the liability of an insurance carrier for compensation to an injured employee, the commission had the power to determine all issues of law and fact upon which the liability of the insurance carrier depended. Employers' Liability Assurance Corp., Ltd., v. Industrial Acc. Comm., 177 Cal. 771, 171 P. 935; Employers' Liability Assurance Corp., Ltd., v. Industrial Acc. Comm., 179 Cal. 432, 177 P. 273; General Accident, Fire & Life Assurance Corp. v. Industrial Acc. Comm., 196 Cal. 179, 237 P. 33; Bankers Indemnity Insurance Co. v. Industrial Acc. Comm., 4 Cal.2d 89, 47 P.2d 719. But in those cases the respective questions regarding the insurance aspect of the proceeding before the commission arose in connection with the rendition of an *award in favor of an injured employee or his dependents* and necessarily were involved in the enforcement of the compensation bene-

fits contemplated under the basic liability of the employer to his employee. The present situation is readily distinguishable in that here the right of action in the employee to enforce his claim was finally determined by the joint and several award in his favor against the insurance carriers which had assumed the obligations of the respective employers in the premises. By such award the employee was assured of the scheduled payments, and the employers were discharged from all liability therefor. This adjudication concluded the authority of the commission to act in the matter. Any controversy between the insurance carriers relative to the burden of payment of the award for which both have been held responsible concerns neither the employee nor the joint employers in their essential relationship. Application for the adjustment of such dispute obviously is not a proceeding *"for the recovery of compensation"* nor does it involve "any right or liability arising out of or incidental thereto." The fact that the petitioner has joined the employee as a nominal party in this proceeding cannot change the basic character of the litigation as an independent claim having no relation to the enforcement of the benefits *allowed the employee* under the system of workmen's compensation established in this state. The petitioner is seeking an award in *its* favor based on a claim wholly distinct from the right of the employee to recover compensation for an industrial injury. These considerations plainly indicate that the commission is not vested with constitutional or legislative power to determine the issues involved in a proceeding supplemental to the adjudication of the liability of the employer to his employee, and the petitioner must seek its relief in the ordinary courts established by and under section 1 of article VI of the state Constitution.

Closely analogous in legal principle to the present situation is the decision in United States F. & G. Co. v. Superior Court, 214 Cal. 468, 6 P.2d 243, involving the denial of a writ of prohibition sought by the insurance carrier to restrain the superior court from proceeding with the trial of an action brought by the employer against the carrier for the recovery of damages for breach of contract to issue workmen's compensation insurance. Because of this breach the employer in a proceeding before the Industrial Accident Commission instituted by the injured employee was held directly liable upon a compensation award and the insurance carrier was dismissed. This court rejected the contention of the petitioning insurance carrier that the matter had already been concluded by the commission's exercise of jurisdiction in the proceeding culminating in the compensation award and held that the employer's claim was a proper matter for decision in the superior court. In distinguishing the dispute as one without the limited jurisdiction of the Industrial Accident Commission, this court stated at page 471 of 214 Cal., at page 245 of 6 P.2d: "The cause of action for damages does not involve the construction of an insurance policy with respect to coverage thereunder, the recovery of compensation or incidental liability or the enforcement against an insurance carrier of compensation liability; it attempts to set forth purely a claim for damages based upon the breach of a contract to insure in a controversy affecting only the employer and the insurance carrier, *no rights of the employee being involved."* (Italics ours.) Likewise here the controversy between the two insurance carriers as to an adjustment of obligations for the payment of compensation does not involve the rights of the injured employee, who under the terms of the award is assured the benefits due him regardless of the outcome of petitioner's claim for reimbursement based upon equitable considerations. Within the reasoning of the United States F. & G. Co. case, petitioner must invoke the aid of the regular courts of this state (Const. art. VI, § 1) for the determination of its rights in the premises.

Nor is the petitioner's position strengthened by its reference to the following general and special employment cases involving the commission's exercise of jurisdiction over questions of liability of the respective insurance carriers as to compensation coverage. Preliminarily it should be noted that in each of these instances the proceeding was instituted by the employee or his dependent and the insurance issue arose in the course of the commission's *measurement of the rights of the claimant* against the joint employers and the insurance carriers which stood in privity with them. The first of these cases is Federal Mutual Liability Ins. Co. v. Industrial Acc. Comm., 190 Cal. 97, 210 P. 628, wherein this court upheld an award which dismissed the insurer of the special employer and assessed liability solely against the insurer of the general employer. In so acknowledging the power of the commission to choose between the insurance carriers on the basis of arrangements made by the employers for insuring the compensation risks of their employees, this court stressed the fact that the general employer was required by his agreement with the special employer to pay premiums on the risks at issue and was entitled to reimbursement therefor from the special employer. Although such adjudication, requiring the insurance carrier which received the premiums for the compensation coverage to satisfy the award *in favor of the employee,* redounded to the benefit of the exonerated carrier, the commission did not undertake to decide the equities existing between the insurance companies in the course of making an award in favor of one against the other. Rather this insurance adjustment resulted solely from the limitation enforced against the widow of the deceased employee in *her right to recover compensation* and so was within the jurisdiction of the commission in its determination of a dispute arising out of the employer-employee relationship.

Then in American Motorists Insurance Co. v. Industrial Acc. Comm., 8 Cal.2d 585, 67 P.2d 103, this court expressly overruled the doctrine of the Federal Mutual Liability Ins. Co. case as to the rights of the employee against the insurance carriers of his joint employers and affirmed an award in favor of the employee against the insurers of both the general and special employer even though the employers had agreed that the injured party should be carried on the payroll of the general employer for the purpose of computing compensation insurance premiums. The abandonment of the earlier view restricting the employee's rights with respect to a joint recovery was predicated upon the observation that it was against the intent and spirit of the Workmen's Compensation Act to allow an agreement between joint obligors to diminish the remedy of the employee. The necessity for a separate settlement of the equities existing between the insurance carriers in regard to the question of which should assume the burden of liability under the terms of the award was recognized in the following statement at page 588 of 8 Cal.2d, at page 104 of 67 P.2d: "Since both employers are discharged, as between insurance companies, equity and fair dealing certainly demand that payment be made by the company which received the premium for the coverage. But that is a matter to be settled between the insurance carriers, if necessary in an *independent suit.*" (Italics ours.) This precise phraseology is significant in that the words "independent suit" plainly suggest an action in the regularly constituted courts of this state rather than a supplemental proceeding before the Industrial Accident Commission, whose limited jurisdiction was exhausted upon making the compensation award determinative of the rights of the employee against the two insurance carriers for his respective employers.

This principle of the American Motorists decision was reiterated in a companion case, Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., 8 Cal.2d 589, 67 P.2d 105, wherein it was held that the commission's discharge of the compensation carrier for the special employer, because the latter did not include the employee on its premium list while the general employer did, was improper. Bearing pertinently upon the question of the proper tribunal for the presentation of such a claim as petitioner here asserts is the following excerpt from that opinion, 8 Cal.2d at page 591, 67 P.2d at page 106, affirming the propriety of a joint and several compensation award in favor of an employee in a general and special employment case: "There is, however, a question as to whether the petitioner [the insurance carrier for the general employer] is entitled to object to the erroneous discharge of the insurance carrier for the special employer. While it is obvious that one employer cannot object if the injured employee does not proceed against a second employer who is jointly and severally liable with him, we think the rule should be different where both employers are brought before the commission and the award erroneously discharges one instead of making a joint and several award against both, since the relative rights of the employers may well be affected by a determination that only one of them is responsible for compensation to the employee. The right of contribution between joint obligors depends upon the satisfaction of more than a fair share of the claim against all. The erroneous discharge by award of the commission of an employer who has a joint and several obligation to pay compensation is a determination by a competent tribunal that the obligation is not joint, an issue which was properly before it for determination in a proceeding to which both were parties. Such a determination if not operative as *res judicata* in a *subsequent suit* between the employers, or their insurers, for contribution or reimbursement according to contract, would at least be competent evidence. See 1 Freeman on Judgments, p. 922; 15 Cal. Jur. 184. It is moreover a question within the exclusive jurisdiction of the Industrial Accident Commission and since that tribunal need not rigidly adhere to rules of pleading and practice, the petitioner should be allowed to make the objection." (Italics ours.)

[5] Thus again is recognized the exclusive jurisdiction of the commission to determine any issues related to the *enforcement of liability against the insurance carriers for the payment of compensation to the employee,* and accordingly the objection of one joint obligor to the erroneous discharge of the other is properly raised in that forum as a protective measure in the event it decides to invoke the ordinary process of the courts in the establishment of any claim for contribution or reimbursement by reason of its obligation to satisfy the industrial award. However, no more under the theory of the Federal Mutual Liability Ins. Co. case than under the reasoning of the two later cases was the commission empowered to make an independent adjustment of any equities between the insurance carriers by an adjudication separate and apart from an award in favor of the employee or those asserting his rights. The fundamental object of the "system of workmen's compensation" established in this state is the provision of a means for the prompt settlement of the employee's claim against his employer or the responsible insurance carrier. The disposition of disputes between insurance carriers independent of the enforcement of the liability of the employer to his employee is plainly not within the jurisdiction of a tribunal created for the purpose of affording compensation benefits to workmen for injuries sustained in their industrial employment. To extend the commission's jurisdiction to include such extraneous and collateral controversies not only would delay and impede the efficacious settlement of employer-employee claims, but likewise would be wholly at variance with the declared social public policy of this state to accomplish substantial justice in all cases of the specified class "expeditiously, inexpensively, and without incumbrance of any character." It therefore follows that the adjustment of petitioner's obligation is beyond the judicial power conferred upon the Industrial Accident Commission by the constitutional provision and the pertinent legislation enacted thereunder, as above noted, and that such claim for reimbursement is a proper matter for litigation through an "independent suit" in the regularly constituted courts. Const. art. VI, § 1.

The order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

51 Cal.App.2d 451

ANDREW v. ANDREW.

Civ. 12103.

District Court of Appeal, First District, Division 2, California.

April 27, 1942.

1. Husband and wife 🔑34

A purported contract between husband and wife relating to rights of the parties in certain property was one between those standing in "confidential relation" and was presumed to be fraudulent. Civ.Code, § 158, 2228, 2235.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relation".

2. Husband and wife 🔑34

The presumption that contract between husband and wife purporting to settle rights of the parties in certain property was fraudulent continued until it was dispelled, and the burden of dispelling it rested on the husband who sought to have it approved. Civ. Code, §§ 158, 2228, 2235.

3. Divorce 🔑253

Evidence sustained provision of divorce decree setting aside contract between hus-

band and wife purporting to settle rights of the parties in certain property, on ground that the contract was unjust, and that at time of preparation and execution thereof, the husband concealed certain assets possessed by him. Civ.Code, §§ 158, 2228, 2235.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Louise Andrew against A. J. Andrew for divorce, wherein defendant filed a cross-complaint. From an adverse judgment, defendant appeals.

Affirmed.

Harold L. Hjelm, of Turlock, for appellant.

C. Ray Robinson, Willard B. Treadwell, Loraine B. Rogers, and W. Eugene Craven, all of Merced, for respondent.

STURTEVANT, Justice.

The defendant in the above entitled divorce action has appealed from the judgment in favor of the plaintiff, his wife. The plaintiff alleged in her complaint a cause of action for divorce based on the alleged extreme cruelty of the defendant. She charged acts of both mental and bodily cruelty. She alleged that she and her husband were possessed of community property but that she did not know the extent and the nature thereof. She set forth that they had three minor daughters. She also alleged that she had no funds to provide for herself and children nor to prosecute said action. She prayed that she be awarded a decree of divorce, that the custody of said minors be awarded to her, and that she be awarded one-half of the community property, and that she be awarded counsel fees and costs. The defendant filed an answer in which he denied the alleged acts of cruelty and he also denied that the spouses owned any community property. He also filed a cross-complaint in which he charged the plaintiff with cruelty. In his cross-complaint he alleged that there was no community property and pleaded in haec verba a property settlement and asked a decree approving it. The plaintiff answered the cross-complaint and in that answer she denied the making of the said property settlement.

The cause was heard on all of said issues and the trial court made findings in favor of the plaintiff. It awarded the plaintiff (1) a decree of divorce; (2) the custody of said minors; (3) sixty dollars per month for the maintenance of said minors; (4) the title to a tract of land, hereinafter called "The Delhi Lots," and certain household furnishings; (5) counsel fees in the sum of $125; and (6) costs of suit. It also ordered that the alleged property settlement be set aside and that the balance of the property be awarded to the defendant.

The defendant makes one point only and that is set forth pursuant to the rules of this court on the first page of his brief. He says: "Where there is no evidence of fraud, force, undue influence, or overreaching, may the court ignore a property settlement agreement executed by a husband and wife after full disclosure of all material facts to each, and, contrary to the agreement, give all the community property to said wife, and grant her attorney fees and costs that were in turn waived in the agreement?" The vice in the question as written rests in the fact that the defendant fails to apply certain statutory rules to the facts. His point as written is not presented by the record before us as clearly appears from a brief recital of the facts.

The plaintiff and defendant intermarried at Damascus in Syria in the year 1928. At that time the defendant owned a farm hereinafter referred to as "The Eighty Acres" located near Delhi in Merced County. After their marriage the plaintiff and defendant acquired a tract hereinafter called "The Twelve Acre Piece," and "The Delhi Lots" on one of which the family dwelling is located. The farm was improved and equipped with tools, implements, truck, automobile, and other accessories. The house was furnished to some extent at the time of the marriage. Later other furnishings were installed. Lots at Delhi were bought and sold. Some mortgages were executed, payments were made on mortgage indebtedness, and at times bank accounts were opened in the name of the husband. The latter at times borrowed from a cousin in San Francisco and from time to time made payments to said cousin. Furthermore, if we correctly understand Mr. Andrew's testimony, at times he had funds standing to his account in the hands of said cousin.

With interests so varied the defendant suggested to the plaintiff that they should make a property settlement. She consented. He employed his present attorney, Mr. Hjelm, to reduce the contract to writing.

The latter prepared a written instrument. The plaintiff and defendant went to his office and plaintiff testified they both signed it. She testified she had no advice except what her husband said and what Mr. Hjelm said. She also testified she did not read said written instrument, and never read it nor knew its contents until the time she commenced this action. On its face it purports to have been acknowledged by the defendant before Mr. Hjelm as notary public on December 15, 1936, and by the plaintiff before Mr. Fowler as notary public on January 5, 1937. But she testified she never acknowledged the execution before Mr. Fowler or anyone else on said date or at all. Mr. Fowler was not called as a witness by anyone. Mr. Hjelm testified plaintiff did not sign on December 15, 1936, but returned to his office on January 5, 1937, when Mr. Fowler, his partner, was present and that she then signed and acknowledged her signature before Mr. Fowler.

On its face said contract provides (1) the parties shall own, share and share alike, the Delhi lots; (2) the husband shall own as his separate property The Eighty Acre farm and (3) each relinquishes his right to succeed to the estate of the other. No mention is made of any other property, real or personal.

Mrs. Andrew testified that before said instrument was written her husband said they would divide their properties half and half. To that remark she consented. On the trial there was no evidence that the oral agreement was not as claimed by Mrs. Andrew. But the written instrument does not purport to state said oral agreement. Neither on December 15, 1936 nor at any time previous thereto did the defendant attempt to inform the plaintiff as to the nature and amounts of his or their assets, or of his or their liabilities.

[1, 2] When under these circumstances the written instrument was introduced in evidence the following propositions at once became obvious. The writing was a purported settlement as to the rights of each spouse in the two properties but no more. As to their other properties, and there were several, it did not even purport to speak. It had been represented that it would divide the properties half and half. On its face it did not even purport to do so. It was a purported contract between husband and wife, that is, between a trustee and his beneficiary. Civ.Code, secs. 158 and 2228. Before it was executed it is not even claimed the plaintiff had had the benefit of independent legal advice. Ordinarily her grantee under such circumstances could not retain the benefits under said instrument. 9 Cal.Jur. 230. Being a purported contract between husband and wife, it was between those standing in a confidential relation and was presumed to be fraudulent. Civ.Code, sec. 2235. That presumption continued until it was dispelled and the burden of dispelling said presumption rested on the husband. Odell v. Moss, 130 Cal. 352, 357, 62 P. 555. That burden he did not assume. The trial court was well within its powers in making the finding which the defendant so vigorously attacks, namely, "* * * the court finds that heretofore the plaintiff and defendant made and entered into an agreement in writing bearing date December 15, 1936, that said agreement was unjust, unfair, unreasonable and inequitable, and that at the time of the preparation and execution of said agreement the defendant concealed from plaintiff and from defendant's attorney certain assets possessed by him."

Much is said in the briefs that on December 15, 1936, the defendant did not disclose that the title to the Twelve Acre Tract stood in his name. It is sufficient to state he did not disclose the exact title or any title to said tract. He was bound to have done so if, as he claims, the said instrument was to be a property settlement between himself and his beneficiary. Civ.Code, § 2228. Neither did he state the items or values of the numerous items of personal property hereinabove mentioned.

[3] We conclude therefore that the defendant did not meet the burden of proof resting on him. He pleaded the purported property settlement. As we have shown the burden rested on him to prove that it was just, fair, reasonable and equitable. He did not even attempt to do so. It follows that the finding holding it "was unjust, unfair, unreasonable, and inequitable" may not be said to be without support. The finding in legal effect was but an application to the facts of the statutory rule. Civ.Code, § 2235, supra.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

51 Cal.App.2d 456

MEYER v. BOARD OF PUBLIC WORKS OF CITY OF LOS ANGELES et al.

Civ. 13008.

District Court of Appeal, Second District, Division 1, California.

April 27, 1942.

Hearing Denied June 25, 1942.

1. Municipal corporations ⚷218(8)

Where there was no requirement in Los Angeles city charter that all causes that might be suggested for removal of city employee in classified civil service be stated in written notice served on him by the board having power to remove him, the statement of a single cause was sufficient.

2. Municipal corporations ⚷178

A finding of board of public works of Los Angeles that superintendent of street maintenance was directly, financially and beneficially interested in public contracts, contrary to the best interests of the city, and contrary to charter of city, was a sufficient charge on which to predicate removal of the superintendent.

3. Constitutional law ⚷70(1)

Courts are without power to legislate by judicial decision.

4. Municipal corporations ⚷218(11)

Under Los Angeles city charter specifying that an employee must be found "fit" and "suitable" before reinstatement to position from which he has been discharged, the quoted words did not restrict the board of civil commissioners in making its investigation to information received by the commission which establishes that the employee affected had become physically or mentally unfit to fill his former position, nor require that the commission determine the employee's fitness and suitability only after he has been acquitted of charges brought against him, set forth in writing.

The word "fit" means suitable to a standard of duty, propriety or taste. The word "fit" is a synonym for "suitable." There are few words in the language that have a broader significance.

See Words and Phrases, Permanent Edition, for all other definitions of "Fit" and "Suitable".

5. Municipal corporations ⚷218(11)

Where Los Angeles city charter specified that employee must be found "fit" and "suitable" before reinstatement to position from which he had been discharged, board of civil service commissioners in passing upon reinstatement of former superintendent of street maintenance could find that superintendent was not a fit and suitable person because he engaged in gambling for high stakes, notwithstanding that such delinquency was not the basis of the original charges for removal of the superintendent and were not set forth in writing in the notice and served upon him.

6. Mandamus ⚷168(2)

In proceeding by former employee of city for peremptory writ of mandate to direct city officials to reinstate him to his position and to permit him to perform the duties of his position from which he had been removed on ground that he was not fit and suitable for the position, rule of presumption of innocence was inapplicable.

7. Municipal corporations ⚷178

A finding of the Los Angeles board of civil commissioners denying reinstatement to superintendent of street maintenance on ground that his gambling for high stakes tended to impair public confidence in him and his department was conclusive on the reviewing court, and could not be interfered with on the ground that it was arbitrary and capricious, in view of the evidence.

8. Mandamus ⚷163

In proceeding for writ of mandate by former superintendent of street maintenance against board of public works of city to compel his reinstatement and to permit him to perform the duties of his position, contention that finding of board of civil service commissioners was arbitrary, capricious, fraudulent, wrongful and unlawful was a mere "conclusion of law", the truth of which was not admitted by general demurrer.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

9. Pleading ⚷225(1)

Where no request was made by petitioner for leave to amend his pleading, trial court, in sustaining demurrer, did not err because order sustaining demurrer was made without leave to amend.

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Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding for writ of mandate by Mosier M. Meyer against the Board of Public Works of the City of Los Angeles and others to direct respondents to reinstate the petitioner to the position of Superintendent of Street Maintenance, Bureau of Engineering, Department of Public Works of the City of Los Angeles, to permit him to perform the duties of such position, and to restore to him all rights incident to the position, and to cause demands and pay checks to be issued to petitioner for salary or wages. From a judgment decreeing that the petitioner take nothing by reason of his action, the petitioner appeals.

Judgment affirmed.

Loren A. Butts, of Los Angeles, for appellant.

Earl G. Read, of Los Angeles, as amicus curiae, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and George William Adams, Deputy City Atty., all of Los Angeles, for respondents.

DESMOND, Justice, pro tem.

Appellant filed a petition for a peremptory writ of mandate to be directed to respondents, "ordering and commanding the respondent Board of Public Works of the City of Los Angeles to reinstate the petitioner to the position of Superintendent of Street Maintenance, Bureau of Engineering, Department of Public Works of the City of Los Angeles, and to permit him to perform the duties of said position and to restore to him all the rights incident to said position and to cause demands and pay checks to be issued to said petitioner for the amount of salary or wages due the petitioner from the 1st day of August, 1940, until restored to duty, at the rate of Four Hundred Seventy-five Dollars ($475.00) per month, and

"Ordering and commanding the respondent Board of Civil Service Commissioners to certify that petitioner has been duly and regularly appointed to the position of Superintendent of Street Maintenance, Bureau of Engineering, Department of Public Works of the City of Los Angeles, and approve the salary or compensation due him from December 31, 1939, and

"Ordering and commanding the respondent Dan O. Hoye, Controller of the City of Los Angeles, to approve the demand in the sum of Three Thousand Three Hundred Twenty-five Dollars ($3,325.00), drawn in favor of petitioner and delivered to the said Dan O. Hoye, all in accordance with the order and instructions of the Council of the City of Los Angeles, as hereinabove set forth, and to approve all other demands or pay checks when presented to him for approval, and

"Ordering and commanding the respondent Leon V. McCardle, Treasurer of the City of Los Angeles, to pay said demands or pay checks when presented to him for payment * * *".

A demurrer was filed to said petition, alleging that it did not "state facts sufficient to constitute a cause of action or to support the issuance of a Writ of Mandate against the respondents or any of them or to entitle petitioner to any relief at all." The trial court sustained this demurrer, and petitioner having declined to amend his petition, the court then entered judgment decreeing that the petitioner take nothing by reason of his action against the respondents or either or any of them. The appeal is from this judgment.

In December of 1939 the appellant, then holding the position of superintendent of street maintenance, received the following communication:

"Los Angeles, Calif., December 22, 1939.

"To the Honorable
"The Board of Civil Service Commissioners,
"1100 City Hall, Los Angeles, Cal.

"Gentlemen:

"You are hereby notified that we have this day discharged effective December 31, 1939, Mosier M. Meyer from his position as Superintendent of Street Maintenance, Code #8293(p) in the Bureau of Engineering of the Dept. of Public Works of the City for the following cause (state fully), to-wit:

"As set out in the attached copy of the resolution adopted by the Board of Public Works at its regular meeting on December 22, 1939, which resolution is hereby made a part hereof with the same force and effect as if set out in detail herein.

"Approved Dec. 22, 1939
"Board of Public Works
"By Milton Offner, Secretary)

"(If above space is insufficient to state the cause, same may be stated or continued on separate pages and attached hereto. Please sign or initial any attached pages.)

"Respectfully yours,

"(Signature) Board of Public Works
of the City of Los Angeles,
California

"(Title) By C. B. Worsnop, President

"Resolution

"Whereas, the Board of Public Works for the past approximately two months, conducted an investigation concerning the conduct of Mosier M. Meyer, in relation to his duties for the City of Los Angeles and the Department of Public Works, and has interrogated witnesses and received evidence, both oral and documentary, and the said Mosier M. Meyer has appeared before this Board and testified under oath; and

"Whereas, this Board is now of the opinion that the said Mosier M. Meyer should, because of his conduct, be discharged from his official duties;

"Now, Therefore, Be it Resolved:

"That it is the sense of this Board, gained from an examination of witnesses and documents, that the said Mosier M. Meyer has been interested, financially beneficial to himself, in one or more public contracts made by private contractors with the City of Los Angeles, and this Department, and that his explanations relative to his part in relation thereto are unsatisfactory and do not convince this Board that he was not implicated therein, and this Board further states and finds that the said Mosier M. Meyer was directly financially and beneficially interested in said public contracts, contrary to the best interests of the City of Los Angeles, and also contrary to Section 28 of the Los Angeles City Charter; and

"That although it is the finding of the Board that the said Mosier M. Meyer was implicated, as above stated, it is the further finding of the Board that irrespective of the presence or absence of guilt of said Mosier M. Meyer in reference to the Grand Jury charges, the manner of their dismissal, and the unsatisfactory explanations to this Board of said Mosier M. Meyer in relation thereto, have resulted in public scandal; and remaining unsatisfactorily explained the further retention of said Mosier M. Meyer as an employee of the Department will result in prejudice to the good order of the Department and loss of public confidence therein; and

"This Board further finds that he has otherwise shown himself unsatisfactory and untrustworthy as a public employee, as more specifically shown by the said evidence and records in said investigation;

"Be It Further Resolved that all evidence, both oral and documentary, and transcripts, be and the same are hereby ordered filed as part of the records of this Department, and reference is now made to the same and the same are hereby made a part of this Resolution;

"Be It Further Resolved that the said Mosier M. Meyer be and he is hereby removed and discharged from his said position as Superintendent of Street Maintenance (Code #8293(p)) effective December 31, 1939;

"Be It Further Resolved, that the Secretary of this Board be, and he is hereby directed to prepare the notice of removal and discharge in accordance with the provisions of the Charter setting forth the substance of this Resolution therein and serve the same forthwith upon the said Mosier M. Meyer and certify the same to the Civil Service Commission."

Appellant had first entered the employ of the city of Los Angeles in the year 1914, working as a chainman on the engineering force, and gradually rose from the ranks until January of 1924, when he was promoted to the position of superintendent of street maintenance, which office he continued to hold until he was removed.

Within five days after the receipt of the notice of his removal effective December 31, 1939, appellant filed with the board of civil service commissioners an answer denying generally and specifically each and every allegation contained in the charges made by the board of public works and asked that the "purported charges be investigated and that this honorable board also investigate the alleged grounds for his attempted removal." Thereafter following a hearing the board of civil service commissioners adopted a resolution reading as follows:

"Whereas, the Board of Public Works discharged Mosier M. Meyer as of December 31, 1939, for cause, following which under Charter section 112, he requested investigation of the discharge by the Board of Civil Service Commissioners, which now has completed its investigation.

"Be It Hereby Resolved, by the Board of Civil Service Commissioners:

"1. That the grounds stated for the discharge are not proven to the satisfaction of this Board by the evidence submitted or obtained; and likewise are not satisfactorily disproven by the testimony of Mosier M. Meyer or by the other testimony and documents relied on by him;

"2. That inasmuch as Mosier M. Meyer in his own behalf presented testimony from which this Board concludes he habitually engaged in gambling for high stakes, over a period of years, under circumstances which tended and may yet tend to impair public confidence in him and his department, this Board does not find him a fit and suitable person for reinstatement;

"3. That these findings be placed in full upon the minutes of the Board, together with the following statement;

"This Board recognizes a duty to determine whether cause exists for discharge, independently of the discharging authority. Because of lapse of time the truth or falsity of the charges here perhaps never will be adjudicated by any law court. In justice to the public and to Mosier M. Meyer, we therefore have taken a long time to investigate and consider.

"The inquiry before the Board of Public Works is indicated by the record to have been far from calm and dispassionate. Mosier M. Meyer objected to the fairness of that inquiry; and therefore this Board extended every opportunity for him and his counsel to appear before this Board, to present evidence, and to call witnesses, in his own behalf.

"The action of the Board of Public Works rests in part on written assertions of Clarence L. Holt. Much delay resulted from an attempt to bring Clarence L. Holt before this Board for questioning by this Board and Mosier M. Meyer. When subpoenaed Clarence L. Holt disappeared, and has not yet been found in the State.

"Mosier M. Meyer has not satisfactorily accounted for his unexplained sources of income, which gave rise to the charge that he had been unlawfully interested in public contracts. He has not cooperated in presenting the related accounts of his wife. His only explanation of the large increments in his own account were that presumably they resulted from his gambling. The checks he exhibited to fortify this explanation were not helpful and did no more than establish other sufficient grounds for discharge, based upon his gaming habits.

"In his former position we are satisfied Mosier M. Meyer was not incompetent, and some testimony indicated extraordinary capacity and workmanship.

"So long as the principal charge remains neither completely proved, nor yet disproved, unfortunately a lack of public confidence in him can reasonably have been thought to exist by his superiors. They, and not this Board, have the duty to determine whether this is to the ultimate detriment of the city and whether disciplinary action should accordingly be taken. Since passage of money through gaming is a traditional method of bribery, extensive gaming by one in a responsible position connected with public works may lead to further public distrust and suspicion, though he may not in fact be corrupt or corrupted.

"Under such circumstances, this Board performing its duty under section 112 of the Charter cannot and does not find Mosier M. Meyer to be a fit and suitable person, so as to set aside the discharge made by the Board of Public Works, effective December 31, 1939."

Following this action by the board of civil service commissioners, the city council of Los Angeles considered the matter, as will appear from the following record attached as an exhibit to appellant's petition:

"Mr. Thrasher: I move, as a substitute motion that the claim of Mosier M. Meyer, for salary due him at the rate of $475.00 per month from January 1, 1940 to July 31, 1940, in the amount of $3,325.00 be allowed; that the money be allocated from the Reserve Fund to the Unappropriated Balance, and the demands be drawn from same for the following reasons:

"1. That the Board of Public Works discharged Mr. Meyer December 31, 1939, on certain charges that were preferred by them, but were never proven by said Board of Public Works, and which were later referred to the Board of Civil Service Commissioners for review, as provided by the City Charter.

"2. That the Board of Civil Service Commissioners, after investigation, were not satisfied with the evidence submitted and did not sustain the findings of the Board of Public Works.

"3. That the grounds upon which the Board of Civil Service Commissioners did discharge Mr. Meyer, were allegedly, frequently indulging in gambling in private life six and one-half years ago.

"4. That the testimony given proved that the gambling referred to was conducted on Mr. Meyer's own time, and not when he was on duty and paid by the City.

"5. The Board of Civil Service Commissioners stated 'in his former position, we are satisfied Mr. Mosier Meyer was not incompetent, and some testimony indicated extraordinary capacity in workmanship'.

"No evidence was presented at any time that indicated that the activities referred to interfered in any shape or manner with the performance of his duties as a City Employee.

"Under these circumstances I believe this unjust discrimination against Mr. Meyer should be rectified by the payment of his salary claim.

"Which Substitute Motion, Being Duly Sec. By Mr. Gay, Was Adopted."

On September 5, 1940, the acting mayor of Los Angeles addressed the following communication to the members of the council:

"* * * With reference to File No. 1039 (1940) returned herewith concerning your action of August 29, 1940, in approving of the transfer of $3,325.00 from the Reserve Fund to the Unappropriated Balance for the payment of the claim of Mosier M. Meyer for salary allegedly due him as Superintendent of Street Maintenance at the rate of $475.00 per month from January 1, 1940 to July 31, 1940, you are advised as follows:

"In view of the attached statements of the City Attorney, Controller and the Bureau of Budget and Efficiency I feel compelled to disapprove of the appropriation. This disapproval is based entirely upon my understanding that such a payment would be contrary to the provisions of the City Charter and does not indicate a concurrence in, or approval of the action of the Board of Public Works or Civil Service Commission.

"Yours truly
"(Signed) R. L. Burns.
"Acting Mayor."

On September 24, 1940, the appropriation was passed over the veto of the acting mayor and a demand for payment of the salary claim to July 31, 1940, was delivered to respondent Hoye, controller of the city of Los Angeles. He refused to allow or approve the claim, and shortly thereafter, on October 1, 1940, the petition for a writ of mandate was filed.

For convenience in discussing the matters presented by this appeal, the board of public works will hereafter be called the board, and the board of civil service commissioners the commission.

Section 112 of the charter of the city of Los Angeles provides "* * * but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the board of civil service commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged or suspended is a fit and suitable person to fill the position from which he was removed, discharged or suspended, said board shall order said person so removed, discharged or suspended, to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension, shall be forthwith certified to the appointing board or officer, and shall be final and conclusive. * * * If the board of civil service commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer."

As his first ground of reversal, appellant claims that the cause referred to in the resolution which was adopted by the board is only partially stated in that resolution, in that "the evidence, both oral and documentary, and the reporter's transcript referred to in said resolution and made a part of the cause for his removal, were not served upon him or filed with the commission as required by section 112 of the charter of said city." He cites the case of Shannon v. City of Los Angeles, 205 Cal. 366, 270 P. 682, as authority for the rule requiring "strict compliance with the requirements of section 112 of the charter of the city of Los Angeles by the discharging authority in order to lawfully or effectively remove an employee in the classified civil service of said city." In that case the petitioner had not received the written notice of the charge made against him as required by the charter, and relied successfully upon that deficiency to secure reinstatement.

[1, 2] We are unable to apply the reasoning of the Shannon case to the facts of the instant case. There is no requirement that all causes that might be suggested for removal of an employee be stated in the written notice served upon him; the statement of a single cause is sufficient, and in this case it was charged by the board that the petitioner should be discharged from his official duties because of his conduct. The conduct then is itemized, to the effect, according to the finding and statement of the board, that "said Mosier M. Meyer was directly, financially and beneficially interested in said public contracts, contrary to the best interests of the city of Los Angeles, and also contrary to section 28 of the Los Angeles City Charter." This in itself is a sufficient charge upon which to predicate the removal of a public employee. A further analysis of the notice and its attached resolution indicates that other causes than the one itemized above were specified therein; but the entire discussion concerning the causes for discharge becomes academic when we consider that the commission, upon the matter being referred to it, decided that "The grounds stated for the discharge are not proven to the satisfaction of this board by the evidence submitted or obtained; and likewise are not satisfactorily disproven by the testimony of Mosier M. Meyer or by the other testimony and documents relied on by him * * *". This last paragraph reads, as counsel for amicus curiae "All City Employees' Association of Los Angeles" suggests, like a "Scotch verdict." At any rate, there is no finding here on the part of the commission that the grounds stated for petitioner's removal were sufficient or that they were sustained. If petitioner had been able to disprove the grounds stated for his discharge, the commission undoubtedly would have made an entry to that effect, but even though they did not do so, we can say definitely that "the grounds stated for such removal," in the language of the charter, "were insufficient or were not sustained."

However, to reinstate an employee in such a situation, it is necessary that the commission find "in writing, that the person removed * * * *is a fit and suitable person to fill the position from which he was removed* * * *" (Italics added.) Here the petitioner is unfortunate, for the commission, as hereinbefore noted, made its finding, number 2, directly to the contrary and amplified that finding in the closing paragraphs of its resolution.

Appellant complains that "The action of the commission in finding or purporting to find that appellant was not a fit and suitable person to be reinstated to his position was arbitrary and unlawful," and that the statement relating to his having been engaged in gambling for high stakes under circumstances which "tended and may yet tend to impair public confidence in him and in the department of street maintenance * * * was and is arbitrary, capricious, fraudulent, wrongful and unlawful." In the brief filed by amicus curiae, it is argued that the words "fit and suitable," "have a limited meaning and can only refer to information received by the commission during the course of its investigation of the 'cause which shall be stated in writing * * *' and which establishes that the employee affected has become physically or mentally unfit or unsuitable to fill the former position."

[3-5] "This must be so," it is contended, "otherwise the provisions requiring service of notice setting forth the cause in writing, which is primarily designed for

the purpose of giving employees adequate notice of the charges against them and an opportunity to prepare a defense before the commission, would have no meaning or effect." It is further argued that: "* * * this phrase does not come into operation, unless the employee has been acquitted on the original charges. * * * that this phrase as used here has nothing to do with moral delinquencies or offenses, or any connection with grounds of discharge, unless the same were the basis of the original charges set forth in writing in the notice and served on the employee." It is also pointed out that "a person is presumed innocent until proven guilty"; and that "* * * these words have a limited meaning and can only refer to information received by the commission during the course of its investigation of the 'cause which shall be stated in writing * * *' and which establishes that the employee affected has become physically or mentally unfit or unsuitable to fill the former position"; and that "* * * the commission can determine the employee's fitness and suitability only after he has been acquitted of the charges brought against him, the charges set forth in writing, filed and served on him." But in our opinion the determination of what the charter means when it says "fit and suitable" depends upon the rules commonly applicable to construction and interpretation. In that connection it must be emphasized that the courts are without power to legislate, and all tendencies on the part of the judicial branch of the government to legislate by judicial decision are uniformly frowned upon.

Webster's dictionary defines the word "fit" as "suitable to a standard of duty, propriety or taste," and the same authority furnishes "fit" as a synonym for "suitable." To us the very definition of the word "fit" indicates that there are few words in our language that have a broader significance and since the Los Angeles charter does not specify that the employee must be found fit and suitable mentally and physically to fill the position from which he was removed we cannot give the words the special and restricted application which is suggested.

[6] As to the presumption of innocence mentioned by counsel it may be said that the rule has no application to the issues here involved.

In answer to the arguments of appellant's counsel and of the friend of the court, respondents call our attention to the fact that the charter itself, adopted by the people of Los Angeles, constitutes the board of civil service commissioners a tribunal to determine upon an investigation, such as transpired in this case, not only whether or not the stated cause of removal is sufficient or sustained, but also whether the employee is fit and suitable to fill the position in which he seeks to be retained. It is claimed that this is a matter committed to the discretion of the board of civil service commissioners, and since it has unquestioned jurisdiction, and has made its investigation and findings thereon, its order is "final and conclusive," as provided by the charter.

[7-9] It does not appear that the order of the commission was based on any prejudice against appellant, for, so far as the record indicates, he was given a fair and adequate hearing by the commission which found on the one hand that the charges against him were not proven and that he was not incompetent to perform the duties of the position which he had held, but on the other hand made the adverse finding upon the evidence before it as to fitness and suitability which bars appellant from reinstatement. Paragraph "2" of the commission's resolution recites, as will be noticed, that the petitioner in his own behalf presented testimony from which the commission concluded that he habitually engaged in gambling for high stakes over a period of years under circumstances which tended and may yet tend to impair public confidence in him and in his department. We do not know exactly what testimony appellant presented to the commission but he did attach to his petition a document concerning which, in his petition, he made the following statement: "* * * all of the evidence submitted to said respondent board of civil service commissioners or obtained by it during the course of the investigation conducted by said respondent Board concerning the gambling indulged in by petitioner, the reputation of petitioner and the confidence which his superiors and the public had in petitioner and in the department of street maintenance, bureau of engineering, department of public works of the city of Los Angeles, is attached hereto, marked

Exhibit 'F' and hereby referred to and by such reference made a part hereof." Exhibit "F," it appears from its caption, is the "Statement of Mosier Meyer, Taken in the Office of the District Attorney (of Los Angeles County) on October 24, 1934." Excerpts are as follows: "People who know me, know that I gamble quite a lot. It won't be hard to verify. * * * I have won as much as $1500 in one pot, just one pot. * * * I carry around, or have carried around until I practically wore them out, I.O.U.'s to the extent of about $5,000 in my pocket. * * * only time I ever played with Mr. Moore was pretty close to seven years ago, when the contractors had a room in this building at First and Spring, on the second floor, there used to be a poker game there, and I sat in the game several times and Tom Moore was working for the Consolidated Rock Co. at that time. * * *

"Q. Now, your winnings at cards, how do you get paid off when you win at cards. A. Cash money as a rule, sometimes a check, sometimes I.O.U.'s which is not always very good. * * *

"Q. During the last few years, you have deposited quite a little money? A. Deposited and drew out, etc.

"Q. For example, in August of 1932, you deposited $1500 in cash? A. Possible.

"Q. Even in your league, that is a lot of money. I mean, a man in your station in life, associating with the people you associate with, and considering the stakes that you play for at cards, $1500 is still not a drop in the bucket for you? A. Well, it is not a very substantial sum. I have made more than that on a real estate deal.

"Q. Well, I will just itemize some of these, Mr. Meyer. Starting back in January, of 1931, you deposited $116 in cash. That is not very much. In April of 1931, you deposited, on April 7, $200, and on the 22nd, $100. All in cash. June, 1931, $225, again in June, $200, and again, $100, making in that month alone $525. A. I must have been doing pretty good that month. * * *

"Q. In January of 1932, $1100; in May, $1550; June, $1025; July, $500; September, $1500; January, 1933, $1000, etc. Making a considerable amount of money, I should say, roughly speaking, about $15,000 in less than three years, aside from your city warrants and aside from your salary checks, this in cash money of the realm. Real sheckels. Let's figure here. Giving you by far the benefit of the doubt, your income from those two houses would be $2500, and your explanation is that there was about $12,000 that you won in gambling? A. I could not say that because I have done some other things beside. * * *

"Q. All we can account for is about $2500, roughly speaking, from rents, and that leaves a balance of $12,000 that we would have to charge to what you won in gambling? A. There is one more thing to clarify that slightly, that is I may have made a little money that I don't recall at this moment, that I will recall, that might be inconsiderable in amount as toward that sum, but that amount of money I would say was all my poker games—I have won more money than that.

"Q. In the last three years playing poker? A. Yes I really have."

The recitals in this document presented to the court by the petitioner himself as part of the pleadings in the case furnish a sufficient answer to the argument of his counsel that the action of the board of civil service commissioners constituted not an exercise of discretion, but an abuse of discretion. The excerpts quoted and other statements contained in Exhibit F demonstrate to our satisfaction that the finding by the commission that petitioner's gambling for high stakes under circumstances which tended and may yet tend to impair public confidence in him and in the department of street maintenance was not, as appellant claimed, in paragraph VIII of his petition, "arbitrary, capricious, fraudulent, wrongful and unlawful." This claim and other adjectival descriptions of the action and decision of the commission constitute merely conclusions of law, on the part of the appellant, the truth of which were not admitted by the general demurrer filed by respondents. See Jones v. O'Toole, 190 Cal. 252, 255, 212 P. 9; Kelley v. Kingsbury, 210 Cal. 37, 39, 290 P. 885; Buttner v. Kasser, 19 Cal.App. 755, 758, 127 P. 811. We are of the opinion that the trial court, in considering and sustaining the demurrer, under the circumstances here presented, did not err. And no error arose because the order was made "without leave to amend," for no application or request was made by the petitioner to amend his pleading. Haddad v. McDowell, 213 Cal. 690, 3 P.2d 550. On the contrary, the record shows, as we have indicated, that he declined to amend. Since in our judgment there was no abuse of discretion on the part of the commission, application of the principle referred to in Brown v. Board of Police Commissioners, 2 Cal.App.2d 245, at page 251, 37 P.2d 737, is decisive of this appeal. As stated in Boyd v. Pendegast, 57 Cal.App. 504, at page 508, 207 P. 713, at page 715, where an investigation of charges against a removed police officer was made by the board of police commissioners, to which that duty was assigned by the charter of the city of Los Angeles, "When such a hearing has been had, the decision, by the very terms of the charter, is placed beyond the reach of any review by the courts." See, also, Nider v. City Commission, 36 Cal.App.2d 14, 97 P.2d 293; Souder v. City of Philadelphia, 305 Pa. 1, 156 A. 245, 77 A.L.R. 610.

The judgment is affirmed.

YORK, P. J., concurred.

DORAN, Justice (concurring).

I concur in the judgment.

It is my opinion that courts, in proper cases, may legally afford relief by mandamus from wrongs that are the product of fraudulent or arbitrary action of administrative bodies. But mandamus will not lie for the purpose of, nor may courts by resort to such procedure undertake to control or direct administrative boards by, inquiring into the wisdom of their official action. Such problems, although they present opportunity for honest differences of opinion, raise no judicial questions. An allegation of fraud or of arbitrary action, in my opinion, is a necessary element to an action in mandamus under such circumstances.

The briefs on appeal on the part of both the appellant and respondents create confusion by disregarding the sole issue. The appellant states the question involved as follows: "Was the appellant lawfully removed from the position of Superintendent of Street Maintenance, Bureau of Engineering, Department of Public Works of the City of Los Angeles?" The respondents, on the other hand, under the heading "Respondents' Position on This Appeal," assert the following: "Respondents argue, on this appeal: 1. That the order of the Civil Service Commission refusing to reinstate appellant is made final and conclusive, pursuant to the provisions of section 112 of the charter, and is therefore not subject to review by the courts. 2. That even though the civil service commission found that the grounds of removal were neither proven nor disproven, nevertheless, it must, in order to reinstate appellant, further find him to be a fit and suitable person to fill the position from which he was removed."

Both positions are entirely beside the issue, and all of the briefs discuss subjects entirely beyond the sole issue involved in the appeal. That issue concerns only the sufficiency of the petition. The prevailing opinion, which follows the briefs, necessarily falls into the same category. For example, the prevailing opinion contains the following: "It does not appear that the order of the commission was based on any prejudice against appellant, for, so far as the record indicates, he was given a fair and adequate hearing by the commission which found on the one hand that the charges against him were not proven and that he was not incompetent to perform the duties of the position which he had held, but on the other hand made the adverse finding upon the evidence before it as to fitness and suitability which bars appellant from reinstatement." In my judgment, the determination of such questions on appeal has no bearing on the sufficiency of the pleadings.

Appellant elected to stand on the petition as presented, and declined to amend. I am in accord with that part of the prevailing opinion which holds in substance and effect that the allegation of fraud was a conclusion and therefore was insufficient. It follows that the demurrer properly was sustained.

THURMAN et al. v. CLUNE et al.

Civ. 13005.

District Court of Appeal, Second District, Division 2, California.

April 28, 1942.

Rehearing Denied May 22, 1942.

Hearing Denied June 25, 1942.

1. Theaters and shows ⚿6

Whether defendants staging an ice hockey game were negligent in not providing either notices warning spectators of danger from flying pucks, or screens to protect spectators in case puck should be driven above railing surrounding rink, so as to be liable for injuries sustained by spectator when struck by flying puck, was for jury.

2. Theaters and shows ⚿6

In action for injuries sustained by spectator at ice hockey game when struck by flying puck, evidence as to practice in other places relative to safeguarding of ice hockey rinks and opinion of experts relative to proper safeguards to be taken in construction of hockey rinks were admissible on issue whether defendants had properly safeguarded the rink.

3. Appeal and error ⚿757(4)

District Court of Appeal would not consider whether trial court committed prejudicial error in giving certain instructions, where plaintiff failed to set forth in his brief the instruction which he claimed was erroneously given. Rules for Supreme Court and District Courts of Appeal, rule 8, § 3.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Mary Katherine Thurman and another against J. W. Clune, the Ice Palace, a corporation, and others, for injuries sustained by named plaintiff when a spectator at a hockey match. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

See, also, 36 Cal.App.2d 364, 97 P.2d 999.

Murchison & Clopton, Bruce Murchison, and Richard C. Hart, all of Los Angeles, for appellants.

Spray, Davis & Gould and Bauder, Veatch & W. I. Gilbert, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages for personal injuries caused by the alleged negligence of defendants, plaintiff appeals.

The undisputed facts are:

March 24, 1938, plaintiff suffered injuries when she was struck in the mouth by a hockey puck while watching an ice hockey match in a pavilion known as the Ice Palace. The pavilion was owned by the defendant Ice Palace, a corporation, which had entered into an agreement with the Associated Student Body of the University of Southern California for the playing of the ice hockey match which plaintiff was witnessing.

The Ice Palace contained a rink in size, construction, and equipment conforming to the general custom and usage of such rinks prevailing throughout the United States and Canada. The skating surface was a sheet of ice approximately 194 feet long and 80 feet wide encompassed by a solid wooden wall three and one-half feet high. Tiers of seats for spectators surrounded the playing surface, those closest to the rink being box seats separated from the ice only by a wooden wall. A wire screen for the protection of spectators had been erected at each end of the rink. It extended upward from the wooden wall and for approximately 10 to 16 feet along both sides. The spectators' seats were approximately 160 feet along each side of the rink and were not protected by screens. There were no signs giving any warning of danger to spectators, although on prior occasions spectators had been struck by flying pucks during the playing of ice hockey games.

About ten minutes before plaintiff was injured, she entered the rink and was seated in a box on one side of the rink, which was unprotected by any wire screen. She had never seen an ice hockey game before and had not theretofore been in the Ice Palace. Shortly after she was seated, the puck, a hard rubber disk approximately three inches in diameter and one inch in thickness, was driven off the ice and struck plaintiff in the mouth, causing serious personal injury.

It is necessary for us to determine three questions, which will be stated and answered hereunder seriatim.

[1] *First: Was there substantial evidence to sustain the finding of the jury that it wasn't an act of negligence of defendants or either of them, which caused plaintiff's injury?*

This question must be answered in the affirmative. On the identical facts set forth above on a previous appeal of the instant case we held that it was a question of fact to be determined by the jury from all of the evidence whether the defendants were negligent in not providing either notices warning patrons of danger from flying pucks or screens to protect spectators in case a puck should be driven above the railing surrounding the rink. (Thurman v. Ice Palace, 36 Cal.App.2d 364, 366, 97 P.2d 999.) It was therefore a question of fact for the determination of the jury whether any negligent act of defendants or either of them was the proximate cause of plaintiff's injury, and the jury's determination of this question is binding upon this court.

[2] *Second: Was it prejudicial error for the trial court to admit over objection evidence showing:*

(a) That there were no other rinks in Los Angeles where ice hockey could be played and the Ice Palace had on previous occasions been leased for ice hockey games, also the manner in which the Ice Palace was equipped on such occasions;

(b) The rules of the National Collegiate Athletic Association governing ice hockey games;

(c) The method of maintenance, equipment, and operation of other ice hockey rinks in the United States and Canada?

This question must be answered in the negative. The practice in other places relative to the safeguarding of ice hockey rinks and the opinion of experts relative to the proper safeguards to be taken in the construction of ice hockey rinks is evidence which is admissible and is entitled to consideration with other evidence on the query of whether defendant in a particular instance has properly safeguarded the ice hockey rink in question. (James v. Rhode Island Auditorium (1938), 60 R.I. 405, 199 A. 293, 298; see, also, Denman v. City of Pasadena, 101 Cal.App. 769, 775, 282 P. 820.)

[3] *Third: Did the trial court commit prejudicial error in instructing the jury?*

This question will not be considered by us, because plaintiff has not set forth in his brief the instruction which he claims was erroneously given by the trial judge. Section 3 of rule VIII, Rules for Supreme Court and District Courts of Appeal (Larmax 1941 Index to Cal.Laws, 1624) requires that a person urging error in the giving of instructions must set forth in his brief all instructions bearing upon the subject covered by the instructions alleged to be erroneous. (See Doyle v. McPherson, 36 Cal.App.2d 81, 84, 97 P.2d 249; People v. Flint, 45 Cal.App.2d 203, 205, 113 P.2d 924.)

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and HANSON, Justice pro tem., concurred.

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51 Cal.App.2d 411

CLARKE v. FOSTER'S, Inc., et al.

Civ. 11814.

District Court of Appeal, First District, Division 1, California.

April 25, 1942.

Hearing Denied June 22, 1942.

1. Municipal corporations 🔑668

Terms of ordinance governing installation and maintenance of sidewalk elevators must receive a reasonable construction in accordance with the purpose of the framers of the law as evidenced by its provisions.

2. Municipal corporations 🔑668

The purpose of the San Francisco ordinance relating to sidewalk elevators is protection against open shafts or elevator openings by the installation of substantial iron doors or gratings over such sidewalk openings as nearly flush with the upper surface of the sidewalk as will permit proper drainage.

3. Municipal corporations 🔑821(17)

Maintenance of sidewalk elevator door with total variation of seven-sixteenths of an inch from being absolutely flush with surface of sidewalk did not violate San Francisco ordinance requiring sidewalk elevator doors to be as nearly "flush" with the upper surface of the sidewalk as will permit proper drainage so as to charge owner of premises with "negligence per se" for injuries sustained by pedestrian in fall while walking over elevator door.

See Words and Phrases, Permanent Edition, for all other definitions of "Flush" and "Negligence Per Se".

4. Municipal corporations 🔑808(7)

Technical violation by owner of sidewalk elevator of San Francisco ordinance requiring sidewalk elevators to be as nearly flush with the upper surface of the sidewalk as will permit proper drainage, making owner guilty of negligence per se, did not authorize recovery by person injured in fall thereon, where trial court found that such violation and negligence was not a proximate cause of the accident.

5. Municipal corporations 🔑808(3)

Irrespective of ordinance, there is an obligation in the construction and use of a sidewalk doorway to an elevator area to maintain it with due regard to the safety of the public using such doors as an integral part of the sidewalk.

6. Negligence 🔑6

An act which will excuse technical violation of statute or ordinance from constituting negligence must result from causes or things beyond control of person charged with violation.

7. Municipal corporations 🔑821(17)

In pedestrian's action for injuries received in fall while walking over sidewalk elevator, whether ordinance relating to sidewalk elevators was applicable was a "question of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

8. Municipal corporations 🔑821(17, 19)

Whether trivial defects in sidewalk elevator were the cause of injury plaintiff received when she fell while walking over such elevator and whether party responsible therefor was excusable under all of the facts and circumstances were "questions of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

9. Municipal corporations 🔑821(19)

Whether violation of ordinance regulating sidewalk elevators was proximate cause of injury plaintiff received when she fell while walking over sidewalk elevator was "question of fact".

* * *

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Action by Helen Clarke against Foster's Inc., and others to recover for injuries received in a fall while plaintiff was walking over defendants' sidewalk elevator. From judgment for defendants, plaintiff appeals.

Affirmed.

Joseph A. Brown and Peter A. Breen, both of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondents.

WARD, Justice.

This is an appeal from a judgment in favor of defendants, rendered by the court sitting without a jury, in a personal injury action based upon their alleged negligence in failing to maintain the doors of a sidewalk elevator in a condition to comply with section 238 of the San Francisco Building Laws known as Ordinance 1008 (New Series).

The plaintiff alleged that she slipped, fell and was injured while walking over said sidewalk elevator, negligently maintained, in front of defendants' place of business. The sidewalk in which said elevator was installed slopes slightly from west to east, in which direction the plaintiff was walking. It had been raining and the sidewalks were wet. There is testimony that while the elevator doors, studded with buttons a few inches apart, conform fairly evenly with the general slope of the sidewalk, there is, at the spot where plaintiff fell, at the east side of the easterly door, between the hinges, a slight unevenness between the leaf of the door and the rim thereof, also a slight unevenness between the rim and the sidewalk proper, the total variation being 7/16 of an inch from absolutely flush with the sidewalk. Also, where the two doors come together, and extending over part of the middle of the eastern door is a slight bulge varying from 5/16 to 3/8 of an inch. It is plaintiff's contention that when crossing the elevator, about in the middle, she slipped on this bulge a distance of approximately six inches and then caught her foot in the

7/16 of an inch variation at the east side of the easterly door.

Section 238 of said building ordinance in part provides: "It shall be unlawful for any person, firm or corporation to construct, operate or use, or cause to be constructed, operated or used any sidewalk elevator unless the * * * sidewalk openings of such sidewalk elevators, be covered with substantial iron doors * * *, as nearly flush with the upper surface of the sidewalk as will permit proper drainage."

The court found that the variations "are minor and trivial defects * * *, that neither of said defendants were guilty of negligence" and "that any injuries received by plaintiff at the time and place alleged in plaintiff's complaint were proximately contributed to by the negligence and carelessness of plaintiff herself in the premises."

[1-3] Appellant contends that in view of the evidence there was a violation of the ordinance in failure to perform a duty imposed by law, and that such violation was negligence per se. In the present case an ordinance is involved, the terms whereof must receive a reasonable construction in accordance with the purpose of the framers of the law as evidenced by its provisions. It would appear that the purpose of the ordinance is protection against open shafts or elevator openings by the installation of substantial iron doors or gratings over such sidewalk openings "as nearly flush with the upper surface of the sidewalk as will permit proper drainage." There is evidence that the doorway herein was "pretty fairly even with the grade of the sidewalk." If this interpretation of the ordinance is correct, that is, that the iron doors after slight warping permitted proper drainage, there would be no violation of the terms of the ordinance, which answers appellant's argument that the ordinance in question was violated because the doors were not perfectly and absolutely flush with the surrounding sidewalk, and that such alleged violation was negligence per se. There is no provision in the ordinance that the doors shall be perfectly flush with the sidewalk, only that no variation shall be permitted greater than is necessary to insure proper drainage.

[4] However, even if this is not the correct interpretation of the ordinance, and if it be conceded that the ordinance does require that sidewalk doors shall be perfectly flush with the sidewalk, in which event the defendants would be guilty of a technical violation of the ordinance, and so guilty of negligence per se, such concession in no way assists appellant. The trial court found that such negligence was not a proximate cause of the accident.

[5, 6] Irrespective of the ordinance, there is of course an obligation in the construction and use of a sidewalk doorway to an elevator area, to maintain it with due regard to the safety of the public using such doors as an integral part of the sidewalk. The precise extent of this obligation presents the main problem herein, but, assuming the ordinance imposed a duty, in addition to that of constructing the doors of an elevator so as to provide adequate drainage, to make it safe also as a passageway, so that we are confronted with a technical violation of its terms, it has been held that a fact which will excuse a technical violation must result from causes or things beyond the control of the person charged with the violation. Gallichotte v. California Mut., etc., Ass'n, 4 Cal.App.2d 503, 41 P.2d 349. Trivial defects, such as the expansion or contraction of metals, ordinarily bound to occur despite the exercise of ordinary care, may be beyond the control of the party responsible. In Whiting v. City of National City, 9 Cal.2d 163, 165, 69 P.2d 990, 991, the court said: "It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist." In Dunn v. Wagner, 22 Cal.App.2d 51, 54, 70 P.2d 498, 499, the court said: "In our opinion the claimed defect was a trivial one and was insufficient to show negligence in the maintenance and construction of the sidewalk or that it was a public nuisance."

[7-9] It has been held that a minor defect is not always a question of fact (Sischo v. City of Los Banos, 37 Cal.App.2d 717, 100 P.2d 305) upon the theory that a sidewalk could not possibly be maintained free from all inequalities and every possible obstruction to travel, and that when an irregularity or change in grade is so slight as to be hardly perceptible, it becomes a question of law whether a public hazard has been created. Sischo v. City of Los Banos, 26 Cal.App.2d 642, 80 P.2d 116, 1020. This rule does not seem to have been generally followed. Ackers v. City of Los Angeles, 40 Cal.App.2d 50, 104 P.2d 399; Allen v. City of Los Angeles, 43 Cal.

App.2d 65, 110 P.2d 75. The question whether an ordinance or statute is applicable is a matter of law, but whether trivial defects were the cause of an accident, and, if so, whether the party responsible therefor is excusable under all the facts and circumstances of a given case are questions of fact. Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26. Assuming that the ordinance was applicable to the facts of this case, whether such violation was the proximate cause of the injury was a question of fact. Murphy v. St. Claire Brewing Co., 41 Cal.App. 2d 535, 107 P.2d 273.

The record discloses substantial evidence upholding the finding that "no act or omission on the part of said defendants, or either of them, proximately contributed to plaintiff's fall and injuries." It is not necessary to determine whether plaintiff was contributorily negligent.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 13480.

District Court of Appeal, Second District, Division 2, California.

April 25, 1942.

Rehearing Denied May 15, 1942.

Hearing Granted June 22, 1942.

1. Workmen's compensation 🔑737

Where transportation is furnished as an integral part of the contract of employment to convey the employee to and from his place of work, the employer becomes liable for injuries received by the employee if he be injured while going or coming in the vehicle furnished by employer, since an injury arising under such circumstances occurs in the "course of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

2. Workmen's compensation 🔑719

An employee on his way home from his place of work is not then rendering a service to his employer so as to render an injury received at such time compensable, but his service begins only when he has returned and proceeds to use some instrumentality provided whereby he immediately places himself in a position to perform his task.

3. Workmen's compensation 🔑735

When an injury suffered by an employee cannot be fairly traced to his employment as a contributing proximate cause, it must be excluded from the exception to the "coming and going rule" rendering compensable injuries received by an employee being conveyed by transportation furnished as an integral part of the contract of employment, and, to bring the peril causing injury within the exception, the peril must have been incidental to the employment.

See Words and Phrases, Permanent Edition, for all other definitions of "Coming and Going Rule".

4. Workmen's compensation 🔑742

Where employee, after working hours, at her own expense, was riding homeward in an automobile of her employer from the latter's place of business though not obligated to do so, employee was not acting in "course of employment" so as to be entitled to compensation when injured by collision of such automobile with a stranger's automobile.

Proceeding under the Workmen's Compensation Act by Jane G. Duffus, claimant, opposed by Val Vita Food Products, Incorporated, employer, and California Casualty Indemnity Exchange, insurer. To review an award by the Industrial Accident Commission, the California Casualty Indemnity Exchange petitions for certiorari.

Award annulled.

Judd Downing and Richard L. Oliver, both of Los Angeles, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

MOORE, Presiding Justice.

This is an original proceeding for a writ to effect the review of an award by respondent commission. The question for our determination is whether an employee who, after working hours, at her own expense, was riding homeward in an automobile of her employer from the latter's place of business, was acting in the course of her employment when injured by the collision of such automobile, so proceeding on the highway, with that of a stranger.

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* Subsequent opinion 132 P.2d 815.

The applicant, Jane Duffus, was an employee in the office of Val Vita Food Products, Inc., in the city of Fullerton, some 33 miles from the city of Los Angeles. She and a number of her fellow employees resided in the latter city. For the convenience of them and of others similarly situated, in July, 1940, Val Vita purchased an automobile to be used by such employees as preferred to use it for the purpose of driving to and from their homes in Los Angeles to the Val Vita plant at Fullerton. For that accommodation the employer charged such employees as took advantage of the offer $4.00 per month. That sum was based upon a pro rata of the running expenses of the car and it was deducted from the pay checks of those who used the automobile. No employee was obligated to make use of such means of transportation but was at liberty to do so. A bus line was conveniently available to any of such employees. Since a driver was not supplied, it became the custom for the employees using the automobile to permit the passengers successively nearest the plant to disembark, each in his turn, leaving the car in the possession of him who lived farthest away to keep the automobile for the night. Upon the return to the plant on the following morning he who had sheltered the conveyance overnight gathered his fellow employees in the reverse order of their disembarkation into the car as he proceeded en route to Fullerton.

On April 18, 1941, three employees of Val Vita, including the applicant, started in the automobile for their several homes. On arriving at Wyverwood, east of Los Angeles, the first party was deposited near Sears, Roebuck & Company. As the car approached the intersection of 8th and Garland Street, it collided with another automobile resulting in certain injuries to Mrs. Duffus. At one point on the way, office mail of Val Vita was deposited. The driver carried along on the same journey some samples to be delivered to a salesman of Val Vita. But the applicant had no mission or errand to do for her employer during the time elapsing from her departure from the office until her arrival at her home.

At the hearing before respondent commission, petitioner as its insurer defended Val Vita against the application of Mrs. Duffus under the plea that such injuries as were sustained by appellant did not arise out of and occur in the course of the lady's employment within the meaning of the Workmen's Compensation Act. On October 24, 1941, findings and award in favor of the applicant were signed and filed whereby petitioner was held liable for her injuries and on the 10th of December, 1941, a rehearing of the matter was denied.

[1] Petitioner now contends (1) that at the time of receiving her injuries applicant was not performing any service growing out of or incidental to her employment and was not acting within the course of her employment; (2) that the injuries sustained by applicant were not proximately caused by her employment. There is nothing in the contract of employment requiring the employer to furnish the applicant with transportation. There is no basis for the claim, and indeed none is made, that the applicant was under obligation to use the automobile as a means of reaching her home. The service was arranged solely as an accommodation for those employees accepting it at a modicum of cost. The employer could at any time have sold the car, thereby leaving the employees to choose other means of transportation without violating any obligation owed under its contract of hire. The labors of the applicant on the day of the accident terminated at 5 o'clock, after which the employer had no right to give her orders or to direct her behavior again until the assumption of her duties on the following day. Because there was no obligation on the part of the employer to furnish the applicant transportation, her case constitutes no exception to the coming and going rule. Where transportation is furnished as an integral part of the contract of employment to convey the employee to and from his place of work, the employer becomes liable for injuries received by the employee if he be injured while going or coming under such circumstances in the vehicle furnished by the employer. An injury arising under such circumstances occurs in the course of employment. Dominguez v. Pendola, 46 Cal. App. 220, 188 P. 1025; Trussless Roof Co. v. Industrial Acc. Comm., 119 Cal.App. 91, 6 P.2d 254; California Casualty Indemnity

Exchange v. Industrial Acc. Comm., 190 Cal. 433, 436, 213 P. 257.

[2, 3] An employee on his way home from his place of work is not then rendering a service to his employer. As a rule his service begins only when he has returned and "proceeds to use some instrumentality provided, by means of which he immediately places himself in a position to perform his task." California Casualty Indemnity Exchange v. Industrial Acc. Comm., supra, 190 Cal. at page 435, 213 P. at page 258. When an injury suffered by an employee cannot be fairly traced to his employment as a contributing proximate cause, it must be excluded from the exception to the coming and going rule. Moreover, in order to bring within the exception the peril which caused the injury to the employee while en route to his home, it must have been incidental to his very employment and not common to the vicinity in which he traveled. It cannot be wholly independent of the employee's obligation to his employer. Indemnity Insur. Co. of North America v. Hoague, 61 App.D.C. 173, 58 F.2d 1074, 1076.

[4] The nearest approach to the facts of the instant case is found in an English decision, to wit, St. Helen's Colliery Co., Ltd., appellants, v. Hewitson, "Appeal Cases," page 65. There the appellants contracted with a railway company to provide special trains for the conveyance of their workmen to and from the colliery. They agreed to indemnify the carrier against claims for damages in cases of accidents to workmen en route. They provided each workman with a pass and charged for it a sum less than the fare actually paid by appellants to the railroad company. This sum was deducted from the weekly earnings of each workman who took advantage of the convenience. At the time of his employment by the colliery each employee who chose such means of transportation, by writing, released the railroad from all claims in case of accident. The railway company had long been under contract with the colliery to provide special trains to convey the workmen to and from the colliery and Marysport at a monthly charge; by the same contract indemnifying the railway company against claims of the employees arising from their use of such transportation. The applicant, a coal hewer, was injured when the engine of his train "fouled the points and was derailed." The rear van of the colliery trains carried the sign "Siddick Colliery Train." The trains were timed to accommodate the several shifts. The tickets for riding the train were obtained at the colliery pay office and the amount charged each workman was deducted from his pay under the heading of "off takes." He paid nothing to the railway company. Seventy-five per cent of those who traveled by the Siddick trains were miners in the colliery in which the applicant worked. If the applicant had had no train, he would have walked or obtained work nearer home. It was an advantage to him to go by the train at the weekly price charged him by the colliery. The court of appeal affirmed the award but, after an exhaustive consideration of the judgment by the House of Lords, it was pointed out that although his obtaining the pass was an inseparable part of his contract of employment, the employee was not directed to travel by such train; that he was at liberty to use any other means of travel; that the workmen were under no control of the employer at the time; neither was appellant bound to make use of the train nor upon leaving it to follow any directions furnished him by the employer. It was held that if the collier had been bound by his contract of employment to travel to the colliery by the train provided, he would then have been doing a thing he was bound to do by his contract. But the granting of a privilege to a collier to ride the railway without requiring him to do so did not impose upon the employee the duty to make use of the convenience supplied at a reduced fare. The House of Lords declared the test to be whether a workman was acting in the course of his employment at the time of receiving his injury, that is, engaged in doing something he was employed to do; something in discharge of a duty to his employer directly or indirectly imposed upon him by his contract of employment; that is, was the act being done at the time of receiving the injury in fulfillment of a duty to his employer? Under this test, it cannot be said that Mrs. Duffus is entitled to compensation for the reason that on the occasion of her ride in the automobile from Fullerton to Los Angeles she was not doing so in the performance of any duty arising out of her employment. She had the right to ride the automobile but she was under no obligation

to do so. She was never employed to travel by any means to or from the factory or to any place at all.

It is therefore ordered that the award by respondent commission be and it is hereby annulled.

W. J. WOOD and McCOMB, JJ., concurred.

51 Cal.App.2d 542

TOOLEY v. PARKER et al.

Civ. 11888.

District Court of Appeal, First District, Division 1, California.

April 29, 1942.

Hearing Denied June 25, 1942.

1. Descent and distribution 🔑82

A written contract made between defendant, who had been bequeathed 20 per cent. of the stock standing in name of organizer of a corporation at latter's death, and organizer's widow after a bona fide dispute whereby widow agreed that upon her death, subject to contingencies, defendant should receive an additional 31 per cent. of the stock and defendant agreed that if he desired to sell his stock, widow should have first right to buy it, was supported by "consideration". Civ.Code, §§ 1605, 1614.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

2. Compromise and settlement 🔑6(4)

Where there is a bona fide dispute and parties compromise their difficulties, the mutual promises of parties constitute a valid "consideration" for the compromise whatever the merits of controversy may be.

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Action by Homer H. Tooley, as executor of the will of Carrie M. Botts, deceased, against John Parker and another to recover shares of stock. From a judgment for defendants, plaintiff appeals.

Affirmed.

Byron Coleman, Carl E. Day, Abraham Setzer, Linforth, Cannon & Miller, Harold O. Mundhenk, and Robert E. Hatch, all of San Francisco, for appellant.

Lillick, Geary, Olson & Charles, Ira S. Lillick, Gilbert C. Wheat, and Harry L. Haehl, Jr., all of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff, as executor of the will of Carrie M. Botts, brought this action to recover 617½ shares of the stock of American Marine Paint Company alleged to be in the possession of defendant Parker. At the date of the death of Mrs. Botts this stock was in the possession of a San Francisco bank, and shortly thereafter the bank delivered the stock to Parker in accordance with written escrow instructions given by Mrs. Botts to the effect that the stock should be delivered to Parker in the event she predeceased him. Parker and the paint company are named as defendants. From a judgment for defendants plaintiff prosecutes this appeal.

The stock in question was delivered to the bank by Mrs. Botts with instructions to deliver it to Parker, subject to certain limitations hereafter discussed, pursuant to a written agreement dated December 14, 1934, between Mrs. Botts and Parker. Appellant contends that this agreement was without consideration, and, further, that it was ineffective as a gift. The trial court found that the contract of December 14, 1934, was supported by a valid consideration, and that the delivery by the bank to Parker was pursuant to that contract.

In order to secure a proper perspective of the present controversy, reference must be made to its background. James M. Botts and his wife Carrie M. Botts organized the American Marine Paint Company in 1903. The company prospered. James M. Botts died in 1934, and at that time he and his wife owned practically all of the stock in the company. By his will James M. Botts bequeathed to his wife her community interest in his estate; to R. Stanley Dollar $20,000; to defendant Parker 20 per cent of the stock of the American Marine Paint Company standing in his name at the time of his death; to his brothers and sisters the residue.

At the time Botts died, 1,953 shares of the stock of the company out of a total of 1,980 shares outstanding stood in the names of Botts and his wife as joint tenants.

The estate was heavily indebted. If the shares were in fact held in joint tenancy, it meant that the creditors of Botts, and legatees Dollar and Parker, and the others named would get nothing. If the shares were in fact held as community property, then the creditors of Botts would be paid, and Dollar and Parker and the other legatees would receive their respective legacies. Shortly after the death of Botts the question arose as to whether the stock was held in joint tenancy or as community property. The stock was first treated by the executor of Botts as joint tenancy stock. It was not listed in the first inventory of Botts' estate, in which were listed assets valued at but $1,969.92.

Prior to 1933 over 1,700 shares of the stock were in Mr. Botts' name and a little over 200 shares in the name of Mrs. Botts. In that year the stock was placed in the names of Mr. and Mrs. Botts as joint tenants. The new certificates issued in joint tenancy (with the exception of one certificate which was pledged with a bank) were not removed from the stock certificate book, and only one of the old certificates for which the joint tenancy stock was issued had been endorsed. The creditors and heirs of Botts contended that the stock was community property. Litigation was threatened over the issue.

Under these circumstances Mrs. Botts decided to compromise the controversy. She was very anxious to retain control of the company. If she contested the issue as to whether the stock was held in joint tenancy or as community property, and that contest resulted in a determination that it was held as community property and so part of Botts' estate, the stock would be largely consumed in paying creditors of Botts and the Dollar and Parker legacies, and Mrs. Botts would lose the controlling interest in the company. In order that she might retain the controlling interest, she worked out separate deals with the creditors and heirs of Botts, with legatee Dollar and with defendant Parker. She ultimately permitted the stock to be inventoried in the estate of Botts as community property. This resulted in the estate being appraised at over $206,000. She borrowed large sums of money from the corporation with which some of the creditors were paid and their claims assigned to her. To other creditors she gave promissory notes. To legattee Dollar, executor of her husband's estate and a legatee to the extent of $20,000, she gave her promissory note for $20,000, and received from him an assignment of his legacy and fees as executor. With Parker she worked out the agreement that is the basis of this present action. She lived up to the letter and spirit of her various agreements until the time of her death on January 20, 1938. Her estate is also heavily involved. The plaintiff, the executor of her estate, has challenged the various agreements made by Mrs. Botts. He contends that all the agreements were unsupported by consideration, mainly on the ground that the stock was in fact joint tenancy stock. This position taken by the executor has led to considerable litigation, two phases of which have been heretofore before the appellate courts. Legatee Dollar sued Mrs. Botts' executor to recover on his note. In that action, as in the present one, it was contended that Mrs. Botts' obligation was without consideration, on the theory that the stock was in fact joint tenancy stock. This court held that the transaction was supported by consideration, and affirmed a judgment in favor of Dollar. Dollar v. Tooley, 46 Cal.App.2d 832, 117 P.2d 39. Several of the creditors who had received promissory notes from Mrs. Botts also sued her executor. There too the executor urged lack of consideration, which contention was again rejected, and judgments in favor of the creditors were affirmed. Lorber v. Tooley, 47 Cal.App.2d 47, 117 P.2d 421.

The present action grows out of transactions between Mrs. Botts and defendant Parker which were part of this general scheme for working out a solution of the problems connected with Mr. Botts' estate. Parker had been bequeathed 20 per cent of the stock of the paint company standing in the name of Botts at the time of his death. If the stock was held in joint tenancy the legacy would fail. The only way that Parker could receive his legacy would be if the stock were held to be community property. Parker made no claim against Mrs. Botts or against Mr. Botts' estate, but it is obvious that, so far as the legacy was concerned, his interests were adverse to Mrs. Botts. Both Mr. and Mrs. Botts had many times promised Parker that he would receive 20 per cent of the stock. From 1925 on Parker had been general manager of the paint company, and, after Mr. Botts' death, he became president. For many years he had been in complete charge of the company. His relations with Mr. and Mrs.

Botts were most cordial and friendly, and continued so until their deaths. Mrs. Botts was desirous of carrying out the terms of her husband's will so far as Parker was concerned, and was also very desirous of keeping Parker in the employ of the company during her lifetime. Under these circumstances, she consulted the firm of attorneys who had represented the paint company and Mr. and Mrs. Botts for many years. Her attorneys drafted the agreement of December 14, 1934, and Parker was unrepresented by counsel. The agreement recites that Parker is a legatee under the will of Mr. Botts of 20 per cent of the stock standing in the name of Mr. Botts at the time of his death; that Parker has rendered valuable services to the corporation which have benefited Mrs. Botts; that Mrs. Botts is indebted to the paint company in various sums, and, under date of July 30, 1934, entered into an agreement with the company pursuant to which Mrs. Botts may transfer to the company stock of the paint company owned by her and the issued and outstanding stock may thus be reduced; that both parties desire to effectuate the provisions of Mr. Botts' will so far as Parker is concerned; that in "consideration of these premises and of the respective sums of ten dollars ($10.00) paid by each of the parties hereto to the other, and of other valuable considerations received by each of the parties hereto from the other" it is agreed that:

Mrs. Botts shall transfer to Parker a number of shares of the stock of the paint company equal to 20 per cent of the present issued and outstanding shares of the company, when legally able; that if Mrs. Botts conveyed or hypothecated shares to the company pursuant to her agreement with that company, Parker agrees to contribute 20 per cent of the stock so conveyed or hypothecated. This provision was intended to permit Mrs. Botts, apparently at the option of the corporation, to pay her debt to the company, incurred for the purpose of raising money to pay Mr. Botts' creditors, with stock, and required Parker to contribute from his 20 per cent a proportional amount of the stock so used. The provision which more particularly gives rise to this action reads as follows: "Upon the death of the First Party [Mrs. Botts], the Second Party [Mr. Parker] (if he be living at said time, and if he be not so living, the then survivors of the wife and children of the Second Party, in equal shares), shall be entitled to receive out of the shares of stock of said American Marine Paint Company owned by the First Party as many shares of said stock as, added to the shares of the capital stock of said corporation which may be owned by the Second Party (or by his above mentioned heirs if the Second Party shall have predeceased the First Party) at said time, shall equal an aggregate of fifty-one per cent (51%) of the then issued and outstanding capital stock of said corporation, it being the intent and purpose of this clause of this agreement that upon the death of the First Party, the Second Party (or his above mentioned heirs, as the case may be) shall have the controlling interest in said American Marine Paint Company."

Thus, upon the death of Mrs. Botts, Parker, or his wife and children if he predeceased Mrs. Botts, was to be entitled to receive stock of the company which would be sufficient with the stock he owned to constitute 51 per cent of the then outstanding stock of the company. To carry out this purpose the agreement provided that, when Mrs. Botts was legally entitled to do so, she should endorse and deposit in escrow a number of shares which would be sufficient with the shares then owned by Parker to equal 51 per cent of the then issued and outstanding stock. Thereafter, if further stock of the company was issued, additional shares were to be deposited in the escrow to maintain the 51 per cent percentage. During her lifetime Mrs. Botts was to have the right to receive all dividends and to enjoy voting powers and other benefits incident to the ownership of the shares deposited in the escrow.

It was further provided that, upon the death of Mrs. Botts, the escrow holder should deliver the certificates to Parker, if he was then living, or, if he had predeceased Mrs. Botts, the stock was to be delivered to Parker's wife and children. But if Parker and his wife and children all predeceased Mrs. Botts, the shares of stock in the escrow were to be returned to Mrs. Botts. It was also provided that Parker, "or his said heirs, as the case may be, shall have a present vested interest therein and in the ownership thereof which shall mature upon the death of the First Party [Mrs. Botts], but which shall terminate upon the death of the Second Party [Parker] and all his said heirs leaving the First Party [Mrs. Botts] surviving them."

The endorsement to be placed on the stock deposited in the escrow, as provided for in the agreement, was to be as follows: "The capital stock represented by this certificate is hereby endorsed, transferred, set over and assigned to John Parker (or to his wife and children, if he shall predecease the undersigned) as of the date of death of the undersigned. In the event that John Parker and his wife and children predecease the undersigned, said stock shall then revert to the undersigned free of all claims and demands."

The agreement also provided as to the 20 per cent of stock which Parker was to receive that he should be without right to sell or hypothecate it without first giving Mrs. Botts an opportunity to meet any offer he had from any other person.

Upon the trial, over objection of appellant that it violated the parol evidence rule, Parker testified that the "other valuable considerations" received by Mrs. Botts, and referred to in the contract were his oral promises to remain with the company throughout Mrs. Botts' life, and not to interfere with whatever course she chose to pursue in regard to the stock standing in Mr. and Mrs. Botts' names as joint tenants in connection with the probate of Mr. Botts' estate.

As already pointed out, the so-called joint tenancy stock was thereafter inventoried in the estate of Mr. Botts as community property. The stock was subsequently distributed to Mrs. Botts, except for 20 per cent distributed to Parker. The decree of distribution was entered on August 4, 1936. On November 30, 1937, Mrs. Botts deposited 617½ shares of the stock in escrow with the Crocker First National Bank in performance of her agreements contained in the instrument of December 14, 1934. She instructed the bank, upon receipt of notice of her death, to deliver the stock to Parker, if living, or, if he had died first, in equal shares to his wife and children. In the event Parker, his wife and children all predeceased her, on the death of the last survivor the stock was directed to be returned to Mrs. Botts. The directions were to apply to any additional shares which Mrs. Botts might deposit in the escrow. This provision arose from the agreement that if the number of shares outstanding should be increased Mrs. Botts should deposit sufficient to maintain the figure of 51 per cent.

In her will, executed in 1937, Mrs. Botts recognized her agreement with Parker. She made a bequest of her stock in the company, subject to her agreement with Parker. After her death the bank delivered the stock to Parker in accord with directions of the escrow.

It thus appears that Mrs. Botts at all times sought to, and did, abide by her agreement with Parker. There is no contention that Mrs. Botts ever expressed any dissatisfaction with that agreement. The case is not one where there is any doubt of intention. The question is whether Mrs. Botts' intention to carry out the agreement must fail because not accomplished in the way the law prescribes.

In this action appellant seeks to recover the 31 per cent of the stock thus delivered to Parker. No contention is made that Parker does not own the 20 per cent of the stock. Appellant contends that, as to the 31 per cent of the stock, the agreement of December 14, 1934, cannot be upheld as a contract because such contract is without consideration; that it cannot be upheld as a gift because Mrs. Botts retained the right to the return of the stock if Parker, his wife and children should all predecease her. Parker takes issue with both these major contentions. The trial court held that the agreement of December 14, 1934, was supported by consideration.

We do not find it necessary to decide whether, if there were not a valid contract, the transaction could be upheld as a valid gift. It is our conclusion that, as held by the trial court, the agreement of December 14, 1934, was amply supported by consideration.

The stock was placed in escrow pursuant to the agreement of December 14, 1934, and delivered to Parker pursuant to that escrow.

[1] In determining whether there was a valid consideration for that agreement, it is essential to keep in mind that at the time that agreement was entered into there was a serious and debatable question as to whether the stock of the paint company was held by Mrs. Botts as the survivor of a joint tenancy, or whether it was community property. Some of the heirs of Mr. Botts had retained counsel who advised them the stock was community property. In Dollar v. Tooley, supra, this controversy is referred to as presenting a "serious question," and it is pointed out that legatee Dollar, who was executor of Mr. Botts'

estate, had been informed by counsel that the stock was not held in joint tenancy. Appellant seeks to minimize the existence of these doubts concerning the status of the stock, and apparently contends that, as a matter of law, the stock was joint tenancy stock. Appellant also points out that Parker never assumed a position of hostility towards Mrs. Botts on this issue by claiming the stock was community property. While it is true that Parker, who was very friendly with the Botts family, never quarreled with Mrs. Botts over the issue, he knew of the controversy, and he knew that his rights would be determined at the same time that the rights of other claimants were determined. Mrs. Botts had no doubt that there was a bona fide dispute over the status of this stock. Her attorney at that time, who had been her attorney and the company's attorney for many years, knew of the controversy and so testified. As already pointed out, Mrs. Botts knew her continued control of the company was at stake. Under these circumstances, after consultation with her attorney, she made the offer to Parker which was accepted by him. By the contract thus consummated Mrs. Botts agreed that as soon as she was legally able she would transfer 20 per cent of the stock to Parker. That was all that Parker would be entitled to if it should be held that the stock was community property. Mrs. Botts also agreed that, upon her death, subject to certain contingencies, Parker should receive an additional 31 per cent. If it be assumed that these two provisions are severable, and that a separate consideration is required to support the promise as to this 31 per cent, there is ample consideration to support that promise. Parker agreed that, if Mrs. Botts should hypothecate or convey shares of stock to the company to apply to her indebtedness to the company, he would contribute 20 per cent of the stock she turned in to the corporation for that purpose. Obviously, if Parker had received the 20 per cent of the stock under the will he would have received it free and clear of any claims of Mrs. Botts. By this agreement he agreed to permit Mrs. Botts to use a portion of his stock to secure her indebtedness, and if the company reduced the number of outstanding shares he agreed to take a proportional reduction. Such agreement was clearly a legal and actual benefit to the promisee, Mrs. Botts, and a legal and actual detriment to the promisor, Parker. As such, it clearly comes within the statutory and common law definitions of consideration. § 1605, Civ.Code. Parker also agreed that in the event that he should desire to sell the stock Mrs. Botts should have the first right to purchase. Parker's acceptance of the 20 per cent of the stock subject to these restrictions clearly constituted consideration for Mrs. Botts' promises in reference to the 31 per cent.

[2] It is elementary law, and hardly requires citation of authority, that where there is a bona fide dispute, and the parties compromise their difficulties, the mutual promises of the parties constitute a valid consideration for the compromise, whatever the merits of that controversy may be. See cases collected 15 C.J.S., Compromise and Settlement, § 11, et seq., p. 728. Here such a bona fide controversy existed, as to the 20 per cent of the stock. That dispute was settled and Mrs. Botts agreed to give an additional amount of stock if Parker would agree to certain restrictions on his stock. To these he agreed.

The considerations heretofore mentioned were set forth in the written agreement of the parties. These considerations, plus the presumption of consideration growing out of the fact the contract was in writing (§ 1614, Civ.Code) amply support the promises made by Mrs. Botts.

This determination makes it unnecessary to pass upon respondents' contentions that if the above considerations are insufficient, sufficient consideration is to be found in Parker's testimony that the "other valuable considerations" referred to in the contract were two in number: 1. His oral promise to remain with the company during Mrs. Botts' life; and (2) his oral promise not to interfere with whatever steps Mrs. Botts might take with regard to the stock in the probate of her husband's estate. Appellant contends that to permit such evidence of oral promises violates the parol evidence rule. Respondents urge that since the contract itself referred to "other valuable considerations" parol evidence is permissible to explain the meaning of the phrase. This is certainly the law in other states. Hieatzman v. Braecklein, 131 Md. 482, 485, 102 A. 917; Frame v. Attermeier, 147 Wis. 485, 133 N.W. 603; Wright v. Stewart, 19 Wash. 179, 52 P. 1020. In view of the fact that the considerations set forth in the agreement itself are ample to support the contract, no reliance need be placed on the oral promises.

For the foregoing reasons, the judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.

51 Cal.App.2d 483

In re McCOY'S ESTATE.

McCOY v. HOUZE.

Civ. 3013.

District Court of Appeal, Fourth District, California.

April 27, 1942.

Hearing Denied June 25, 1942.

1. Executors and administrators 🔑184

A wife may, by her agreement, waive her right to ask for a family allowance, but in order to bar a family allowance the intention to waive the right must be clear. Probate Code, § 680.

2. Executors and administrators 🔑185

Whether a wife's right to a family allowance has been waived by an antenuptial or postnuptial property settlement agreement is a matter of construction and interpretation.

3. Courts 🔑107

General statements in a decision respecting whether a wife has waived her right to a family allowance by an antenuptial or postnuptial property settlement agreement must be considered with language used in the agreement construed in the court's opinion.

4. Executors and administrators 🔑185

Under a property settlement agreement executed by husband and wife before divorce whereby each party discharged the other from all liability for maintenance and both parties agreed that agreement should constitute a complete settlement of all of their property rights and claims, the wife "waived" her right to a family allowance. Probate Code, § 680.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Proceeding in the matter of the Estate of Thomas Eugene McCoy, deceased, by Mildred M. McCoy against N. C. Houze, as administrator, etc., wherein Mildred M. McCoy filed a petition for a family allowance. From an order denying the petition, Mildred M. McCoy appeals.

Affirmed.

Chas. F. Blackstock and Wm. A. Reppy, both of Oxnard, for appellant.

Fred Fischer, of Taft, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from an order denying appellant's petition for a family allowance. The admitted facts are as follows:

Appellant and Thomas E. McCoy, now deceased, were husband and wife. They had no children. Appellant had procured an interlocutory decree of divorce under a complaint charging him with extreme cruelty. Prior to the rendition of said decree appellant and deceased executed a property settlement agreement the terms of which, so far as material here, are as follows:

"The settlement of community property rights effected by this instrument shall continue to be binding upon the parties, regardless of whether or not they shall hereafter live together as husband and wife and regardless of whether or not a decree of divorce may be granted for or against either party. * * *

"Each party to this agreement in consideration of the covenants and considerations above set forth hereby expressly waives his or her right to administer the property or estate of the other party in the event of his or her death; each party hereby waives any claim to inherit any share or portion of the estate of the other, by heirship, descent, succession or otherwise, unless by the will of the decedent. * * *

"* * * each party specifically discharges the other from all liability for maintenance as husband or wife, or otherwise, in consideration of the covenants and transfers of property herein set forth, each party hereby waives and releases the other from all claim, other than as herein stated, to alimony, support money, * * *

"The parties agree * * * that this instrument constitutes a full and complete settlement between the parties of all of their property rights, and of all claims of either party arising out of the marital relation of the parties."

During the interlocutory period appellant's husband died.

Appellant expects to receive about $6,000 from a policy of insurance on the decedent's life. By the property settlement agreement decedent had a right to change the beneficiary of this policy which he did not do. When appellant and decedent were living together he earned approximately $200 a month, all of which was consumed in living expenses. Since her husband's death appellant worked two weeks, found it too strenuous, and had to stop. Appellant has no separate income.

The right to a family allowance is covered by section 680 of the Probate Code, which is based on the former section 1466 of the Code of Civil Procedure, and which reads as follows: "The widow and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent."

[1] The sole question presented on this appeal is whether appellant waived her right to ask for a family allowance by reason of the above-quoted provisions of the property settlement agreement. It is not disputed that the wife may, by her agreement, waive such right. It is well established, however, that in order to bar a family allowance the intention to waive the right must be clear and explicit, and that any uncertainty in the language of the agreement will be resolved in favor of the right. Estate of Whitney, 171 Cal. 750, 154 P. 855; Estate of Gould, 181 Cal. 11, 183 P. 146; Estate of Bidigare, 215 Cal. 28, 8 P.2d 122, 123.

Appellant contends that she did not waive her right to a family allowance by said agreement and cites Estate of Bidigare, supra, as being a case in which "almost the identical situation was considered by the Supreme Court." In that case the property settlement agreement was signed on February 11, 1930, the wife was granted an interlocutory decree on February 18, 1930, and the husband died on April 21, 1930. The widow filed a petition for a family allowance and the appeal was from the court's order granting the same. The property settlement agreement involved in the cited case read as follows: "It is hereby agreed that, except as herein specified, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all liabilities, debts or obligations of any kind or character incurred by the other from and after this date, and from any and *all claims and demands, including all claims of either party hereto upon the other for support and maintenance as wife or husband, or otherwise,* it being understood that this instrument is intended to settle the rights of the parties hereto in all of said respects." (Italics added.)

In affirming the judgment the court said at page 30 of 215 Cal., at page 123 of 8 P.2d: "The agreement here in question does not in terms waive or purport to waive any claim as surviving widow, as was the case in Estate of Yoell, 164 Cal. 540, 129 P. 999. By the agreement each party is released from 'any and all claims and demands including all claims of either party hereto upon the other for support and maintenance as wife or husband, or otherwise'. No provision of the contract suggests that the parties had in contemplation the death of the husband before the entering of the final decree of divorce. The release of claims and demands of one against the other would seem to refer to claims and demands between them as living spouses. The claim of the widow here asserted is against the estate of the decedent and not against him. The words 'or otherwise' should not, we think, be held to extend the waiver to a claim for family allowance, but should be held to refer to the claims mentioned in the clause in which they are found, viz., claims between them as husband and wife. These words used in the agreement, instead of being plain and explicit evidence of waiver, tend to the uncertainty which is not permitted to control in cases of this kind."

Appellant also cites Estate of Shapero, 39 Cal.App.2d 144, 102 P.2d 569. In that case decedent and respondent entered into an antenuptial agreement by the terms of which it was agreed that "as an integral part hereof, and in consideration of all mutual covenants contained herein, that both parties hereby release each other, waive and relinquish all rights, interest or claims against the other for any alimony, attorney's fees or costs in connection with any possible litigation there may be between them and arising out of, or in connection with their domestic relations, or otherwise, which may happen between them at any time during their married life, including also all rights of inheriting, administration, homestead or otherwise, whatever. * *" After the death of the husband the widow petitioned for a family allowance and the appeal was from the order granting such family allowance, the contention of appellant being that the widow by the terms of the antenuptial agreement had waived her right to a family allowance. The District Court of Appeal affirmed the order and a hearing was denied by the Supreme Court.

In Estate of Yoell, 164 Cal. 540, 129 P. 999, 1001, the property settlement agreement contained the following language: "It is further expressly covenanted and agreed that neither party hereto will in any way or manner contest or oppose the probate of the other's will, whether heretofore or hereafter made, or interfere with the other, their heirs or assigns, in the exercise of the rights of property herein stipulated and agreed to; that neither of them will at any time hereafter assert any right, interest, or title as heirs at law of the other to any property devised or bequeathed by such will, or as against the estate of the other, should the other die intestate and all claim as such heir, or as surviving husband and wife, respectively, and all right to contest or oppose the last will of the other is hereby expressly waived, together with all right to administer or to apply for letters of administration, or letters of administration with the will annexed, upon the estate of the other. * *"

The Supreme Court in passing upon the question as to whether the widow had waived her right to a family allowance said: "* * * To establish such relinquishment of right, no more apt words could be chosen than those deliberately employed in the agreement under consideration. True, it does not in terms and by name relinquish the right to a family allowance, but it does more than this. The wife covenants that she has renounced and waived all claim which she has or may have as *heir* of the husband or as his *surviving wife*. It is only as heir and surviving wife that she could make her demand for a family allowance, a demand which she has solemnly renounced."

[2, 3] It will be noted that the question of whether or not the right to a family allowance has been waived by an antenuptial or postnuptial property settlement agreement is a matter of construction and interpretation. General statements contained in decisions cannot always be taken at their face value but must be considered in connection with the language used in the contract construed in the opinion. The provisions of each agreement must be examined critically, as the question of waiver or nonwaiver depends sometimes on a slight difference in phraseology. And, as was stated in Estate of Whitney, supra [171 Cal. 750, 154 P. 857]: "So, too, the wife may, by agreement, surrender the privilege of applying for an allowance. Whether the right to demand an allowance is inconsistent with the will, or has been surrendered, is a question of interpretation of the will or the contract. In the case of a contract, we think the right should not be held to have been surrendered by an agreement between the spouses 'except by clear and explicit language.'"

[4] Applying the rules hereinbefore set forth to the particular contract involved in the instant case, we believe it must be held that appellant, in and by said agreement, intended to and did waive her right to a family allowance. The language used in the contract under consideration is far more inclusive than the language used in any of the cases in which it was held that the right to a family allowance was not waived. It is clear from the agreement that appellant and deceased intended to settle all present and future rights as against each other and against their respective estates. Each party in said agreement waived all right to administer the estate of the other and all claim to inherit any part of the estate of the other; and each party discharged the other from all liability for maintenance of the other; and, finally, both parties agreed that said agreement "constitutes a full and complete settlement between the parties of all of their property rights, and *of all claims of either party arising out of the marital relation of the parties.*" (Italics ours.)

We conclude, therefore, that taking the agreement as a whole, and applying to it the elementary rules of construction, appellant in and by said agreement waived her right to a family allowance and that the trial court did not err in denying her petition therefor.

The order denying appellant's petition for a family allowance is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

51 Cal.App.2d 516

GELBERG v. CONSOLO.

Civ. 13368.

District Court of Appeal, Second District, Division 2, California.

April 28, 1942.

1. Trial 🔑**377(2)**

Trial courts are vested with a broad discretion in permitting parties to reopen a case for purpose of introducing further proof.

2. Appeal and error 🔑**970(4)**

A trial court's ruling upon a request to reopen a case for purpose of introducing further proof will be disturbed on appeal only where there has been a clear abuse of discretion to the prejudice of the party complaining.

3. Trial 🔑**377(2)**

In action on a foreign judgment where plaintiff offered into evidence an exemplified transcript of the foreign judgment, it was not an abuse of discretion for trial court to reopen case and receive additional evidence consisting of an exemplified copy of the foreign judgment.

4. Judgment 🔑**818(7)**

In action on foreign judgment, where defendant had been served with process and appeared by attorney who filed an answer in her behalf in the suit in which the foreign judgment was obtained, refusing to permit defendant to introduce evidence that at the time the foreign judgment was rendered against her, she was not in the jurisdiction of the court, had no knowledge of the proceedings, and was not represented by counsel was not error.

◆

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by E. R. Gelberg against Carolyna Strohmayer Consolo on a foreign judgment. From a judgment for plaintiff, defendant appeals.

Affirmed.

H. A. Gebhardt, of Los Angeles, for appellant.

Samuel S. Gilbert and R. M. Hemperly, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover upon a foreign judgment defendant appeals.

The essential facts are:

Plaintiff brought an action upon a foreign judgment and at the time of trial offered into evidence an exemplified transcript of the judgment. Thereafter the case was submitted and before decision was rendered upon motion of plaintiff the trial court permitted plaintiff to introduce in evidence an exemplified copy of the judgment obtained in the state of New York.

It is necessary for us to determine two questions which will be stated and answered hereunder seriatim.

First: Was it error for the trial court to permit plaintiff to reopen his case and offer additional evidence after the case had been submitted for decision?

[1-3] This question must be answered in the negative. The rule is established by a long line of authorities that trial courts are vested with a broad discretion in permitting parties to reopen a case for the purpose of introducing further proof, and the trial court's ruling upon a request to reopen a case will be disturbed on appeal only where there has been a clear abuse of discretion to the prejudice of the party complaining. (Bublitz v. Reeves, 40 Cal. App. 75, 78, 180 P. 28.) In the instant case it was clearly not an abuse of discretion for the trial court to reopen the case and receive additional evidence.

Second: Did the trial court commit prejudicial error in refusing to permit defend-

ant to introduce evidence that at the time the final judgment was rendered against her in the state of New York, she was not in the jurisdiction of the court, had no knowledge of the proceeding, and was not represented by counsel?

[4] This question must likewise be answered in the negative. Defendant had been served with process and appeared by an attorney, who filed an answer in her behalf in the suit instituted against her in the state of New York. It was therefore immaterial whether at the time the final judgment was entered against her she was (a) in the state of New York, (b) represented by counsel, or (c) knew that the proceedings were being taken against her.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

CHUTUK v. SOUTHERN COUNTIES GAS CO. OF CALIFORNIA.*

Civ. 13075.

District Court of Appeal, Second District, Division 2, California.

April 28, 1942.

Hearing Granted June 25, 1942.

1. Negligence 🔑21

A defendant is not liable for injuries resulting solely from acts of persons other than the defendant, its agents or employees.

2. Trial 🔑203(1)

A litigant is entitled to have the jury instructed upon any theory of the case which is based upon the pleadings and which finds substantial support in the evidence.

3. Appeal and error 🔑1067

The failure of trial court to give a requested instruction relative to a pleaded issue which finds substantial support in the evidence constitutes prejudicial error.

4. Appeal and error 🔑1067

Gas 🔑20(5)

In action against gas company by employee of sewer contractor for injuries received as result of gas explosion in a manhole owned by city, where evidence would have sustained finding that gas which found its way into manhole escaped as result of damage to gas company's main occurring when sewer contractor's mechanical ditch digger over which gas company had no control struck service pipe, failure to give instructions requested by gas company relieving gas company of liability if such evidence were found true was prejudicial error.

5. Gas 🔑20(2)

In action against gas company by employee of sewer contractor for injuries received as result of gas explosion in a manhole owned by city, doctrine of "res ipsa loquitur" was not applicable since manhole was not under control of gas company.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

6. Negligence 🔑121(2)

The doctrine of "res ipsa loquitur" is inapplicable unless the instrumentality which causes the injury is under the exclusive control of the party against whom the rule is invoked.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Frank Chutuk against Southern Counties Gas Company of California for injuries received in a gas explosion. From a judgment for plaintiff, defendant appeals.

Reversed.

LeRoy M. Edwards and O. C. Sattinger, both of Los Angeles, for appellant.

Earl E. Howard, of Hollywood, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages for personal injuries resulting from alleged negligence, defendant appeals. There was substantial evidence introduced at the trial from which the jury could have found the following facts:

Defendant operated and maintained a 6-inch gas main in the Pacific Palisades area including a main on Friends Street. The main was located 30 inches below the surface of Friends Street and the service pipes which took off from the top of the main were about 2 feet beneath the surface of the ground.

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* Subsequent opinion 132 P.2d 193.

The gas company received notice from the city of Los Angeles that a sewer line was going to be placed in the Pacific Palisades area. Immediately defendant began an inspection of its gas pipes, making repairs where necessary. It found that the work on its pipes on Friends Street had been properly done and that the main and service pipes were in good condition.

About July 5, 1939, the sewer contractors commenced their work in the area under the direction of plaintiff who was in full charge of the work. The ditch work on Friends Street took place in September of 1939, which was after defendant had completed an inspection of its 6-inch mains. The sewer contractors used an Austin mechanical digging machine and one of the employees of the sewer contractor testified that the trenching machine struck a 2-inch service pipe of defendant company while they were working on Friends Street. After the accident hereinafter described it was found that this service pipe was bent and at its connection with the 6-inch main the threads were broken, thereby permitting gas to escape and seep into the adjacent territory, including the manhole in which plaintiff was injured.

On November 2, 1939, plaintiff, while inspecting the sewer line preparatory to an inspection by the city, entered a manhole owned by the city and with a hammer and chisel started to chip concrete off the sewer pipe in the manhole. After he struck his chisel five or six times an explosion occurred resulting in serious injury to plaintiff.

Defendant relies for reversal of the judgment on this proposition, among others:

The trial court committed prejudicial error in refusing at defendant's request to instruct the jury as follows:

"Where it is shown from the evidence that an accident may have happened from one of two or more causes, for one of which the defendant is liable and for the other or others of which it is not liable, then there can be no recovery as against defendant because you are not allowed to speculate or guess as to which of the two or more causes produced the accident. If, from the evidence, it is equally probable that the accident may have resulted from the negligence, if any, upon the part of the defendant, or from the acts of some third person over whom defendant had no control and whose acts it had no reason to anticipate, then you cannot speculate or guess as to whom produced the accident, and your verdict must be for the defendant." (Underscoring added.)

"If you should find that the acts or omissions which caused natural gas to escape (if you find that natural gas of the defendant company did escape at the time and place here involved) were the acts of other persons than the said defendant or its agents or employees, and that such acts of such third persons, independently of any negligence on the part of this defendant, caused the injuries received by the plaintiff, then your verdict must be for the defendant." (Underscoring added.)

"Before you can return a verdict against defendant it must appear from a preponderance of the evidence that said defendant was guilty of negligence which proximately caused or contributed to the damage alleged in the complaint to have been sustained by the plaintiff. If you find by a preponderance of the evidence that the accident or explosion was solely and proximately caused by a person or persons over whose acts defendant had no control, you must return a verdict in favor of defendant." (Underscoring added.)

"Defendant was not, at the time and place here in question, an insurer of the person of the plaintiff, or of anyone else, and was only liable to the plaintiff in the event that some negligent act or omission on its part proximately caused his injuries. Accordingly, if you find by a preponderance of the evidence that some person, other than said defendant, interfered with defendant's gas mains and pipes so as to cause the same to leak or allow or permit of the escape of gas therefrom, and that defendant did not, or in the exercise of ordinary care could not have had notice of the fact that gas was escaping therefrom in reasonable time to permit it to repair or remedy the cause of the leak (if you find such to be the fact) and such escaping gas proximately caused the in-

juries sustained by plaintiff, then your verdict must be in favor of the defendant." (Underscoring added.)

This proposition is tenable. The trial judge did not give any instructions to the jury upon defendant's theory of the case as requested by defendant in the instructions set forth, supra.

[1-3] The following rules are applicable to the instant case:

(1) A defendant is not liable for injuries resulting solely from acts of a person or persons other than the defendant, its agents, or employees.

(2) A litigant is entitled to have the jury instructed upon any theory of the case which is based upon the pleadings and which finds substantial support in the evidence. (Bickford v. Pacific Electric Ry. Co., 120 Cal.App. 542, 548, 8 P.2d 186; Raymond v. Hill, 168 Cal. 473, 479, 143 P. 743.)

(3) The failure to give a requested instruction relative to a pleaded issue which finds substantial support in the evidence constitutes prejudicial error. (Stanton v. French, 83 Cal. 194, 196, 23 P. 355; 24 Cal.Jur. (1926), 833, § 96.)

[4] Applying the foregoing rules to the facts of the instant case, we find from the evidence that there was testimony which would have sustained a finding of the jury that the gas which found its way into the manhole in which plaintiff was injured escaped as a result of the damage which a mechanical ditch digger, operated by the sewer contractor, made when it struck defendant's service pipe located on Friends Street. If this was true, obviously defendant was not liable for the injury which plaintiff received. Defendant having requested proper instructions upon this theory of the case as set forth above, it was prejudicial error for the trial judge not to give such instructions or their equivalent.

[5, 6] The doctrine of res ipsa loquitur is not applicable to the facts of the instant case, for the reason that the manhole in which plaintiff received his injury was not under the control of the defendant, the rule being established in California that the doctrine of res ipsa loquitur is inapplicable unless the instrumentality which causes the injury is under the exclusive control of the party against whom the rule is invoked. (Hohnemann v. Pacific Gas & Electric Co., 35 Cal.App.2d 597, 603, 96 P.2d 350.)

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and HANSON, Justice pro tem., concurred.

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51 Cal.App.2d 579

ROSELLE v. BEACH.

Civ. 6565.

District Court of Appeal, Third District, California.

April 29, 1942.

Hearing Denied June 25, 1942.

1. **Automobiles** 🔑171(4)

Where two automobiles enter street intersection at lawful rates of speed at approximately same time, driver of automobile approaching from right has right of way, but it is such driver's duty to yield right of way to automobile first entering intersection from his left. Vehicle Code, § 550, St.1935, p. 186.

2. **Automobiles** 🔑244(2, 41)

Evidence of positions of automobiles and their skid marks after collision between them has little probative value on issues of respective drivers' negligence.

3. **Automobiles** 🔑171(10)

Where it was raining hard at time of collision between two automobiles at street intersection and water on front left window of one automobile prevented its driver from seeing other automobile approaching from his left, he was guilty of "negligence" in entering intersection without taking unusual precautions.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

4. **Automobiles** 🔑208

One driving automobile with solid black curtain over right-hand window thereof, so that he could not see another automobile, approaching street intersection, at which they collided, from his right, was negligent. Vehicle Code, § 676, St.1935, p. 224.

5. Automobiles 🔑245(90)

Whether negligence of one driving automobile with solid black curtain over right-hand window, so that he could not see another automobile, approaching street intersection, at which they collided, from his right, proximately contributed to accident, *held* for jury.

6. Automobiles 🔑246(60)

Where a participant in automobile accident is dead or unable for any other reason to give account of what occurred, and his side of case is not fully covered by testimony of witnesses called on his behalf, it is proper to give instruction to jury that presumption is that every man obeys law and that deceased driver was traveling at lawful speed on proper side of highway.

7. Negligence 🔑122(2), 138(3)

Where a participant in accident testifies to, or has witnesses who explain, his actions, he should not be given benefit of statutory presumption that a person takes ordinary care of his own concerns, and giving of instruction as to such presumption is error, unless it is made applicable to both parties to action for damages resulting from accident. Code Civ.Proc. § 1963, subd. 4.

8. Appeal and error 🔑1170(9)

In action for automobile driver's death as result of collision with automobile driven by defendant at street intersection, errors in instructions that presumptions were that defendant was traveling at lawful speed on proper side of highway, free from fault and not liable for any damage to plaintiff, were not sufficiently prejudicial to warrant reversal of judgment on jury's verdict for defendant. Const. art. 6, § 4½.

9. Appeal and error 🔑1060(1)

In action for death of driver of automobile colliding with defendant's automobile, statement by defendant's attorney that court would instruct jury that plaintiff and defendant were only persons interested in case, after asking a juror whether he understood that no insurance company was interested therein, *held* not prejudicial to plaintiff.

10. Trial 🔑217

In action for death of automobile driver as result of collision with defendant's automobile, instruction that no other persons or corporations than plaintiff and defendant were interested in action, and that jurors should not consider any other persons or corporations as parties to or interested in action, was correct.

11. Trial 🔑108½

In action for death of automobile driver as result of collision with defendant's automobile, a question, asked juror by plaintiff's counsel, as to whether such juror had interest in any insurance company interested or engaged in business of insuring automobile owners against liability for negligence in operation of their automobiles, was proper for purpose of ascertaining juror's frame of mind.

12. Trial 🔑217

As jurors in negligence action are likely to draw and act on conclusion, from question of plaintiff's counsel as to whether they have interest in insurance company, that any judgment against defendant will be paid by such company, court must attempt to counteract effect of such question by giving such an instruction as that no persons or corporations other than plaintiff and defendant are interested in action.

13. Appeal and error 🔑1060(1)

In death action, plaintiff cannot complain, on appeal from judgment on jury's verdict for defendant, that question asked juror by plaintiff's counsel as to whether such juror had interest in any insurance company, together with statement by defendant's counsel and instruction by court, had effect of convincing jury that there was no insurance, which it would otherwise assume that there might be, as it was unnecessary for plaintiff to open up such subject.

14. Appeal and error 🔑1064(1)

In death action by decedent's widow, as administratrix of his estate, instruction that no person other than plaintiff and defendant had any interest in case was not error warranting reversal of judgment on jury's verdict for defendant as inconsistent with instruction to consider pecuniary loss to decedent's children.

15. Appeal and error 🔑843(2)

In death action, whether instruction that jury could not consider loss of care, comfort, and society of a loved one, but could only consider pecuniary loss, in assessing damages, was erroneous as fatally at variance with another instruction, correctly stating law on such subject, need not be considered on appeal from judgment on jury's verdict for defendant.

16. New trial ⚖143(4)

A juror is never permitted to impeach his verdict by affidavit in support of motion for new trial that he was misled by another juror's arguments and believes that new trial should be granted.

◆

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Fannie E. Roselle, as administratrix of the estate of Harvey A. Roselle, deceased, against Claude E. Beach, for the death of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Affirmed.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

Lovett K. Fraser and Burt W. Busch, both of Lakeport, for appellant.

Hoge, Pelton & Gunther, of San Francisco, H. G. Crawford, of Lakeport, Mannon & Brazier, of Ukiah, and A. Dal Thomson, of San Francisco, for respondent.

DEIRUP, Justice pro tem.

Plaintiff has appealed from a judgment that was entered pursuant to a verdict of a jury in favor of the defendant. The action arose out of a collision between a Ford sedan and a Ford pick-up near the center of the intersection of Fifth and Forbes streets in the city of Lakeport. The sedan, driven by the defendant in his lane northerly on Forbes Street, struck broadside the pick-up which was being driven by the plaintiff's intestate easterly on Fifth Street and the two cars came to rest near the northeast corner of the intersection. Harvey A. Roselle, the plaintiff's intestate, dropped dead the day after the accident. He had suffered from a serious heart ailment for a considerable time and the question whether his death was due to the accident or not was not determined, for the jury decided in favor of the defendant, Claude E. Beach, on the issues of the negligence of the respective drivers of the cars.

[1, 2] Fifth Street being 28 feet wide, the distance from its center line to the southerly line of the intersection is 14 feet. The distance that Beach traveled into the intersection before his sedan hit the other car was therefore less than 14 feet. Forbes Street is 44 feet wide; therefore Roselle traveled 22 feet into the intersection before he reached the center line and also a few feet farther than that before his pick-up was hit by the sedan. If the two cars had entered the intersection at a lawful rate of speed at approximately the same time Beach, coming as he did from the right, would have had the right of way, but it was his duty to yield the right of way to Roselle if the latter entered the intersection first. Vehicle Code, § 550, St.1935, p. 186. Either Roselle had the right of way or he was traveling very much faster than Beach. The evidence of speed is very unsatisfactory. Beach estimated his own speed at 15 miles per hour and made the same estimate of the speed of the Roselle pick-up, but he said that he did not see the Roselle car until immediately before the impact, and at the time of the accident he said that he did not see the Roselle car at all. He admitted that he had been working in the rain and was in a hurry to get home. So far as the record shows no person other than Beach and Roselle saw the accident. Counsel for appellant claims that the position of the cars and the testimony of a traffic officer, based on skid marks, prove that Beach was traveling at a high rate of speed, but the actions of cars after a collision are so unpredictable that evidence of this character has little probative value. Corcoran v. Ward, 115 Cal.App. 180, 1 P.2d 455; Rudat v. Carithers, 137 Cal.App. 92, 30 P.2d 435; Johnston v. Peairs, 117 Cal.App. 208, 3 P.2d 617; Fishman v. Silva, 116 Cal.App. 1, 2 P.2d 473.

[3-5] It was raining hard at the time of the collision and the water on the front left window of the sedan prevented Beach from seeing the other car. It was therefore negligence on his part to enter the intersection without taking unusual precautions. Havens v. Loebel, 103 Cal.App. 209, 284 P. 676; Havens v. Loebel, 103 Cal.App. 294, 284 P. 717; Falasco v. Hulen, 6 Cal.App.2d 224, 44 P.2d 469. Roselle, on the other hand, had placed a solid black curtain over his right-hand window so that he could not see the Beach car coming from his right. He, too, was therefore negligent. See Vehicle Code, § 676, St.1935, p. 224. If he had seen the Beach car he might well have prevented the accident. It was therefore within the province of the jury to determine that his negligence contributed to the accident proximately and we cannot say that its verdict is not supported by the evidence.

[6, 7] Appellant specifies certain instructions given by the trial court at the

request of the respondent and bearing on the presumption of care as constituting reversible error:

"The presumption in this case is that the defendant was traveling at a lawful rate of speed, and on the proper side of the highway at all times. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence.

"Likewise, there is a presumption in this case that the defendant was free from fault, and this presumption follows him throughout the entire case, unless it has been overcome by other evidence.

"Merely because the plaintiff has brought this action against the defendant, you cannot presume that the defendant is at all liable. On the contrary, the law presumes that the defendant is not liable for any damage to the plaintiff."

The court also gave the following instruction on behalf of the plaintiff: "The presumption is that every man obeys the law and the presumption in this case is that the deceased was traveling at a lawful rate of speed and on the proper side of the highway at all times. This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence."

The propriety of the giving of such instructions has been discussed in our appellate courts many times, and the principles of law that are applicable thereto are, in our opinion, fully established. Where, as in the case of Roselle, a participant in an accident is dead or, for any other reason, is unable to give an account of what occurred and his side of the case is not fully covered by the testimony of witnesses called on his behalf, it is proper to give such an instruction as was given on behalf of the plaintiff. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510; Schulman v. Los Angeles Ry. Corp., 44 Cal.App.2d 122, 111 P.2d 924; Scott v. Sheedy, 39 Cal.App.2d 96, 102 P.2d 575. But if, as in the case of Beach, a participant testifies to his own actions or has witnesses who explain them, even though there is a presumption of law that "a person takes ordinary care of his own concerns" (Code Civ.Proc., § 1963, subd. 4), he should not be given the benefit of the presumption because it can have no weight. For this reason the giving of such an instruction in such a case is uniformly held to be error unless it is made applicable to both of the parties, and in certain instances judgments have been reversed for this reason. Clary v. Lindley, 30 Cal.App.2d 571, 86 P.2d 920; Kelly v. Fretz, 19 Cal.App.2d 356, 65 P.2d 914; Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 210 P. 269.

More often, however, the appellate court has determined that the error is not sufficiently prejudicial to warrant a reversal for the reason that the facts proven and the other instructions given by the court preclude the inference that the jury was misled. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709; Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884; Stroh v. Bauman, 37 Cal.App.2d 241, 99 P.2d 337; Beck v. Sirota, 42 Cal.App.2d 551, 109 P.2d 419.

[8] Such instructions should not be given by the trial court in any case in which the party for whom they are requested has had an opportunity to prove his case in court. But we are bound by the provisions of section 4½ of article VI of the Constitution to the effect that "No judgment shall be set aside * * * on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Tuttle v. Crawford, supra; Rogers v. Interstate Transit Co., supra. We have examined the instructions that were given by the trial court in reference to negligence, contributory negligence, the burden of proof and the law relative to accidents of this kind. They are complete and fair. The nature of the accident was brought to the attention of the jury. We do not believe that the verdict was affected by the erroneous instructions and we hold, therefore, that the error was not sufficiently prejudicial to warrant a reversal of the judgment.

[9-13] In the examination of one of the jurors counsel for the plaintiff asked: "You have no interest in any insurance company who are interested or engaged in the business of insuring automobile owners against liability for negligence due to the operation of their automobile, have you?" The juror answered, "No." Immediately thereafter counsel for defendant asked him,

"You understand, no insurance company is interested in this case?" The juror queried, "In no connection whatsoever?" To this counsel replied, "No, the court will instruct you that the only persons interested in this case are Mrs. Roselle, individually, and as administratrix of the estate of her husband, and Mr. Beach, and nobody else is interested in the case. Now, if the court gives you that instruction, will you follow that instruction?" The answer was "Yes."

At the conclusion of the trial the court gave the type of instruction that has been approved in Brown v. Yocum, 113 Cal.App. 621, 298 P. 845; Miller v. Cranston, 41 Cal.App.2d 470, 106 P.2d 963, and Elmore v. County of Lassen, 10 Cal.App.2d 229, 51 P.2d 481, adding thereto the following: "This is an action between plaintiff on the one hand and defendant on the other hand, and no other person or persons, companies or corporations are interested in this action, and it would be contrary to your duties as jurors, and contrary to your oaths as jurors, to consider any other person or persons, company or corporation as parties to or interested in this action."

Appealing to the rule of law that proof of insurance by the plaintiff is error or misconduct of so extreme a nature that it cannot be cured but must result in a mistrial or reversal of a judgment (Citti v. Bava, 204 Cal. 136, 266 P. 954; Squires v. Riffe, 211 Cal. 370, 295 P. 517), counsel for appellant argues that such a statement as was made by counsel for the defendant should be held to be equally prejudicial.

We think that the effect upon the juror of the attorney's statement was to refer him to the instruction which he knew the court would give for the true situation in respect to insurance. And that instruction tended to negative insurance as fully as did the statement that was made by counsel. Such an instruction is correct for the reason that, as a matter of law, there is no one in the case other than the plaintiff and the defendant. The question which counsel for the plaintiff asked was proper for the purpose of ascertaining the frame of mind of the venireman. If one actually is interested in a casualty company he might well be prejudiced against damage suits. An affirmative answer might lead to proof of actual bias or at least furnish a reason for a peremptory challenge. But the purpose of asking the question nearly always is to give to the juror and all other persons within hearing the impression that any judgment that may be entered will be paid by an insurance company, so that the jury need not be concerned about inflicting hardship upon the defendant, and might therefore be inclined not only to find in favor of the plaintiff, but also to be more generous in its verdict. Inasmuch as jurors are likely to draw such a conclusion and act upon it, the courts are required to attempt to counteract the effect of the question by giving the type of instruction that we have alluded to. In view of the prevalence of insurance today, it is likely that the question asked by the plaintiff, coupled with what may be said by counsel for the defendant and also the instruction that the court gives, have the effect of convincing the jury that there is no insurance in cases where it would assume that there might be. But if this is the effect, the plaintiff cannot complain; for it is not necessary for him to open up the subject.

[14, 15] Counsel objects also to the portion of the instruction which we have quoted because it assured the jury that no person other than the plaintiff and defendant had any interest in the case, whereas the children of the decedent would be entitled to participate in any judgment collected by the plaintiff. The jury was, of course, fully instructed to consider the pecuniary loss to the children, but counsel argues that the two instructions were wholly inconsistent and that it is impossible to tell which one the jury accepted. One answer to this argument is that the jury must have understood that the plaintiff represented not only herself but other persons as well and that the instruction referred to still other persons. The other is that the jury never got to the point of considering the right either of the plaintiff or anyone else to recover damages in any specific amount, for it decided that no one was entitled to recover. For the same reason it is unnecessary for us to consider whether an instruction to the general effect that the jury could not consider the loss of the care, comfort and society of a loved one, but could only consider pecuniary loss, was fatally at variance with another instruction which stated the law on this subject correctly. This instruction also is moot for the reason that the verdict was for the defendant.

[16] In connection with his motion for a new trial counsel for plaintiff presented

the affidavits of ten jurors to the effect that they had been misled by the arguments of one of their number and believed that a new trial should be granted. A juror is never permitted to impeach his verdict in this manner and affidavits of this kind can serve no purpose. Toomes v. Nunes, 24 Cal.App.2d 395, 75 P.2d 94. It obviously would not do to permit counsel to reargue the facts and the law with each juror after the verdict in order to induce him to petition the court to grant a new trial.

The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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51 Cal.App.2d 587

ANDERSON COTTONWOOD IRR. DIST. v. ZINZER.

Civ. 6684.

District Court of Appeal, Third District, California.

April 29, 1942.

Hearing Denied June 25, 1942.

1. Adverse possession 🔑85(3)

Evidence supported finding that defendant's possession of an island in river was not adverse to plaintiff irrigation district, and hence defendant acquired no title by prescription.

2. Adverse possession 🔑8(1)

Even if defendant's possession of an island in river was adverse to plaintiff irrigation district, defendant acquired no title by prescription, where before five-year period had elapsed it became the law that such a title could not be acquired as against an irrigation district. Civ.Code, § 1007.

3. Deeds 🔑38(1)

The description of premises in a deed need be only sufficiently definite to enable the land to be identified.

4. Deeds 🔑38(1)

Land conveyed by grant may be described by name. Civ.Code, § 1092.

5. Deeds 🔑38(1)

A description of premises in a deed to plaintiff irrigation district wherein grantor purported to convey all his interest in an area of land known as the "Island" situated in the Sacramento river between the river and the Wheel Ditch, describing it more particularly by metes and bounds, was sufficient, where it did not appear that there was more than one parcel of land which would answer to description. Civ.Code, § 1092.

6. Quieting title 🔑44(5)

The taking possession of property by plaintiff irrigation district and exercising acts of ownership over it created a disputable presumption of sufficient weight to warrant a judgment quieting title. Code Civ. Proc. § 1963, subd. 12.

7. Adverse possession 🔑100(1)

Where plaintiff, in quiet title action, relied in part on a prescriptive right, plaintiff, by introducing deed, brought its claim within provisions of Code of Civil Procedure, so that proof of ordinary use of occupant would be sufficient and all of property described in the deed, rather than a part of it, would be deemed to have been occupied. Code Civ.Proc. §§ 322, 323.

8. Adverse possession 🔑57

Evidence showing that the use by plaintiff irrigation district of an island in river was an essential, continuous use for purposes of plaintiff district, and that use was exclusive and open and notorious for 15 years before defendant went upon property, was sufficient to establish a title by prescription in plaintiff district.

9. Adverse possession 🔑86

Fact that plaintiff irrigation district did not prove that it had paid taxes upon property in which it was claiming a title by prescription was not fatal to district's claim, since an irrigation district is not subject to taxation of property used by it in a governmental capacity.

10. Quieting title 🔑36

The description of property in complaint and in judgment in a quiet title action was not too indefinite to entitle plaintiff to relief, even though one could not follow description on paper and thereby determine what land was in dispute, where anyone could find end of plaintiff's dam in river and the intake of plaintiff's canal and, having done so, could follow the lines of the property.

11. Quieting title ⚷43

In quiet title action, a complaint in the ordinary form permits proof of title by adverse possession as well as a record title.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Anderson Cottonwood Irrigation District against H. M. Zinzer, to quiet title to a parcel of land. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Hearing denied; CARTER, J., not participating.

Chas. L. Gilmore, of Sacramento, for appellant.

L. C. Smith and Alfred E. Frazier, both of Redding, for respondent.

DEIRUP, Justice pro tem.

Plaintiff brought this action to quiet title to a parcel of land in Shasta County described as follows: "Commencing at the southerly end of the dam of the Anderson, Cottonwood Irrigation District at the confluence of the Sacramento River and the intake canal of said District; thence in an easterly direction, following the water line of the Sacramento River to the point of the confluence of the Sacramento River and the Anderson-Cottonwood Irrigation District Canal; thence in a general westerly direction along the northerly bank of said Canal to the point of beginning; excepting therefrom so much thereof as belongs to the State of California for highway purposes; containing six acres, more or less."

It is alleged in the complaint that the plaintiff is a public corporation; that it is now, and for a long time has been the owner and in possession of the land; that the land constitutes, and for many years has constituted a part of the operative property of plaintiff as an essential part of its intake canal; that the defendant has occupied a portion of the premises, and, without right, asserts an interest. The answer admits that plaintiff is a public corporation, and that defendant claims an interest, but alleges that he is the owner of the land, and that the action is barred by the statute of limitations. The trial court found for plaintiff, and defendant appealed.

Resolving conflicts in the evidence in favor of the findings of the court, it appears that the land is an island in the sense that the water in the Sacramento River and the canal surround it but that it has not been a natural island in the river for many years, if ever. It was a part of the mainland, but was cut off by a high slough through which water flowed only at times of high flood. This slough was deepened by a former owner for irrigation purposes, and was known as the "Wheel Ditch." However, the land was called an island, and it is convenient to designate it in this manner. It lies in an easterly and westerly direction, relatively narrow in comparison with its width, and is of little value for farming.

Plaintiff acquired the land from John Diestelhorst in 1916, for the purpose of taking water from the Sacramento River and conducting it through a canal to the mouth of a tunnel; thence to the irrigable lands within the district. It constructed a dam across the river with one end at the westerly point of the island to divert the water, dug a canal along line of the "Wheel Ditch," and built a diversion dam and headgates in the canal near the easterly point of the island, and a tunnel to convey the water into the distribution system. The lower end of the canal, between the headgates and the river serves as a spillway to release excess water into the river. The island has been an essential part of plaintiff's distribution system ever since the works were completed in 1917. The land has been a barrier between the river and the canal, and a means of ingress to, and egress from, the various structures for the purpose of adjusting and repairing them. It has also been used as a place for the deposit of material whenever it was necessary to clean out the canal.

[1, 2] The defendant first went upon the premises in 1932, and in 1933, he built a small house. He has lived on the island ever since, doing little in the way of improvement, other than clearing a space for a small garden. It is the contention of counsel for appellant that the possession was hostile and adverse. This does not appear clearly from the evidence, and the court found that it was permissive. It is in evidence that at one time he posted a no-trespass notice; that he raised a garden; that he objected to material from the canal

being dumped on his watermelon patch, and that the employee of the plaintiff moved his drag-line and put the material in another place. He attempted to locate the land for mining purposes, but his notice was hopelessly defective, and the land was not open to location. He made no objection to the use of the land by the plaintiff for its purposes; thus the defendant's possession was not exclusive of that of the plaintiff. It was not until 1938 that he asserted any title to the land. We think that the court was well warranted in finding that the possession of the defendant was not adverse. But if it had been, he could not have acquired title by prescription, because in 1935, before the five-year period had elapsed, it became the law that such a title cannot be acquired as against an irrigation district and other public agencies. Civ. Code, § 1007.

It follows that the defendant is a mere trespasser. Nevertheless it was necessary for the plaintiff to show title in itself.

[3-6] Plaintiff introduced in evidence a deed from John Diestelhorst who, with his father, had occupied the land for forty years. It is clear from the description in the deed and the evidence in this case that it was the property in dispute, and not other property, that was conveyed. In the description there are references to the "Diestelhorst Farm" near Redding; the slough known as the "Wheel Ditch" and an area of land known as the "Island" situated in the Sacramento River between the river and the Wheel Ditch. The grantor conveys all his right, title and interest in this "Island," describing it more particularly by metes and bounds. The sufficiency of the description is questioned by the defendant, but no suggestion has been made that any other parcel of land in Shasta County answers to it. "It is only necessary that the description of premises in a deed or mortgage be sufficiently definite and certain to enable the land to be identified." Rea v. Haffenden, 116 Cal. 596, 48 P. 716, 718. Land conveyed by grant may be described by name. Smart v. Peek, 213 Cal. 452, 2 P.2d 380; Murray v. Tulare Irr. Co., 120 Cal. 311, 49 P. 563, 52 P. 586; Hitchcock v. Lovelace, 47 Cal.App.2d 818, 119 P.2d 151; Civ.Code, § 1092. The "Island" was therefore conveyed to the plaintiff. In any event, plaintiff took possession of the property and exercised acts of ownership over it. This created a disputable presumption of sufficient weight to warrant a judgment quieting title. Code Civ.Proc. § 1963, subd. 12; Lowe v. Penn, 105 Cal.App. 366, 287 P. 509.

[7] Counsel for appellant asserts however, that the deed was not received in evidence for the purpose of proving the title, but only for the limited purpose of serving as a basis for proof of title founded on a written instrument. It is true that the plaintiff relied in part, at least, on a prescriptive right. By introducing the deed it brought its claim within the provisions of sections 322 and 323 of the Code of Civil Procedure, so that proof of the ordinary use of the occupant would be sufficient and all of the property described in the deed, rather than a part of it, would be deemed to have been possessed and occupied.

[8, 9] We have already detailed the use to which the property was put by the plaintiff. It was an essential, continued use for the purposes of the plaintiff, and was exclusive and open and notorious for fifteen years before the defendant went upon the property.

It is claimed further by the appellant that plaintiff failed to establish a title by prescription because it did not prove that it had paid the taxes upon the property. There is nothing in the record to show that taxes were assessed. If they were, they were assessed illegally and could not have been collected, for an irrigation district is not subject to taxation of property used by it in a governmental capacity. Anderson-Cottonwood Irrigation District v. Klukkert, 13 Cal.2d 191, 88 P.2d 685; Turlock Irrigation District v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72; Reclamation District No. 551 v. Sacramento County, 134 Cal. 477, 66 P. 668.

[10] Counsel for appellant insists that the description of the property in the complaint and in the judgment is too indefinite to entitle the plaintiff to any relief. It is true that one cannot follow the description on paper and thereby determine what land is in dispute. But anyone could find the end of the plaintiff's dam in the Sacramento River and the intake of plaintiff's canal; and having done this, he could not fail to follow the lines of the property.

[11] There is no merit in the contention of counsel for appellant that the complaint is insufficient in that it does not set out the facts that must be proven to establish title by prescription. A complaint in the ordinary form, such as the one that was filed in

this action, permits proof of title by adverse possession as well as a record title. Williams v. City and County of San Francisco, 24 Cal.App.2d 630, 76 P.2d 182.

The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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51 Cal.App.2d 508

McWANE v. HETHERTON et al.
Civ. 13070.

District Court of Appeal, Second District, Division 2, California.
April 28, 1942.

1. Automobiles 🔑244(37, 45, 58)

Evidence that motorist about to make a left turn, when she saw automobile approaching from the opposite direction at a high rate of speed and weaving somewhat, stopped her automobile with left fender projecting into left-hand side of street approximately 1½ feet but leaving approximately 13½ feet between front of automobile and left curb sustained findings that ensuing collision was proximately caused by negligence of driver of oncoming automobile and that driver of stopped automobile was not contributorily negligent.

2. Appeal and error 🔑1010(1)

Negligence of a defendant and contributory negligence of plaintiff are "questions of fact" for determination by the trier of facts whose findings will not be disturbed if supported by substantial evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Appeal and error 🔑1008(1)

Appellate court was bound not only by trial court's finding in support of judgment that driver of oncoming automobile was negligent and that such negligence was proximate cause of injury, but also by implied finding that driver of stopped automobile had not violated provisions of Vehicle Code with respect to side of highway on which automobile should be operated and the proper warnings to be given by horn. Vehicle Code, §§ 526, 527, 551, St.1935, pp. 181, 182, 186; § 671, St.1937, p. 169.

4. Negligence 🔑82

Failure to comply with a statute does not constitute "contributory negligence" in the absence of a showing that the violation of the statute was a proximate cause of plaintiff's injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

5. Automobiles 🔑226(2)

Motorist's failure to give signal required by statute of her intention to make a left turn did not constitute "contributory negligence" barring recovery for injuries sustained in head-on collision with approaching automobile, where such failure to comply with statute was not a proximate cause of the collision. Vehicle Code, § 544, St.1935, p. 185.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Harry O. McWane against Edith Hetherton to recover damages for injuries sustained in an automobile accident, wherein defendant filed a cross-complaint against plaintiff and others for damages resulting from the same accident. From judgments in favor of defendant and cross-complainant, plaintiff and cross-defendants appeal.

Judgments affirmed.

R. Bruce Murchison, Richard C. Hart, and John Bricker Myers, Jr., all of Los Angeles, for appellants.

Winterer & Ritchie and Robert L. Faucett, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of respondent on (a) appellant McWane's complaint and (b) respondent's cross-complaint, after trial before the court without a jury in an action to recover damages which resulted from injuries received in an automobile accident, appellants appeal.

The evidence being viewed in the light most favorable to respondent, the essential facts are:

On the afternoon of December 31, 1939, respondent was driving an automobile in a southerly direction on Normandie Avenue just north of where it intersects with 110th Street in the city of Los Angeles. Respondent extended her left arm * when approaching the intersection indicating that she intended to make a left turn into 110th Street. As she commenced to turn easterly into 110th Street, she noticed a car owned by appellant McWane and being operated by appellant Fitzpatrick traveling in a northerly direction on Normandie Avenue approximately 600 feet south of the intersection. The car in which appellants were riding was traveling about sixty miles an hour and weaving to some extent as it proceeded along the avenue.

Respondent immediately stopped her car leaving the left fender projecting into the east half of Normandie Avenue approximately one and one-half feet. There remained approximately thirteen and one-half feet between the front of respondent's automobile and the easterly curb line of Normandie Avenue. Thereafter the left front fender of appellants' car struck the left front fender of respondent's car, as a result of which respondent received injuries to her person and property in the amount of $3,336.24.

Appellants rely for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the trial court's finding that appellants' negligence was the proximate cause of the damage suffered by respondent.

Second: Respondent was contributorily negligent as a matter of law.

[1] Both of the foregoing propositions are untenable. An examination of the record discloses that there was presented to the trial judge direct evidence of eye witnesses in conformity with each and every fact set forth above. From these facts the trial judge may reasonably have believed that respondent acted as a reasonably prudent person under similar circumstances would have acted in immediately stopping her car when she saw the automobile in which appellants were driving approaching her at a speed of approximately sixty miles an hour and weaving in its course along Normandie Avenue; also that appellants, in failing to perceive the car in which respondent was riding and by failing to drive to the east of respondent's car or to stop before hitting her car, did not act as a reasonably prudent person similarly situated would have acted, and they were therefore negligent and such negligence was the proximate cause of the damage suffered by respondent.

[2-5] An unbroken line of decisions in this state holds that negligence upon the part of defendant and contributory negligence on the part of plaintiff are questions of fact for determination by the trier of fact, whose findings will not be disturbed by this court if, as in the instant case, there is substantial evidence to support them. (Kapper v. Harris, 10 Cal.App.2d 630, 633, 52 P. 2d 569.) In view of this rule we are bound, not only by the trial court's finding that appellants were negligent and that their negligence was the proximate cause of the injury suffered by respondent, but also by the trial court's implied finding that respondent did not violate any provision of sections 526, 527, 551 and 671 of the Vehicle Code, St.1935, pp. 181, 182, 186, and St.1937, p. 169. Nor is there any merit in appellants' contention that the evidence fails to disclose that respondent, before turning into 110th Street, failed for the last fifty feet to give a proper signal of her intention to make a turn and thereby violated section 544 of the Vehicle Code, St.1935, p. 185, since the law is established in California that the failure to comply with a statute does not constitute contributory negligence in the absence of a showing that the violation of the statute was a proximate cause of the plaintiff's injury. (Reeves v. Lapinta, 25 Cal.App.2d 680, 681, 78 P.2d 465.)

In the instant case the trial court impliedly found, based on substantial evidence, that, even though respondent did not introduce evidence that she had extended her left arm continuously for the last fifty feet before she turned into 110th Street, such failure so to do was not a proximate cause of the accident which ensued.

It is our view that the present record is exceptionally free from error and that the judgment of the trial court is not only overwhelmingly supported by the evidence but that a contrary judgment would have been against the decided weight and preponderance of the evidence.

For the foregoing reasons the judgments are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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*The evidence fails to disclose for what distance respondent's arm was extended prior to the time she started to turn her car into 110th Street.

51 Cal.App.2d 472

MASATO SUMIDA et al. v. PACIFIC AUTOMOBILE INS. CO.

Civ. 13396.

District Court of Appeal, Second District,
Division 2, California.

April 27, 1942.

1. Appeal and error ⚷927(7)

On appeal from judgment based upon directed verdict for defendant, evidence was required to be viewed in light most favorable to plaintiff.

2. Insurance ⚷435

Where undisputed evidence was susceptible of only interpretation that motor vehicle owner was receiving from a farmer 10 cents per person for transportation of workers at time of accident, under automobile liability policy excluding liability for loss resulting while vehicle was being used to carry persons for a "consideration" insurer was not obligated to pay judgment obtained against insured owner for injuries sustained in accident. St.1935, p. 716, § 11580(b) (2).

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

3. Insurance ⚷435

Where undisputed evidence was susceptible of only interpretation that motor vehicle owner was receiving from a farmer 10 cents per person for transportation of workers at time of accident, under automobile liability policy excluding liability for loss resulting while vehicle was being used to carry persons for a "consideration" at time of accident, the vehicle was not being used for a permissible "business use" but accident occurred under conditions which excluded it from terms of policy. St.1935, p. 716, § 11580 (b) (2).

See Words and Phrases, Permanent Edition, for all other definitions of "Business Use".

4. Appeal and error ⚷205

Where a question to which objection is sustained does not in itself indicate that answer to it will be favorable to party seeking to introduce testimony, before ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made.

5. Appeal and error ⚷205

Where questions to which objections were sustained did not indicate that answers would be material or beneficial to party seeking to introduce testimony, and offer of proof was not made as to what answers witness would give to questions, whether trial court properly sustained objections to questions would not be considered.

6. Witnesses ⚷379(1), 388(10)

A witness may be impeached by evidence that he has made at other times statements inconsistent with his present testimony, but before he can be so impeached the statements must be related to him with the circumstances of times, places and persons present, and he must be asked whether he made such statements and, if so, allowed to explain them. Code Civ.Proc. § 2052.

7. Witnesses ⚷388(6)

Where deponent was not present at trial and when deposition was taken he was not asked whether he had made allegedly inconsistent statements in the presence of others at particular time and place, objection to offer of proof that deponent had made statements inconsistent with testimony given in deposition was properly sustained. Code Civ. Proc. § 2052.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Masato Sumida and others against Pacific Automobile Insurance Company to compel defendant to pay an unsatisfied judgment previously recovered against an alleged insured of defendant. From an adverse judgment, plaintiff appeals.

Affirmed.

J. Marion Wright and Owen E. Kupfer, both of Los Angeles, for appellants.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment predicated upon the granting of defendant's motion for a directed verdict in an action brought pursuant to the provisions of section 11580, subdivision b(2) of the Insurance Code, St. 1935, p. 716, for the purpose of compelling defendant to pay unsatisfied judgments previously recovered against the alleged insured of defendant, plaintiffs appeal.

[1] Viewing the evidence in the light most favorable to plaintiffs (appellants),

as we must in reviewing a judgment based on a directed verdict (In re Lances' Estate, 216 Cal. 397, 400, 14 P.2d 768), the material facts are:

Plaintiffs Sumida, Ishizuka, Shimono, Ishikawa, and Harada recovered a judgment for personal injuries received while they were riding in an automobile owned by K. Meno. Plaintiff Matsumoto as the administrator of the estate of S. Hatakeyama, deceased, also recovered a judgment for the wrongful death of Mr. Hatakeyama, who died as a result of injuries received in the same accident which resulted in injuries to the other plaintiffs in the present suit. At the time of the accident the injured parties were being transported in a pick-up truck owned by Mr. Meno from the fields where they had been working to the camp where they were living.

Executions on the judgments were issued and returned unsatisfied, and the present litigation was then instituted.

May 12, 1937, defendant issued an insurance contract to K. Meno and/or T. Ishibashi covering the automobile in which the injured plaintiffs and Mr. Hatakeyama, deceased, were riding at the time of the aforementioned accident. This policy contained, among other provisions the following:

"The Company Does Hereby Agree with the Assured named in the Declarations made a part hereof, in consideration of the premium hereinbefore provided, as respects accidents occurring during the period of this Policy, by reason of ownership, maintenance or use of any automobile described in said Declarations, only while within the limits of the United States (exclusive of Alaska, the Hawaiian, Philippine and Virgin Islands, Panama Canal Zone, Porto Rico, and other possessions) and Canada, including while on coastwise steamer between ports within said limits, subject however, to the conditions, limitations and exclusions contained in this Policy, as follows:

"Clause A. Legal Liability for Bodily Injuries or Death:

"To pay the loss from the liability imposed by law upon the Assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered, or alleged to have been suffered by any person or persons (except employees of the Assured while engaged in operating or caring for an automobile in the course of employment of the Assured, or injured in the course of employment in the business of the Assured or entitled to benefits under any Workmen's Compensation law, plan or agreement) as a result of the ownership, maintenance or use, for the purposes described in Declaration 5, of any automobile described in Declaration 9, including the loading and unloading of such automobile; in addition to the cost of rendering first aid to the injured, of defending any suit or civil action at law in the name of and on behalf of the Assured arising out of such accidents, whether groundless or not, and interest accruing after entry of judgment on said amounts."

Defendant denied liability in the present action upon the sole ground that at the time of the accident the insured vehicle was being used to carry persons "for a consideration" within the exclusion clause of the policy, which read as follows:

"This Policy excludes loss resulting or arising from any of the following causes, or while any automobile described herein is being used or maintained under the following conditions, unless otherwise specifically provided for by endorsement attached to this Policy: . . . d. While carrying persons for a consideration, express or implied, or while rented or leased."

At the trial there was received in evidence the deposition of Mr. Meno, the insured, whose testimony in substance was as follows:

"I testified at the trial of the Superior Court actions in November, 1938, as follows: 'Q. Did you have any arrangement with the farmers whereby the farmers paid you for these plaintiffs' transportation? A. Yes, I had an arrangement that I would get ten cents for each person. Q. And who paid that? A. The farmers.' I so testified at the trial but I would like to make an explanation. The arrangements that I had with the farmers were that the farmers were to call for the boys and bring the boys back to camp; but in instances where the farmer was very busy and could not do this, I arranged to take the boys back and forth, for which the farmers in the emergency were to pay me ten cents per head per person. It was arranged that I was supposed to go and pick the boys up at 5 o'clock in the afternoon on the day of the accident. They were to be picked up at the Nakata and Tagama ranch. The reason for that was these farmers were busy at that time and as an emergency I took them there and was to meet them in the afternoon of that day * * * That was ten cents per person for that day only. Every time I transported these men in place of the farmers it was ten cents per man each day regardless of how many trips there might be in the course of a day's time. It was ten cents per person per day."

There was also received a transcript of the testimony of plaintiff Ishikawa given at the trial of his action against Mr. Meno, which testimony was in substance thus:

"I met Meno in 1937 a little before June. I had a talk with him about an arrangement for me to go to Palos Verdes. I asked him how much it would be for board and he said fifty-five cents, and that he would take us and bring us back to and from the ranch. Mr. Meno was the big boss out there. He had a labor camp * * * I know the other boys here the plaintiffs in this action. They were all out at Meno's camp on the date of the accident. They were all working under the same arrangement * * * Meno said that he would get work for me. He said that he would collect the money and then pay me. I was supposed to board there and for my work I was to get thirty cents an hour. Mr. Meno was to get fifty-five cents a day for boarding me. Mr. Meno said that he would take me from the camp to the farms in the morning and call for me in the evening. He said he had a car that he would take me in."

Mr. Takenaga, a farmer who had employed the injured on the day of the accident, testified that he had hired men from Mr. Meno's camp during the period from September to August, 1937, and he stated:

"The boys got to the farm in June, 1937, on Meno's truck. He came after them. Sometimes they walked back and other times I took them back * * *

"Q. At any time was there any charge made to you by Mr. Meno at the times that he came and got the boys, or brought them to the ranch? * * *

"A. No; to my knowledge there wasn't any * * * I paid Mr. Meno the money for the work of the boys. I did not pay anything to the boys myself. The basis as I recall it, I think, was twenty-five cents an hour."

He also testified that he did not have any arrangement with Mr. Meno for transporting the men to and from their work, and that he made no payments to Mr. Meno for such purpose.

Plaintiff Sumida testified that he did not hand any "cash money" to Mr. Meno for anything and that as he rode to and from work he had never, including the day on which the accident occurred, handed Mr. Meno any money in cash or currency.

It is necessary for us to determine three questions, which will be stated and answered hereunder seriatim.

First: Was it error for the trial court to grant defendant's motion for a directed verdict on the ground that the undisputed evidence disclosed that at the time of the accident, which resulted in the judgments against Mr. Meno, the plaintiffs and the decedent were riding in the truck owned by Mr. Meno, while giving a consideration for such transportation and therefore the case fell within the exclusion clause of the insurance policy issued by defendant?

[2] This question must be answered in the negative. The undisputed evidence as set forth above was susceptible of only one interpretation and that was that Mr. Meno was receiving 10 cents per person for the transportation of the parties at the time the accident occurred which resulted in the unfortunate injuries and death. Therefore, under the exclusion clause of the policy as set forth, *supra*, defendant was not obligated to pay the judgments which had been obtained against Mr. Meno.

Second: At the time of the accident in question was the truck being used for a merely permissible business use in accordance with the terms of the policy?

[3] This question for the reasons set forth in the answer to the first question must be answered in the negative. The exclusion clause of the policy was clear and free from ambiguity and under the undisputed facts as set forth above the accident occurred under conditions which excluded it from the terms of the policy which defendant had issued. There is no other provision in the policy upon which plaintiffs may base their claim than those set forth above.

Third: Did the trial court err in sustaining defendant's objections to:

(a) the following questions asked Mr. Sumida:

"Q. What was said, if anything, about that arrangement, other than there would be fifty-five cents a day deducted?"

"Q. Did you ever pay Mr. Meno any money, yourself, in cash for transportation, or anything else?"

"Q. Did Meno ever tell you that he expected to receive ten cents a day from any farmers that he took you out to?"

"Q. Did you know that he ever stated that he was receiving ten cents a day for transporting you?"

"Q. Did Mr. Meno state to you at any time as to whether or not he divided up in any way or apportioned in any way this fifty-five cents that you say he deducted from your wages?"

(b) Plaintiffs' offer to prove for the purpose of impeaching Mr. Meno's testimony, given in his deposition as set forth above, that Mr. Meno prior to the taking of his deposition had stated that he received nothing from the farmers for transporting the plaintiffs to work on the day of the accident or on any other day, and that he had no arrangement with the farmers to receive anything for such transportation?

This question must be answered in the negative.

[4, 5] (a) We will not consider whether the trial court properly sustained objections to the questions set forth above, for the reason that the law is established in California that, where a question to which an objection is sustained does not in itself indicate that the answer to it will be favorable to the party seeking to introduce the testimony, before the ruling will be reviewed on appeal an offer of what is proposed to be proven must first be made to the trial court so that the reviewing court can determine whether the proposed evidence would have been material and beneficial to the party offering it. (Travelers Fire Ins. Co. v. Brock & Co., 30 Cal.App.2d 115, 117, 85 P.2d 904.) In the present case the questions to which objections were sustained did not indicate that the answers would be material or beneficial to plaintiffs nor was any offer of proof made as to what answers the witness would give to the questions.

[6, 7] (b) The objection to the offer of proof was properly sustained on the ground that a proper foundation for the admission of the testimony had not been laid. A witness may be impeached by evidence that he has made at other times statements inconsistent with his present testimony, but before this can be done the statements must be related to him with circumstances of times, places, and persons present and he must be asked whether he made such statements and, if so, allowed to explain them. Code Civ. Proc. § 2052. In the present case Mr. Meno was not present at the trial, and when his deposition was taken he was not asked whether he had made the alleged inconsistent statements in the presence of other parties at a particular time and place. Therefore the foregoing rule was not complied with and the court's ruling was correct.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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51 Cal.App.2d 497

HEUER et al. v. TRUCK INS. EXCHANGE.

Civ. 11774.

District Court of Appeal, First District, Division 2, California.

April 28, 1942.

1. Insurance 🔑229(2), 246

Automobile liability policy issued in order to qualify the insured to operate a trucking business under permit issued pursuant to City Carriers' Act could be canceled only upon ten days' written notice to the Railroad Commission, as provided in the act, and could not be canceled by mutual consent of the parties in violation of such statutory provision. St.1935, p. 1059, § 6.

2. Insurance 🔑665(8)

Evidence sustained finding that agent through whom insured obtained automobile liability policy, and who knew several companies had previously canceled their policies with insured, represented insurer rather than insured, so that knowledge of the prior cancellations would be chargeable to insurer.

3. Insurance 🔑514½

Agreement between plaintiffs and automobile liability insurer entered into before trial of action against insured whereby plaintiffs agreed in event of recovery to fully release insurer from liability upon advance by insurer of one half the amount of judgment recovered but not to exceed specified amount to be repaid out of any money received by plaintiffs on account of such judgment in excess of one half thereof did not tend to establish that judgment in favor of plaintiffs entered after trial on the merits was "collusive."

See Words and Phrases, Permanent Edition, for all other definitions of "Collusive".

4. Insurance ⊂⇒**606(1)**

Money advanced by automobile liability insurer to successful plaintiffs in action against insured pursuant to agreement entered into before trial and release executed after judgment whereby insurer was released from all liability on account thereof and repayment of money advanced by insurer with interest out of any money received by plaintiffs on account of judgment in excess of one-half thereof was secured by a lien upon judgment constituted a "loan" and not "payment" of judgment, as affecting question of subrogation, where policy issued by insurer was void from its inception.

See Words and Phrases, Permanent Edition, for all other definitions of "Loan" and "Payment".

5. Insurance ⊂⇒**606(1)**

As affecting question of subrogation, evidence that money advanced by one automobile liability insurer to successful plaintiffs in action against insured, repayment of which was secured by a lien on judgment, was merely a loan and did not satisfy judgment and that there was no liability against such insurer because policy issued by it was void from its inception, sustained finding that plaintiffs in judgment were the "real parties in interest" in action against another liability insurer of the same insured to recover amount of the judgment. Civ.Code, § 2888.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party in Interest".

◆

Appeal from Superior Court, City and County of San Francisco; Everett Clay McKeage, Judge.

Action by Joseph Heuer and others against Truck Insurance Exchange, a corporation, to recover under an automobile liability insurance policy the amount of a judgment previously recovered against insured for the death of plaintiffs' decedent. From a judgment in favor of plaintiffs, the defendant appeals.

Judgment affirmed.

Appelbaum & Mitchell and Lewis N. Mitchell, all of Oakland, for appellant.

Frank J. Baumgarten, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiffs, as the heirs at law of Helen Heuer, deceased, recovered a judgment in the sum of $3,500 and costs against one Robinson for the death of said deceased. Plaintiffs then brought this action against defendant Truck Insurance Exchange as the insurer of said Robinson. The cause was tried by the court sitting without a jury, and a judgment was entered in favor of plaintiffs. Defendant appeals from said judgment.

On April 6, 1938, defendant issued its automobile liability insurance policy to said Robinson which policy contained the customary provision for a right of action on behalf of a third person to recover against the insurer in the event that a judgment for personal injuries or death was recovered by such third person against the insured. Robinson was operating a trucking business under a permit issued pursuant to the "City Carriers' Act" Stats.1935, chap. 312, p. 1057. Said policy was filed with the Railroad Commission on April 9, 1938. Under section 6 of said act, it is provided that such policy "shall not be cancellable on less than ten (10) days written notice to the Railroad Commission."

The accident and resulting death of the deceased occurred on April 25, 1938. Prior to that time, defendant had addressed letters to Robinson and the Railroad Commission under date of April 23, 1938. The letter to Robinson gave notice that the policy "will be cancelled and all liability of this Exchange will cease on April 30, 1938 at 12:01 a. m." There was enclosed in said letter a check for $5.14 to cover "the unearned Guaranty Deposit Premium" and defendant retained the premium which would have been earned up to April 30, 1938. The letter to the Railroad Commission notified the commission that Robinson's policy "will be cancelled at 12:01 a. m., Standard Time, on May 4, 1938." The last-mentioned date was no doubt used as the effective date of the cancellation because of the statutory requirement of ten days' notice to the commission found in the above-quoted provision of section 6 of the act.

The foregoing facts are undisputed and it is entirely clear that the accident of April 25, 1938, occurred before the effective date of cancellation fixed by defendant in either its letter to Robinson or its letter to the Railroad Commission. There are other facts, however, upon which defendant relied in the trial court.

Robinson dealt with one Silverstein in obtaining his insurance coverage and defendant claimed that Silverstein represented Robinson rather than the defendant. The trial court found against defendant on this claim as will hereinafter appear. The evidence showed and the trial court found that several insurance companies had previously cancelled their policies with Robinson and that Silverstein knew of said prior cancellations. Shortly after defendant issued its policy to Robinson, it notified its district manager "to get hold of the agent that wrote it and have him place it in another company because we wanted to get off." The district manager testified "They told me to get hold of Silverstein and have him assist the assured." Silverstein notified Robinson and the latter demanded that the district manager tell him why defendant desired to cancel his policy. The district manager said he did not know but that the policy would not be cancelled until such time as another policy had been obtained in order to permit Robinson to continue his operations under the "City Carriers' Act."

Silverstein then applied for a policy for Robinson with the New York Casualty Company. He represented to the latter that no previous insurance policy of Robinson's had been cancelled. There was a conflict in the evidence on the subject of the making of these representations by Silverstein but the trial court made findings against defendant with respect to said representations and defendant does not question the sufficiency of the evidence to sustain said findings. As a result of Silverstein's efforts, a policy of insurance was written by the New York Casualty Company on April 22, 1938, and was delivered by Silverstein to Robinson. This policy contained an express declaration, in line with Silverstein's representations, that no policy of Robinson's had previously been cancelled. It appeared that an endorsement required by the Railroad Commission had not been attached to said policy and Silverstein took back the policy for the purpose of obtaining said endorsement. The endorsement was duly attached and the policy was forwarded to the Railroad Commission for filing. It reached the commission and was filed on April 26, 1938, being the day following the accident.

When defendant received notice of the accident, it took the position that its policy had been cancelled prior to the accident of April 25, 1938. It denied liability and refused to defend Robinson in the action thereafter instituted by plaintiffs against him. The New York Casualty Company took the position that its policy was void because of material misrepresentations but it entered into an agreement with Robinson to defend plaintiffs' action without waiving any of its rights.

The action brought by plaintiffs against Robinson was tried by the court sitting without a jury. Prior to the trial of that action, and on April 15, 1939, plaintiffs entered into an agreement with the New York Casualty Company to which reference will be hereinafter made. Following the making of that agreement, counsel for both parties advised the trial court that the cause was to be tried on its merits, but that in the event of a recovery by plaintiffs, the prayer of the complaint was reduced to a prayer for $3,500. Thereafter and on April 21, 1939, plaintiffs recovered judgment against Robinson in said action for $3,500 and costs. Following the entry of said judgment and on May 2, 1939, plaintiffs entered into a further agreement with the New York Casualty Company and thereafter commenced this action against defendant.

The above-mentioned agreements of April 15, 1939, and May 2, 1939, are the subjects of discussion in the briefs. The agreement of April 15 was in the form of a letter addressed by plaintiffs to the New York Casualty Company. It recited that said company has disclaimed liability under its policy and that it took the position that said policy was void and had been rescinded. It provided "In the event of our recovering a judgment in the above case against R. G. Robinson, we agree to fully release your company of all claims under any policy of your company issued to said Robinson, on account of such judgment or by reason of any liability of said Robinson arising out of the subject matter of the above suit, upon the payment and advance to us by you of a sum equal to one-half of the amount of any such judgment, exclusive of costs, (which sum in no event shall exceed $1,750.00) and we further agree, from and out of any moneys received by us, by suit or settlement, upon any claim which we may have against any person, firm or corporation (other than said Robinson) based upon any such judgment against said Robinson or upon any liability of said Robinson arising out of the subject matter of the above suit, and not otherwise, to repay to you all sums so received by us in excess of one-half of the principal, exclusive of interest and costs, of any judgment recovered by us against said Robinson in the above action, up to but not exceeding the amount, with interest thereon, hereinabove provided to be paid and advanced to us by you."

The agreement of May 2, 1939, was in the form of a release. It recited the issuance of the policy of the New York Casualty Company to Robinson and the subsequent rescission thereof on the ground of material misrepresentations; the disclaimer of liability by said company; the entry of the judgment in favor of plaintiffs against Robinson; and the desire of the parties to settle all claims. It was therefore agreed in consideration of the sum of $1,750, "paid and advanced" to plaintiffs, that plaintiffs would release said company from all claims. It was further agreed that the "payment and advance" of said sum should not be construed as a waiver by the company of its rescission of the policy or as an admission of liability. It was further agreed that in the event that plaintiffs should recover any sum from any person or corporation, other than Robinson, upon said judgment in excess of $1,750, then plaintiffs in that event and not otherwise agreed to repay to said company an amount equal to such excess but in no event more than $1,750 with interest from date at 7 per cent per annum. Plaintiffs further agreed not to assign or settle their claim without the consent of said company and, "to secure the repayment of said sum of $1,750 and interest," plaintiffs granted to said company "a lien upon all the proceeds of said judgment against said Robert G. Robinson and upon all the proceeds of any claim or cause of action against any person, firm, corporation or insurer as above mentioned."

The trial court found that on April 25, 1938, said policy issued by defendant to Robinson had not been cancelled and that it was then in full force and effect; that on said date, Robinson negligently operated his truck and thereby caused the death of the deceased; that plaintiffs thereafter recovered the above-mentioned judgment against Robinson for damages for the death of said deceased which judgment had become final; that said judgment had not been satisfied in whole or in part but that the New York Casualty Company had made a loan to plaintiffs of $1,750; that said judgment was not collusive and was not rendered pursuant to any plan to receive said $1,750 in full or any satisfaction of said judgment; that Silverstein was the licensed agent of defendant and that he knowingly made false representations to the New York Casualty Company in applying for the policy for Robinson; that said company relied upon said representations in issuing its policy to Robinson; that said company promptly rescinded its policy upon learning of the falsity of said representations; that said policy of the New York Casualty Company was void from its inception and was not in force on April 25, 1938; that defendant had refused upon demand to pay said judgment and that there was owing and unpaid from defendant to plaintiffs the full amount thereof together with interest thereon; and that plaintiffs were the real parties in interest in this action.

[1] Defendant contends that certain of the findings of the trial court are not sustained by the evidence. In this connection, it may be stated that defendant makes no claim that the evidence was insufficient to sustain the findings regarding the false representations by Silverstein to the New York Casualty Company and the resulting invalidity of the policy issued by that company. Defendant does attack the finding to the effect that defendant's policy had not been cancelled and that it was in force on April 25, 1938. It claims that its policy had been cancelled by mutual consent of the parties. It is a sufficient answer to this claim and to the authorities relied upon by defendant to point out that the policy here was issued to provide the compulsory, statutory insurance required by the above-mentioned act in order to qualify Robinson for a permit to operate under said act. Under the terms of said act, said policy could be cancelled only in the manner provided in section 6 of the act and it could not be cancelled by mutual consent of the parties in violation of the provisions of said section. The distinction between what

may be termed voluntary insurance and what may be termed compulsory, statutory insurance has been heretofore discussed in the authorities. See Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 751, 7 P.2d 999, 85 A.L.R. 13; National Auto Ins. Co. v. Industrial Acc. Comm., 19 Cal.App.2d 276, 281, 65 P.2d 128. Defendant recognized the fact that its policy was not cancellable except upon giving ten days' notice to the Railroad Commission when it sent notice to the commission on April 23, 1938, that its policy would be cancelled on May 4, 1938. We conclude that the finding that defendant's policy had not been cancelled and that said policy was in force on April 25, 1938, is sustained by the evidence.

[2] Defendant also attacks the finding that Silverstein was the agent of the defendant. While the words "broker" and "agent" were used rather loosely in certain questions and answers found in the record, the true facts were brought out in the testimony directed specifically to the issue in question. Silverstein testified that he was never a licensed broker but that in 1938, he did have "agency rights with the Truck Insurance Exchange." Defendant's district manager testified that Silverstein was "a licensed agent of the Truckers" and that Silverstein was acting "for us as soliciting agent." This testimony was ample to sustain said finding of the trial court.

[3, 4] Defendant also attacks the findings that the judgment against Robinson was not collusive and that the New York Casualty Company made "a loan" to plaintiffs in the sum of $1,750. There is no evidence whatever in the record to sustain defendant's claim that the judgment against Robinson was collusive. It affirmatively appears that said action was tried on its merits and that the only stipulation made in that case was that the prayer of the complaint should be reduced to $3,500. With respect to the money advanced to plaintiffs by the New York Casualty Company, we believe the evidence was ample to sustain the finding that said money was advanced as "a loan." The agreements dated April 15, 1939, and May 2, 1939, show that said money was to be repaid with interest upon certain contingencies and that said company was given a lien to secure the repayment thereof.

[5] Closely related to the attack last mentioned is defendant's attack upon the findings that the judgment against Robinson remained wholly unsatisfied and that plaintiffs were the real parties in interest in this action. Defendant cites and relies upon Yezek v. Delaware, L. & W. R. Co., 176 Misc. 553, 28 N.Y.S.2d 35 and Purdy v. McGarity, 262 App.Div. 623, 30 N.Y.S.2d 966. Both cases involved facts showing that the insurer's liability to the insured was absolute and that the so-called loan transactions were mere subterfuges. In the Yezek case, the court distinguished numerous cases in which transactions had been upheld as loan transactions and said at page 37 of 28 N.Y.S.2d, "In the latter class, of which the present case is one, the insurer's liability to the insured is absolute when the loss occurs. * * * The insured is entitled to prompt payment without resort to a loan. The transaction is held to be a payment." And on the same page the court quoted from Kalle & Co., Inc., v. Morton, 156 App.Div. 522, 524, 141 N.Y.S. 374, 376, as follows: "If it be true, as indicated, that the policy could not have been enforced, then the insurance company had a right to exact such terms * * * as it chose as a condition of payment." In the present case, the policy issued by the New York Casualty Company was void and could not have been enforced. There was obviously no liability, absolute or otherwise, upon said company as in the cases cited by defendant. Under these circumstances said company could exact such terms from plaintiffs as it saw fit in making the advance of $1,750. In other words, said company could properly enter into a loan transaction secured by a lien and the trial court was justified in finding that such was the nature of the transaction resulting from the agreements above mentioned. It follows that the finding that the judgment remained wholly unsatisfied was sustained by the evidence. It further follows that the finding that plaintiffs were the real parties in interest was sustained by the evidence as the lien, or agreement for a lien, held by said company, transferred no title to the latter. Civ.Code, § 2888.

Defendant's further contentions that "The evidence is insufficient to justify the judgment" and that "The judgment is against law" present no points which require further discussion.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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BILLINGS et al. v. DELGADO et al.

Civ. 3029.

District Court of Appeal, Fourth District, California.

April 27, 1942.

1. Municipal corporations ⇨982
Taxation ⇨727, 786

Where plaintiff in quiet title action acquired title to real property under sale by city for delinquent taxes for 1933–34, and defendant claimed title under tax sale after property had been deeded to state in 1929 for delinquent county taxes for 1928, the 1935 amendment to statute governing tax sales, and providing that deed by tax collector shall convey title to purchaser free of taxes due at time of such sale, did not apply, and plaintiff taking under last tax sale had superior title. Pol.Code, § 3897, subd. 7.

2. Taxation ⇨615

The law in force at time of sale of real property to the state for delinquent taxes applies and follows through all the proceedings dependent upon that sale.

3. Municipal corporations ⇨982
Taxation ⇨786

Where real property was deeded to the state for delinquent county taxes, purchaser of tax title from city for subsequent delinquent city taxes had superior title to purchaser at state tax sale under statutory provision making state tax deed subject to subsequent taxes levied by a municipality. Pol.Code, §§ 3785, 3785b–3787, 3897.

4. Appeal and error ⇨680(3)

Where record on appeal did not show original complaint, but showed that appellant answered amended complaint after demurrer thereto was overruled, and appellant failed to point out wherein amended complaint failed to state a cause of action or was barred by statute, appellant's contention that she was entitled to judgment because, after her demurrer to original complaint was sustained, respondent filed an amended complaint which was identical, was not supported by the record.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by L. R. Billings and others against Jesus Delgado and others to quiet title to real property. From a judgment for plaintiffs, Rose Gray appeals.

Affirmed.

A. Peter Ohanneson, of Shafter, and Ernest H. Tuttle, of Wasco, for appellant.

H. E. Schmidt, of Bakersfield, for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from a decree quieting respondent's title to certain lots in the city of Delano, in Kern County. Respondents filed an action to quiet title against appellant and other defendants, and appellant filed an answer asserting title to said lots by virtue of a tax deed from the state under section 3897 of the Political Code. The other defendants did not contest the action.

There is no dispute as to the factual situation, which may be summarized as follows: Jesus Delgado was the record owner of the lots in controversy. County taxes assessed for the years 1928 to 1935 inclusive were not paid, and the property was deeded to the state and thereafter at a tax sale under section 3897 of the Political Code appellant purchased the property and received a deed in October, 1937, which deed was recorded in June, 1939. For delinquency in city taxes assessed for the fiscal year 1933–1934, the city of Delano sold said lots to respondents, and the tax collector of said city executed a deed to respondents on April 5, 1940.

Respondents base their claim upon the deed from the tax collector of the city of Delano, and appellant bases her claim on the deed from the tax collector of Kern County. No question is raised as to the regularity of either tax sale.

In the case of Woodill & Hulse Elec. Co. v. Young, 180 Cal. 667, at page 669, 182 P. 422, at page 423, 5 A.L.R. 1296, our Supreme Court said:

"In spite of this conflict, however, we believe that the underlying principles, by whose application the question must be decided, are clear and lead with certainty to the conclusion that in liens of this character, imposed on property—that is, on a thing itself regardless of ownership—by public authority for a public purpose, the one last imposed is paramount.

"No question is made but that this is the well-established rule as to liens for general taxes. It is so held almost universally and has been so decided in this state. Anderson v. Rider, 46 Cal. 134, 138; Dougherty v. Henarie, 47 Cal. 914; Chandler v. Dunn, 50 Cal. 15; California, etc., Co. v. Weis, 118 Cal. 489, 50 P. 697. The reason for it is concisely stated in Dougherty v. Henarie, supra, thus: 'The necessity of collecting revenue for the support of the government imperatively requires that the lien for taxes shall take precedence over all other liens, and that a tax sale, followed by a proper conveyance, shall transfer the title discharged of prior tax liens. If the rule were otherwise, purchasers at tax sales would be deterred from bidding, and a large portion of the revenue would remain uncollected.' "

Appellant contends that the deed received by her under section 3897 conveyed title to her free and clear of all liens, taxes, etc. levied or assessed against the property, which were due at the time of such sale, and appellant cites section 3897, subdivision (7) of the Political Code, as amended in 1935 (Stats.1935, ch. 396, p. 1440), which subdivision reads as follows: "A deed given by the tax collector upon a sale made as in this section provided shall convey title to the purchaser free and clear of all liens, taxes, assessments or encumbrances of any kind or character whatsoever levied or assessed or liened on the property which are due at the time of such sale so conveyed prior to the date of such sale, and, except as against actual fraud, such deed duly acknowledged shall be prima facie evidence of the regularity of all proceedings from the assessment of the assessor to and including the execution of such deed."

[1, 2] Whatever may be the effect of the 1935 amendment upon sales made thereunder of property which was sold to the state after said amendment became effective, it would not apply to the sale made in this case by the state to appellant, because the property here in controversy was sold to the state in 1929 for the delinquent state and county taxes of 1928, and in that year section 3897 did not contain subdivision (7) as above set forth, or any similar provision. The law in force at the time of a sale of real property made to the state for delinquent taxes applies and follows through all the proceedings dependent upon that sale.

In the case of Scott v. Beck, 204 Cal. 78, at page 82, 266 P. 951, at page 953, the court said: "It must be kept in mind that we are dealing with, and speak of, the law as it was in July, 1914, when the sale of this property was made to the state for delinquent taxes of 1913. That law follows through all proceedings dependent upon that sale. Biaggi v. Ramont, 189 Cal. 675, 679, 209 P. 892."

[3] Furthermore, the property here involved was deeded to the state under sections 3785, 3785b, 3786 and 3787 of the Political Code, and under the provisions of section 3787, said deed was subject to taxes levied by a municipality.

We believe, therefore, that the trial court correctly concluded that the title of respondents under the deed from the tax collector of the city of Delano was superior to the title of appellant under the prior sale made under section 3897.

[4] Appellant makes the further contention that she was entitled to judgment because after her demurrer to respondents' original complaint was sustained, respondents filed an amended complaint which was identical with the original complaint. The record does not show the original complaint but it does show that appellant's demurrer to the amended complaint was overruled and that appellant filed an answer thereto. Appellant does not point out wherein the amended complaint failed to state a cause of action or is barred by the statute. As the original complaint is not in the record we cannot determine the alleged similarity of the two pleadings. Therefore, this argument made by appellant is not supported by the record and need not be considered, if we should assume without holding, that there might be merit in the contention if the record contained both pleadings.

In view of the foregoing, the judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

WELPORT OIL CO. v. FAIRFIELD et al.

Civ. 3035.

District Court of Appeal, Fourth District, California.

April 28, 1942.

Rehearing Denied May 25, 1942.

Hearing Denied June 25, 1942.

1. Mines and minerals 🔑78(3)

In attempting to enforce forfeiture clause of an oil lease, lessor is bound by terms of the lease and a notice prematurely given cannot support a judgment quieting title against drilling company.

2. Mines and minerals 🔑78(1)

Where oil lease authorizing lessor to declare a forfeiture upon failure to commence drilling a second well within 90 days after discovery of oil in paying quantities in first well, left determination of whether well was producing oil in paying quantities to discretion of operating company, operating company was entitled to a reasonable time in which to put well on steady production and make its decision on such matter.

3. Mines and minerals 🔑78(1, 3)

Where oil lease authorizing lessor to declare a forfeiture on failure to commence drilling a second well within 90 days after discovery of oil in paying quantities in first well, left determination of whether well was producing oil in paying quantities to discretion of operating company, lessor's allowance of only two days after drilling of first well, a small producer, had stopped for operating company to determine whether well was producing oil in paying quantities was not a "reasonable time", and, hence, a notice by lessor of intention to declare a forfeiture for failure to commence drilling of second well was "premature" and could have no effect. St.1939, p. 1122, § 3217.

See Words and Phrases, Permanent Edition, for all other definitions of "Premature" and "Reasonable Time".

4. Mines and minerals 🔑78(7)

Where oil lease authorizing lessor to declare a forfeiture upon failure to commence drilling a second well within 90 days after discovery of oil in paying quantities in first well, left determination of whether well was producing oil in paying quantities to discretion of operating company, what would be a reasonable time in which operating company was to determine the productivity of the well was a "question of fact" addressed to trial judge.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Evidence 🔑20(1)

It is common knowledge in oil industry that in drilling an oil well with modern equipment, mud is forced into the oil strata which impedes the prompt flow of oil; that when there is a reasonable gas pressure and considerable oil, such mud ordinarily is removed within a short time; and that where quantity of oil and gas pressure both are small, the cleaning process may take considerable time.

6. Evidence 🔑20(1)

It is common knowledge that some oil wells sand up for a considerable time before steady production can be obtained.

7. Mines and minerals 🔑78(1)

Under oil lease requiring operator to continue drilling of well "with due diligence until a depth not greater than 2,000 feet has been reached" unless oil in paying quantities be discovered at a lesser depth, an operator should be given a reasonable time within which to prove productivity of oil sands he has found at a depth of less than 2,000 feet.

8. Mines and minerals 🔑79(6)

Where lessor seeking to have oil lease declared forfeited did not specify as a breach in its notices of intention to declare a forfeiture the fact that it had been paid no royalty because none of oil produced had been sold, fact that lessor had been paid no royalty would not be considered in determining whether lessor properly declared a forfeiture.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Welport Oil Company against Freeman E. Fairfield, and others, to quiet title to certain leasehold interests in land. From a judgment for plaintiff, the defendants appeal.

Reversed in part and affirmed in part.

Pease & Dolley and Arthur B. Knight, all of Los Angeles, for appellants.

Harvey, Johnston & Baker, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment quieting title to certain leasehold interests in 60 acres of land in Kern County.

R. H. Anderson, Inc., owned the property in question here in fee. In November, 1936, that corporation, as lessor, entered into an oil lease with Welport Oil Company as lessee, leasing 200 acres of land to be drilled for oil. This lease gave the lessee the right to drill for oil to a depth of not greater than 2,000 feet and provided that: "It being expressly understood that the Lessor hereunder is retaining all rights to oil, gas or other hydrocarbon substances located two thousand (2,000 feet) or more below the surface of the ground." This lease was duly recorded.

Under date of January 1, 1940, plaintiff entered into an oil lease with Freeman E. Fairfield covering 60 acres of the same property. This lease limited drilling to "a depth of not greater than 2,000 feet," and reserved to the lessor all oil, gas or other hydrocarbons below that depth. During the following month Freeman E. Fairfield and his wife subleased the same property to C. R. Price and Company, the contract containing the same restriction as to the depth of the wells to be drilled. During the same month C. R. Price and Company subleased the same property to Mid State Petroleum Company with the same restriction on the depth of the wells.

The Welport Oil Company-Freeman E. Fairfield lease contained the following provisions which are important here:

"3. The Lessee agrees to start the drilling of a well for oil within thirty (30) days from the date of this agreement, and to continue the work of drilling such well after commencing the same with due diligence until a depth of not greater than 2,000 feet has been reached, unless oil is discovered in paying quantities at a lesser depth, or unless such formations are encountered at a lesser depth as will indicate to the geologist of the Lessee that further drilling would be unsuccessful. If by reason of encountering mechanical difficulties in the prosecution of work, or other causes, the Lessee shall determine to abandon the same, this lease shall continue in full force, provided a new well is commenced within ninety days and thereafter drilled diligently as hereinabove provided.

"4. After discovery of oil in paying quantities in the first well the Lessee agrees to commence the drilling of a second well within 90 days thereafter, and after the discovery of oil in paying quantities in said well and each succeeding well, to similarly commence the next succeeding well until 6 wells have been drilled, including offset wells. * * *

"16. A well in paying quantities is hereby defined as follows: 'Paying quantities' as used in this Section shall be considered as such production as in the judgment of Lessee will be sufficient reasonably to assure a profit over and above the cost of drilling and producing such well.

"This definition shall not apply to wells to be operated on the expiration of the twenty-year period or on the abandonment of a portion of the premises, and in such case the Lessee may operate such wells as Lessee in its discretion shall deem sufficiently productive to operate. * * *

"21. In the event of any breach of any of the terms or conditions of this lease by the Lessee, and the failure to remedy the same within ninety days after written notice from the Lessor so to do, then, at the option of the Lessor, this lease shall forthwith cease and determine, and all rights of the Lessee in and to said land be at an end."

The Mid State Petroleum Company (hereafter called Mid State) caused the drilling of a well to be started about the middle of February, 1940. It was drilled to a depth of 1,214 feet. The last drilling was done on March 18, 1940, when an attempt was made to put it on production. It continually sanded up and was not placed on steady production until about August 17, 1940, although some oil mixed with mud and water was produced from it each month during that period.

Under date of June 18, 1940, plaintiff served on Freeman E. Fairfield a written notice to remedy default under the terms of his lease with plaintiff. The default specified in the notice was failure to comply with the provisions of paragraphs 3 and 4 of the lease, the material parts of which have been quoted. This notice was received on June 19, 1940.

On September 18, 1940, plaintiff served on Fairfield a written notice of termination of the lease because of failure to remedy the default specified in the earlier notice.

Under the terms of the lease the right of the plaintiff to declare a forfeiture is dependent upon a breach of the terms of the lease by the lessee and the lapse of ninety days after written notice of the default without remedying it.

It seems to be conceded by counsel that the right to forfeit the lease must be limited to those breaches of its terms specified in the first notice of June 18, 1940. Counsel for plaintiff states that the breaches relied upon are as follows: (1) Failure to drill the well to a depth of not more than 2,000 feet as oil in paying quantities was not found at a lesser depth. (2) If it be considered that the well produced oil in paying quantities, the failure to commence drilling a second well within ninety days thereafter. (3) If the well did not produce oil in paying quantities, the failure to deepen it to the specified depth.

It is clear from the record that drilling stopped on March 18, 1940, and was not thereafter resumed; that Mid State diligently tried to put the well on steady production and did not succeed in doing so until August 17, 1940. That due diligence was used in this endeavor does not seem to be questioned.

If the well produced oil in paying quantities it became the duty of Mid State to start drilling a second well within ninety days. Ninety-two days elapsed between March 18, and June 18, 1940, the respective dates that drilling stopped and the giving of the notice of breach of the terms of the lease.

In considering the claimed default of Mid State in failing to use due diligence in its drilling operations it should be borne in mind that the contract gave it the absolute right to allow ninety days to elapse between the discovery of oil in paying quantities in one well and the commencement of the drilling of the succeeding well and that no default could have been predicated on Mid States' use of all that time before starting the later well. It is also true that under the contract the question of whether or not a well produced oil in paying quantities was left to the discretion of Mid State. It is therefore apparent that the plaintiff only gave Mid State two days in which to determine the productivity of the well.

Defendants argue that this notice was prematurely given as they should have been entitled to a reasonable time after drilling stopped within which to determine whether or not the well could produce oil in paying quantities. The lease does not define a well producing oil in paying quantities but in paragraph 16, which we have quoted, leaves the determination of that question to "the judgment of the lessee." Mid State was given but two days to determine that question before the specified niney days in which it should start a second well commenced to run if the notice of June 18, 1940, be considered as given in proper time and not as prematurely given. Under the notice plaintiff must have considered the question of the productivity of the well settled on March 20, 1940, ninety days before the date of the notice, otherwise its notice was prematurely given before Mid State was in default.

[1] It seems to be established that in attempting to enforce the forfeiture clause of an oil lease the lessor is bound by and must conform to the terms and conditions of the lease and that a notice prematurely given can have no effect and cannot support a judgment quieting title against the drilling company. Scheel v. Harr, 27 Cal.App.2d 345, 80 P.2d 1035; Sandrini v. Branch, 32 Cal.App.2d 707, 90 P.2d 593; Forney v. Shell Oil Co., 137 Cal.App. 114, 29 P.2d 864; Smith v. Edelman, 214 Cal. 488, 6 P.2d 508. Therefore, the first question confronting us is this: Assuming the well to be a commercial producer, was the notice of June 18, 1940, prematurely given? The answer to this question obviously depends on whether or not the drilling company had a reasonable time after drilling stopped to determine if the well would produce oil in paying quantities and if two days before the ninety-day period commenced to run constituted such reasonable time.

Section 3217 of the Public Resources Code, St.1939, p. 1122, provides as follows: "A well is completed, for the purposes of this chapter, thirty days after it has commenced to produce oil, water, or gas, unless drilling operations are resumed before the end of the thirty-day period."

If the provisions of this section are applicable here (which we are not required to hold) then the ninety-day period within which Mid State was required to start the drilling of a second well would not have expired until July 16, 1940, and the notice was prematurely given and cannot support the subsequent notice of cancellation which also would have been prematurely given.

[2-4] As the lease did not define a well producing oil in paying quantities but left the determination of that question to the discretion of the operating company, it seems to follow as a matter of course that Mid State was entitled to a reasonable time in which to put the well on steady production and make its decision on that matter. Where, as here, the well was a small producer, and continually sanded up, thus producing oil only intermittently, it cannot be held that two days before the ninety-day period started to run was a reasonable time within which to decide that important question. What would be a reasonable time in which to determine the productivity of the well was a question of fact addressed to the trial judge upon which he failed to find. No rule can be laid down to govern all cases, the facts of each case must control. Where the well is a good producer the question is easy of prompt determination, but where, as here, the well was a small producer and sanded up many times, a sufficient time should have been given in which to determine its productivity with the use of skill and the exercise of due diligence.

We have thus far considered the case and the obligations of the parties under the assumption that the well was a commercial producer. We must now consider the duties of the parties under the assumption that the well did not produce oil in paying quantities. Under such circumstances the obligations of Mid State are set forth in paragraph 3 of the lease. They are to continue drilling "with due diligence until a depth of not greater than 2,000 feet has been reached" unless oil in paying quantities be discovered at a lesser depth. The obligation to continue drilling is a continuing one and the facts here present the question of what was the exercise of due diligence under them.

[5, 6] Mid State had found an oil sand at a depth of 1,214 feet. We are not referred to and cannot find the log of the well in the record so know nothing of the depth of the strata. It is common knowledge in the oil industry that in drilling an oil well with modern equipment mud is forced into the oil strata which impedes the prompt flow of oil; that when there is a reasonable gas pressure and considerable oil, this mud ordinarily is removed within a short time; that where the quantity of oil and the gas pressure both are small, the cleaning process may take considerable time. It is also common knowledge that some oil wells sand up for a considerable time before steady production can be obtained.

[7] Where an oil sand is found and the well does not immediately clear up and produce oil, must the operator shut off that strata and proceed to drill through it in search of other oil sands before thoroughly testing the productivity of the sands found? We think not, as any such conclusion would result in the serious loss of natural resources in a great many cases. The operator should be given a reasonable time within which to prove the productivity of the oil sands he has found and while he uses due diligence and efficient skill in attempting in good faith to produce oil from those sands he should not be subject to the penalty of forfeiture of his lease and the loss of his investment because he did not shut off and proceed to deepen his well to the maximum depth specified in the lease before he could determine their productivity. No definition of drilling "with due diligence" should exclude a reasonable time within which to attempt to develop production from a discovered oil sand if the work is done promptly, skillfully, without undue delay and in good faith.

Here Mid State complied with these requirements insofar as the evidence shows and was unable to produce clean oil from the well until August 17, 1940. It should follow that the notice of June 18, 1940, was prematurely given and cannot support a forfeiture of the lease because it gave Mid State but two days before the start of the ninety days in which to start the second well in which to determine the productivity of the well. This cannot be held to be a reasonable time under the facts here.

Under date of August 15, 1940, Freeman E. Fairfield and Ruth Fairfield, his wife, C. R. Price & Company and Mid State Petroleum Company signed and acknowledged a quitclaim deed to Welport Oil Company releasing from the oil lease about 50 of the 60 acres of the leased property, thus reserving to Mid State about 10 acres around the one well. This was done under paragraph 7 of the lease which gave the lessee the right to quitclaim any part of the leased property "after discovery of oil."

This deed was received by plaintiff on, or shortly after October 1, 1940, and was recorded on October 12, 1940, after the notice of forfeiture had been served, so all that is really involved here is about 10 acres of the property originally leased by plaintiff to Fairfield.

Defendants maintain that by the acceptance of this deed plaintiff has recognized the validity of its original lease which it here seeks to have declared cancelled, has changed the positions of the parties and has waived the purported forfeiture if it ever had any effect. As the judgment must be reversed we need not explore this problem. In this connection plaintiff points out that certain overriding royalties were assigned to various persons who did not join in the quitclaim deed. They were joined as defendants here and have not appealed from the judgment against them so it is final as to them. The judgment is also final as to C. R. Price & Company and its trustee in bankruptcy. From the record before us it would appear that plaintiff has been successful in clearing its title to fifty of the sixty acres described in its lease to Fairfield.

In this connection attention should be directed to the concluding portion of the second paragraph of numbered paragraph 16 of the lease which provides that "on the abandonment of a portion of the premises * * * the Lessee may operate such wells as in its discretion shall deem sufficiently productive to operate." It would seem that an abandonment of the major portion of the leased premises has been effected.

On a subsequent trial consideration should be given to the question of the right of Mid State to retain and operate its one well with sufficient land to enable its operation as long as that well, in the discretion of Mid State, produces sufficient oil to pay to operate.

The trial court found that the well was not, at the time of trial on May 8, 1941, and never had been, a well producing oil in paying quantities. This finding, which might have been termed a conclusion of law, is based on the following facts found: "It is true that after the defendant Mid State Petroleum Company went into possession of the aforesaid premises under its aforesaid lease, it expended as the cost of drilling of said well on said premises more than $11,000; and that thereafter it has expended in producing said well more than $1,000; and that hereinafter the reasonable cost of producing such well would exceed $1,000 per year. It is true that said well is now, and at all times has been, without value, and is not worth any part of said sum of $10,000, or any amount whatsoever."

There is no other particular fact found bearing on the question of the well having produced oil in paying quantities. The well had produced between 2,300 and 3,800 barrels of oil between March 18, 1940, and the time of trial. The undisputed evidence is to the effect that the well went on steady production on August 17, 1940, and had to be cleaned but once after that date; that it produced and continued to produce between fifteen and twenty-five barrels of clean oil per day; that the market value of that oil was 65 cents a barrel at the time of trial; that the well was pumped in connection with eleven other neighboring wells so that the cost of operation was small.

If the well can produce fifteen barrels of oil per day per year, and if that oil could be sold for 65 cents per barrel, as the evidence indicates, there would be an annual return to the operating company of about $1,400 a year after deducting royalties and costs of production. It may be, and probably is, true that other expenses, such as taxes, should be deducted from this annual return before the net can be correctly determined. While the annual net return from the well will be small, we believe that this question should be further explored before the trial judge reaches the conclusion that the well will not produce oil in paying quantities in view of the fact that the lease leaves the determination of that question to the lessee and the evidence now in the record indicates that the oil produced would more than pay operating and production costs.

[8] Plaintiff complains because it had been paid no royalty because none of the oil produced had been sold. We are not particularly concerned with this question here because failure to pay royalties was not specified as a breach of the lease upon which plaintiff relied in either of the notices served by it.

The portion of the judgment against appellants Freeman E. Fairfield, Ruth Fairfield and Mid State Petroleum Company is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

51 Cal.App.2d 527

SYAR et al. v. UNITED STATES FIDELITY & GUARANTY CO.

Civ. 6666.

District Court of Appeal, Third District, California.

April 28, 1942.

Hearing Denied June 25, 1942.

1. Trial 🔑165

On motion for nonsuit, every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence must be considered facts proved in favor of plaintiff, and contradictory evidence must be discarded and relevant evidence, even though erroneously admitted, must be given credit and benefit of its full probative strength.

2. Insurance 🔑128(2)

In action for breach of contract to execute bond to secure performance of a highway construction contract, evidence of agent's special authority to issue the bond was sufficient to justify submission of such issue to jury. Civ.Code, § 2316.

3. Principal and agent 🔑21, 121

The fact of agency when it rests on parol may be established by agent's testimony, and his testimony is admissible to prove the agency and the nature and scope of his authority and to bind his principal.

4. Insurance 🔑92

In action for breach of contract to execute bond to secure performance of a highway construction contract, evidence was sufficient to create inference that defendant's agent was duly authorized to issue bond. Civ.Code, § 2316.

5. Principal and agent 🔑22(2)

While admissions, statements and declarations of an agent other than his own testimony in the case in which the issue arises are not admissible to prove such agency they are admissible for such purpose after prima facie proof of agency has been made.

◆

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action by C. M. Syar and others against United States Fidelity & Guaranty Company for damages for breach of contract. From a judgment of dismissal, plaintiffs appeal.

Reversed.

Hewitt & McBride, of Yuba City, and Hugh K. McKevitt and Jack M. Howard, both of San Francisco, for appellants.

Horace W. B. Smith, of San Francisco, and Jerome D. Peters, of Chico, for respondent.

TUTTLE, Justice.

Plaintiffs seek to recover damages for breach of contract. At the close of their case, a motion for nonsuit was granted, and this appeal is prosecuted from judgment of dismissal thereafter entered.

[1] The following statement of the facts is made in view of the well-known rule that on a motion for nonsuit, every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence must be considered facts proved in favor of plaintiff; contradictory evidence must be discarded and the evidence weighed in the light most favorable to plaintiffs' claim. Relevant evidence even erroneously admitted must be given the credit and benefit of its full probative strength. The reporter's transcript contains several hundred pages, and it is obviously impracticable to set forth all of the evidence adduced upon the part of plaintiffs.

At the time in question, E. Carl Langguth and Harold W. Moore were licensed under the law as resident or local agents of respondent, at Yuba City, California, with the power to write and issue notarial and judicial or court bonds and undertakings. They were also authorized to solicit (but not write or issue), other bonds and undertakings, including contract bonds of the character involved in this action. Defendant is a corporation authorized under the laws of the state of California to transact a surety business and issue surety bonds. It maintained a branch office in San Francisco, which was managed by Edwin Porter. The latter was also a vice-president of defendant. Ernest Copeland was superintendent of its bond department in San Francisco. Early in 1940, Langguth had a conversation with plaintiff Syar, in which the latter stated that he might bid upon a state road contract, which required a bond for faithful performance upon the part of the successful bidder. Langguth thereupon solicited the writing of such bond. Later, Porter visited Yuba City, and informed Langguth that respondent would bond Syar for $25,000. They also discussed the matter of securing plaintiff through an indemnity bond issued by the other plaintiffs. Porter expressed doubt as to whether a $25,000 bond would be sufficient. On April 25, Langguth wrote Copeland, enclosing Syar's financial statement, and stating that a further and complete statement would be furnished later. He recommended in the letter that the bond be issued. Langguth testified as follows, concerning a conversation had with plaintiff Rose: "Mr. Rose asked me if the Company would issue it (the bond) and I said, yes, we would." On the morning of April 24, the date when the bids were opened, Langguth met plaintiffs at the office of defendant Oil & Burner Company. He had been previously advised by Syar that the latter company was willing to act as indemnitor. At that time Langguth testified that he had told plaintiff Rose, the defendant was going to issue a bond, stating, "definitely, we will bond you." When the bids for the work were opened, that of plaintiff Syar was lowest. Syar had delivered to the state of California a certified check in the sum of $5,600. The bid was accepted, and the highway construction contract was awarded to Syar. On April 26th, but under date of April 24th, Langguth wrote the following letter to Syar:

"Dear Mr. Syar:

"This is to advise you that if you are successful in your bid for highway work in Mendocino and Lake Counties for the State of California, bids for which are to be opened on April 24, 1940, upon express approval of the Company had and obtained, the United States Fidelity & Guaranty Company will furnish the necessary bonds, provided the co-partnership doing business under the fictitious name of Yuba-Sutter Oil & Burner Co., of Marysville, California, will act as Indemnitor thereon.

"Yours very truly,
"Moore & Langguth,
"Agents for United States Fidelity & Guaranty Co.
"By: E. C. Langguth."

With the following attached below:

"April 24, 1940.

"This is to certify that the co-partnership doing business as Yuba-Sutter Oil & Burner Co., of Marysville, California, will act as indemnitor on the above-mentioned bonds if bid of C. M. Syar is successful in the described premises.

"Yuba-Sutter Oil & Burner Co.,
"L. M. Rose,
"L. M. Rose, copartner."

Plaintiff Rose testified that Langguth told him, "All right, you can consider yourself bonded on that job." He testified that on the morning when the bids were opened, Langguth told him that a letter would be forthcoming guaranteeing the issuance of a bond to plaintiffs on the work, if the bid were successful; that he (Rose) returned with the check for the bid deposit, and Langguth said, "I will get the information and letter from the Bonding Company * * * I am going to phone them right now." That Langguth telephoned defendant, and when the conversation was finished, he said to Rose, "You can consider yourself bonded, and the letter will be forthcoming." He also stated, "We are all right, and you boys can go ahead; you are bonded. I just talked to my Company, and everything is all prepared and ready to go." Plaintiff Syar testified that after the bids were opened at Sacramento, he was present when Langguth telephoned defendant company from a telephone booth, and that Langguth returned from the booth, saying, "She is a cinch, boys, she is in the bag." Thereafter, defendant refused to issue the bond and the deposit of $5,600 was forfeited to the state. Syar testified that he tried to obtain a bond from other sources, but was unsuccessful. He further testified that he would have realized a profit of $13,174.74 from the performance of the contract.

It is contended by appellants that their evidence makes out a case of actual authority upon the part of the agent. "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." Civ.Code, § 2316. All parties agree that the power of attorney from respondent to its agent did not include authority to issue the bond, and the undisputed evidence shows that plaintiffs knew that such bond could not be issued without special authorization from the officers of respondent in San Francisco. Appellants contend, however, that there is evidence from which it can be inferred that such special authority was given.

[2, 3] We think that the evidence was sufficient to justify the submission of the issue to the jury. In Kast v. Miller & Lux, 159 Cal. 723, at pages 727, and 728, 115 P. 932, 933, it is stated: "The rule is well established that the fact of agency when it rests in parol may be established on the trial by the testimony of the agent himself. His testimony is admissible and competent to prove the agency and the nature and scope of his authority and to bind his principal thereby. This is the general, and, it may be said, the universal rule. Mechem on Agency, § 101; Parker v. Bond, 121 Ala. 529, 25 So. 898; O'Leary v. German American Ins. Co., 100 Iowa 390, 69 N.W. 686; Brown v. Cone, 80 App. Div. 413, 81 N.Y.S. 89; Lawall v. Groman, 180 Pa. 532, 37 A. 98, 57 Am.St.Rep. 662; Garber v. Blatchley, 51 W.Va. 147, 41 S.E. 222; New Home S. M. Co. v. Seago, 128 N.C. 158, 38 S.E. 805; Union Hosiery Co. v. Hodgson, 72 N.H. 427, 57 A. 384; Nostrum v. Halliday, 39 Neb. [828], 829, 58 N.W. 429, and a host of other authorities that might be cited."

In 2 C.J., pages 933, 934, section 689, it is said: "The rule that the declarations of an agent are, as against his principal, inadmissible to prove the fact of his agency does not apply to his testimony as a witness on the trial in which such fact is in issue; and consequently the testimony of the agent, unless he is disqualified for some other reason, is competent to establish the fact of his agency, and the existence of facts from which the agency may be inferred, at least where the authority was verbally conferred; and to refuse to allow him to testify and be cross-examined, is reversible error." See also 3 C.J.S., Agency, § 322.

And as stated in 2 Am.Jur., page 353, section 446: "Although an alleged agent's extrajudicial statements are not admissible to prove the fact of his agency, the fact may, when it rests in parol, be established on the trial by the testimony of the agent himself; he is a competent witness to prove the agency, and his testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject."

[4, 5] The agent Langguth testified, in respect to a conversation with plaintiff Rose, as follows: "Mr. Rose asked me if the Company would issue it (the bond), and I said, yes, we would * * *." Again, he testified: "We were working on a bunch of figures, and questions were asked by Mr. Rose, and I said, 'Yes, definitely, we will bond you'; and that was all there was to it." Such testimony, together with all the surrounding facts and circumstances proven by plaintiffs, would be sufficient to give rise to the inference that the agent was duly authorized by respondent to issue the bond. After the agent had testified, plaintiffs Rose and Syar were called to the witness stand, and corroborated the testimony of the agent. Their testimony is detailed above. While the admissions, statements and declarations of an agent, other than his own testimony in the case in which the issue arises, are not admissible to prove such agency, they are nevertheless admissible for such purpose after prima facie proof of such agency has been made. 2 Am.Jur., p. 352, § 445; 2 C.J., p. 938, § 692; 3 C.J.S., Agency, § 322.

It is contended that the evidence shows that the issuance of the bond was contingent upon the furnishing of a financial statement by appellants. This is a debatable question, and might have been resolved either way by the jury. Such evidence may therefore be disregarded on an appeal of this character. The testimony of the agent that: "definitely, we will bond you," certainly is in conflict with the theory that there was any contingency existing.

We are satisfied that, under the authorities cited above, plaintiffs made out a prima facie case, and that the trial court erred in granting the motion for nonsuit.

The judgment is reversed.

THOMPSON, Acting P. J., concurred.

51 Cal.App.2d 518

PEOPLE v. FITZGERALD.

Crim. 3558.

District Court of Appeal, Second District, Division 2, California.

April 28, 1942.

1. Criminal law 🔑1144(13)

On appeal by accused the evidence was viewed in the light most favorable to the prosecution.

2. Homicide 🔑257(1)

Evidence, including evidence of specific intent, sustained conviction of assault with deadly weapon with intent to commit murder.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Clarence Fitzgerald was convicted of assault with a deadly weapon with intent to commit murder, and he appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before the court without a jury defendant was convicted of assault with a deadly weapon with intent to commit murder.

[1] Viewing the evidence in the light most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

On the morning of October 30, 1941, appellant told his wife that "she had better be praying." About 7:30 that evening he left the house leaving his wife and daughter alone. About twenty minutes later he returned and called to his wife to open the front door, as his key would not work. She asked him what he wanted and he merely told her to open the door. Upon her refusal to open it, he fired a shot through the front door. He then poked the barrel of his gun through the hole in the glass and, pointing the gun in her direction, fired a second shot.

Defendant relies for reversal of the judgment on the proposition *that there is no substantial evidence to sustain the finding that defendant had the specific intent to murder his wife.*

[2] This proposition is untenable. We have examined the record and are of the opinion that there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn therefrom to sustain the findings of fact herein mentioned and each and every other material finding of fact upon which the judgment was predicated, including the specific intent on defendant's part to murder his wife; for example, there was direct testimony by eyewitnesses tending to establish the facts set forth above. In addition defendant's wife testified that at least twice on the day in question "he [defendant] had been telling me all day he was going to kill me; that I had better be praying." The record is free from error.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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51 Cal.App.2d 479

SAECKER v. METROPOLITAN LIFE INS. CO.

Civ. 2683.

District Court of Appeal, Fourth District, California.

April 27, 1942.

1. Insurance 🔑665(5)

Evidence justified denial of recovery on rider of life policy providing for additional benefits in event of insured's death through accidental means and not through suicide, on ground that death of insured who was found below a hospital window was result of suicide rather than an accidental fall.

2. Evidence 🔑222(2)
Witnesses 🔑406

In action on life policy with defense of suicide where insured's wife had testified that during a long illness insured mentioned suicide but that she had taken away all

possible weapons, and that shortly prior to the time he went to the hospital where he met his death, he had not mentioned suicide, testimony of insurer's witness as to a conversation with the wife about 11 months before insured's death, that she had found her husband in circumstances indicating an intent to commit suicide was not erroneously admitted on the ground that it called for "hearsay" and was too remote, especially since it did contradict the prior testimony of the wife.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

3. Appeal and error ⚷1054(1)

In action on a life policy with defense of suicide, permitting insurer's witness to testify to a conversation with insured's wife indicating that insured contemplated suicide over objection that the testimony was too remote and was hearsay, was not prejudicial to insured in view of other evidence supporting a finding of suicide and especially so where the case was tried to the court.

4. Appeal and error ⚷1033(3)

In action to recover on a life policy with defense of suicide, testimony of physician that insured had told physician that insured had once decided that the best thing for him to do was to commit suicide, but that he had finally reached the conclusion that he should go to a hospital and have something done to cure him, was not ground for reversal of judgment for insurer, since testimony was favorable to the beneficiary.

5. Appeal and error ⚷1071(3)

Action of trial court in finding an allegation of a complaint to be untrue, contrary to the fact, did not require a reversal where such finding was not controlling, and the finding which was sufficient to defeat recovery was supported by the evidence.

Appeal from Superior Court, Kern County; Pat R. Parker, Judge.

Action by Elizabeth F. Saecker against the Metropolitan Life Insurance Company to recover on a rider to a life policy providing for payment of additional sum in event insured's death occurred through accidental means, and was not suicidal in nature. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for appellant.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action upon a rider to a life insurance policy providing for the payment of an additional $1,000 in the event the death of the insured occurred through accidental means and was not suicidal in nature. The court found that the insured died as a result of self-destruction and the plaintiff, the widow of the insured, has appealed.

Appellant's main contention is that the evidence is insufficient to sustain the finding to the effect that the insured committed suicide. The deceased was found on the cement pavement below a window of a room on the third story of a hospital. It is conceded that his death occurred as a result of his falling from this window and there is no direct evidence as to whether that fall was accidental or whether the deceased intentionally jumped or threw himself from the window. The appellant relies upon the presumption against suicide and contends that all of the evidence supports rather than rebuts that presumption.

The insured, a man 63 years of age, had been ill for three years, suffering from a painful affliction. On January 1, 1940, he was taken to this hospital for the purpose of being built up so that he could more safely undergo a surgical operation. On the evening of January 4, the appellant and their daughter visited him and he appeared to be hopeful and more cheerful than he had been for a long time. When the appellant left the hospital that evening her husband asked her to bring his electric razor the following morning.

Near the foot of the insured's bed was a window the ledge of which was 27 inches from the floor and the window itself would open to a width of 31 inches. This window opened into a light well. At about 9 o'clock that night a nurse went into the room and raised the window about 8 inches from the bottom and adjusted the shade to the level of the window. The window screen was hooked. The insured was then in bed attired in a short hospital gown. At about 10 o'clock that night the nurse looked into the room and the insured was in bed and apparently quiet. At 10:45 o'clock that night the body of the insured was found on the concrete pavement of the light well at a point just below the window. He was then dressed in pajama jacket and trousers and had on sheepskin slippers. Immediately thereafter the room was examined and the window shade was found to be up, the window fully open, the screen unhooked and there was no damage to the blind, to the screen or to the window.

The appellant argues that the decedent's fall can be explained in other ways which are more reasonable than suicide; that he may have put on his trousers to go across the hall to the toilet; that he may have become dizzy and slipped and fallen while attempting to open the window; that he may have leaned out to observe something outside and lost his balance; that the facts that he was more cheerful and hopeful and requested that his razor be brought to him are inconsistent with an intention to commit suicide; and that there is nothing in any of the evidence which "necessarily negatives the presumption against suicide."

[1] The appellant particularly relies upon the case of Byers v. Pacific Mutual Life Ins. Co., 133 Cal.App. 632, 24 P.2d 829, as being factually similar to the instant case. In that case, however, the jury resolved the facts against the theory of suicide. While a similar finding might have been sustained here it is quite a different matter to hold that the evidence compels such a finding. It may here be said that the evidence points with equal, if not greater, force toward suicide than toward accident. See Valentine v. Provident Mut. Life Ins. Co., 12 Cal.App.2d 616, 55 P.2d 1243. The entire question is purely one of fact and not one of law and the evidence, with reasonable inferences therefrom, supports the finding made.

[2-4] The appellant further contends that certain evidence relating to prior statements of the insured with respect to committing suicide was incompetent and improperly received. The appellant testified, without objection, that her husband "had said he wished he could (commit suicide) because he was in so much pain, but he had never said that he would"; that he had no pistol at home; that "I had taken everything of that kind away immediately after he first said he wished he could"; that he had not mentioned taking his own life shortly prior to January 4, 1940; and that he had not mentioned such a thing "for quite a while; he just kind of joked about it sometimes when he was feeling bad, but hadn't talked seriously about it." The respondent's witness, Dr. McLain, was then allowed to testify as to a conversation he had with the appellant on February 15, 1939, over the objection that such testimony called for hearsay and was too remote. He testified that on that occasion the appellant stated to him that on the previous night she had gone downstairs and found her husband holding an empty revolver and looking for some shells, and that she had then put away all sharp instruments as a precaution. While the admission of this testimony seems questionable, it was a statement of what the appellant had herself told the witness and hardly hearsay as to her, and it did contradict or impeach her prior testimony to the effect that she had not put all sharp instruments away. While that conversation occurred some eleven months before the death of her husband it was during his long illness. Moreover, this testimony added nothing material to the facts previously testified to by the appellant. Without further discussing the question as to the admissibility of this evidence any possible error could not be held sufficiently prejudicial to justify a reversal in view of the other evidence supporting the finding of suicide and especially since there was no jury. Another doctor was allowed to testify, over the appellant's objection, that on January 1, 1940, the insured told him that he had finally reached the conclusion that he was going to have something done for himself; that sometime before he had thought that possibly the best thing for him to do was to commit suicide; that he had decided that this was not the thing to do; and that he had decided to go to a hospital to see if something could not be done to cure him. As the trial judge remarked regarding these statements of the insured, "The statement would seem to be his statement, instead of being an intention to destroy himself, it would be that of a man that had decided to preserve himself." This testimony was favorable to the appellant, rather than otherwise, and furnishes no ground for a reversal.

[5] The only other point raised is that the court erred in finding that an alle-

gation of the complaint is untrue. This allegation was that "due proof of the death of H. Julius Saecker as required by the terms and conditions of said policy and supplemental contract" had been made. the court found this to be untrue. It is admitted that the appellant made due proof of the death of the insured, and the only controversy was as to whether that death had occurred in a manner which was within the terms of the supplemental contract, that is, through accidental means and not by suicide. It is obvious that the court, in finding that this allegation of the complaint was not true, intended merely to find that death had not occurred in the manner and under the conditions which are within the terms of the supplemental contract. While the findings could be improved in this respect the matter is of little importance here, since the finding to the effect that the deceased died by suicidal intent is controlling whether or not the proper preliminary proof of death was furnished to the insurer.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

51 Cal.App.2d 444

PEOPLE v. MONTGOMERY.

Cr. 3534.

District Court of Appeal, Second District, Division 2, California.

April 25, 1942.

Hearing Denied May 21, 1942.

1. Habeas corpus 🔑27

The corrective judicial process of "habeas corpus" has been established for those who claim that they have been denied the right of due process or of equal protection of the laws, and a prisoner in custody, pursuant to final judgment, is entitled to a judicial inquiry by such process into the truth of the causes of his detention in order to test the jurisdiction of the court entering a final judgment. 28 U.S.C.A. § 451 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Habeas Corpus".

2. Criminal law 🔑1023(12)

Where accused moved to vacate a conviction in the court of its origin, an appeal was not maintainable from order denying such motion, but the only available relief from such conviction was an appeal from the judgment.

3. Criminal law 🔑1023(12)

Where a judgment of conviction is itself appealable, appeal must be taken therefrom and not from a subsequent order refusing to vacate the judgment.

4. Criminal law 🔑1014

An accused may not try out his contentions piecemeal by attacking the validity of a judgment of conviction against him in successive proceedings. Code Civ.Proc. § 1908.

5. Constitutional law 🔑250
Criminal law 🔑574, 635

The federal constitutional provisions regarding rights of accused to a speedy and public trial, etc., and in conferring equal protection of the law upon persons within a state do not prohibit the state of California from adopting its own rules of practice and procedure in trials and appeals. U.S.C.A. Const. Amends. 6, 14.

6. Criminal law 🔑998
Habeas corpus 🔑29

If in the application of the state of California's rules of practice and procedure in trials and appeals, an accused's liberty has been jeopardized by denial of his immunities under federal constitutional provisions regarding rights of accused to a speedy and public trial, etc., and conferring equal protection of the law upon all persons within a state, accused is entitled to an investigation of the facts preceding and attendant upon his conviction by habeas corpus, but such investigation may not be initiated by a motion to vacate such judgment. U.S.C.A. Const. Amends. 6, 14.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Charles W. Montgomery was convicted of pandering, and he appeals from order declining to assume jurisdiction of his motion to vacate the judgment of conviction. Order affirmed.

See, also, 117 P.2d 437.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appeal from an order refusing to assume jurisdiction to act in any way upon the motion of defendant to vacate the judgment of conviction while the appeal from such judgment was pending.

Defendant was convicted of pandering. The judgment of conviction was affirmed by this court (Division One) September 29, 1941, 117 P.2d 437. While this appeal was pending he presented his motion to vacate the judgment of conviction on the following grounds: (1) that the indictment of defendant was returned by a grand jury consisting entirely of white persons while he was a negro; (2) that there had been a systematic exclusion of colored persons in the impanelment of county grand juries over a period of years; (3) that by reason of such facts the indictment contravenes the Fourteenth Amendment to the Constitution of the United States in that it denied defendant the equal protection of the laws granted by such amendment; and (4) that all proceedings based upon the indictment were in contravention of the Fourteenth Amendment and void.

The court declined "to assume jurisdiction to act in any way on the motion as filed."

[1] A corrective judicial process has been definitely established for those who claim that they have been denied the right of due process or of equal protection of the laws. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; Ex parte Connor, 16 Cal.2d 701, 707, 108 P.2d 10; 28 U.S.C.A., chap. XIV, § 451 et seq.; Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406. Under those decisions a prisoner in custody, pursuant to final judgment is entitled to a judicial inquiry into the very truth and substance of the causes of his detention in order to test the jurisdiction of the court which entered the final judgment. Johnson v. Zerbst, supra, 304 U.S. page 466, 58 S.Ct. 1019, 82 L.Ed 1461.

[2] Instead of pursuing the historic remedial process provided by the above cited authorities, defendant chose to present a motion to vacate the judgment of conviction in the court of its origin. Appeal from the order denying such a motion is utterly without merit. A long line of decisions of this state have established that the only available relief from a final judgment of conviction is an appeal from such judgment. The defendant cannot present his motion to set aside a conviction and then appeal from the order denying such motion. People v. Simms, 41 Cal.App. 2d 466, 469, 107 P.2d 86; Alpers v. Bliss, 145 Cal. 565, 569, 79 P. 171; People v. Walker, 132 Cal. 137, 64 P. 133; Tripp v. Santa Rosa St. R. Co., 69 Cal. 631, 632, 11 P. 219; Henly v. Hastings, 3 Cal. 341.

[3] When a judgment is itself appealable, the appeal must be taken therefrom and not from a subsequent order refusing to vacate it. Alpers v. Bliss, supra, 145 Cal. page 569, 79 P. 171; Goyhinech v. Goyhinech, 80 Cal. 409, 22 P. 175; People v. Carkeek, 35 Cal.App.2d 499, 503, 96 P. 2d 132. This is especially true where the questions presented upon the appeal from the subsequent order could have been fairly and properly raised on an appeal from the judgment. People v. Bowles, 135 Cal. App. 514, 27 P.2d 411; People v. Ramirez, 139 Cal.App. 380, 33 P.2d 848.

[4] A defendant may not try out his contentions piecemeal by attacking the validity of the judgment against him in successive proceedings. Code Civ.Proc. § 1908; In re Connor, supra, 16 Cal.2d page 705, 108 P.2d 10; In re Drew, 188 Cal. 717, 207 P. 249.

[5, 6] Neither the Sixth nor the Fourteenth Amendment to the Constitution of the United States prohibits this state from adopting its own rules of practice and procedure in trials and appeals. Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166; People v. Kelley, — Cal.App. 2d —, 122 P.2d 655. If in the application of such rules a prisoner's liberty has been jeopardized by denial of his immunities under those amendments, he is entitled to a searching investigation into the facts preceding, and attendant upon, his conviction. Zerbst v. Johnson, supra. But such investigation may not be initiated by his motion to vacate such judgment. Alpers v. Bliss, supra.

Order affirmed.

W. J. WOOD, and McCOMB, JJ., concurred.

51 Cal.App.2d 777

PEOPLE v. MONTGOMERY.

Cr. 3561.

District Court of Appeal, Second District, Division 2, California.

April 25, 1942.

Hearing Denied May 21, 1942.

Criminal law ⇨1014
Habeas corpus ⇨29

Where judgment and conviction had been final for more than a year, accused could not attack conviction by an appeal raising the point of want of due process, but the correct procedure for attacking the validity of a judgment for alleged violation of federal constitutional provisions regarding rights of accused to a speedy and public trial, etc., and conferring equal protection of the law upon persons within a state was by habeas corpus. U.S.C.A.Const. Amends. 6, 14.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Charles W. Montgomery was convicted of pandering and the conviction was affirmed. From an order that the sentence theretofore imposed be placed in effect after return of a remittitur, defendant appeals.

Affirmed.

See, also, 117 P.2d 437.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

After appellant had been convicted of seven counts of pandering and attempted pandering, his appeal from the judgments entered therein was affirmed by this court. 47 Cal.App.2d 1, 117 P.2d 437. Upon the return of the remittitur the trial court ordered that the sentence theretofore imposed be "placed in full force and effect." Thereupon appellant took this appeal. Whether his appeal is from the court's order "placing the original judgments in full force and effect" or whether he attempts to appeal from the original judgments which became final more than fourteen months prior to the last-mentioned order is not clear.

To make the effort of appellant intelligible, we must infer that his purpose is to appeal from the last-mentioned order of the court authorizing enforcement of the judgments.

Basing our action and discussion upon that hypothesis, we now have the situation where the appellant had been convicted, the judgment and his conviction had been final for more than a year, and he now undertakes to attack it by raising the point of the want of due process in the proceedings prior to the judgment of conviction.

In People v. Montgomery, 125 P.2d 108, this day filed, we have disposed of the question raised by appellant on this appeal. It is there made clear that the time, method and procedure for attacking the validity of a judgment for the alleged violation of the provisions of the Sixth and Fourteenth Amendments to the Federal Constitution have been expounded in the cases of Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, and Ex parte Connor, 16 Cal.2d 701, 108 P.2d 10.

The order is affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

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51 Cal.App.2d 447

STOCKTON v. WEEKS.

Civ. 11806.

District Court of Appeal, First District, Division 1, California.

April 27, 1942.

1. Mines and minerals ⇨73

The term "bonus" as used in an oil and gas lease has no fixed meaning, and there must be a construction of the particular lease in each case.

See Words and Phrases, Permanent Edition, for all other definitions of "Bonus".

2. Mines and minerals ⇨77

Where option for exploration of oil and gas provided that prospective lessee should select at least 1,000 acres and pay prospective lessors as a bonus, $10 per acre for all acreage selected, and that lease should have a rider providing for payment of the $10 bonus for acreage selected, less $2,000 theretofore paid for option, and that payments should be made at rate of $1,000 every three months, and lease provided that lessee might at any time quitclaim lease, lessee had right to quitclaim realty to lessors at any time without liability for further payments of quarterly installments.

◆

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by R. L. Stockton and Frances E. Stockton, against Harry H. Weeks, to recover balance allegedly due to plaintiffs under the terms of an oil and gas lease. R. L. Stockton died pending the trial and Frances E. Stockton was substituted as sole party plaintiff. The defendant filed a cross-complaint asking for reformation of the lease in event it should be construed to bind him for the payment of any further sum. From an adverse judgment, Frances E. Stockton appeals.

Judgment affirmed.

Osborn, Burum & Shortridge, of Bakersfield, for appellant.

Samuel H. Wagener, of Oakland, and Carlson & Collins, of Richmond, for respondent.

MURPHY, Justice pro tem.

This action was brought in the county of Kern, California, to recover the sum of $10,600 alleged to be the balance due to the lessors under the terms of an oil and gas lease covering property in said county owned by plaintiffs, R. L. Stockton and Frances E. Stockton, husband and wife, the lessors. The action was transferred to Contra Costa County, the residence of the defendant and lessee, Harry H. Weeks. Pending the trial, Mr. Stockton died and his wife was substituted as sole party plaintiff. The lessee filed an answer denying liability for the payments claimed by the lessors and also filed a cross-complaint asking for reformation of the lease in the event it should be construed by the court to bind him to the payment of any further sum. From a judgment of the trial court in favor of the defendant and cross-complainant, the surviving lessor, plaintiff and cross-defendant below, has prosecuted this appeal.

In March, 1938, prior to the execution of the lease in question, the parties had entered into an option under which the respondent was given the right to take a lease for the exploration of oil and gas, for which option respondent paid appellant the sum of $1,000 and later paid an additional $1,000 for an extension thereof. The option provided that the respondent should select at least 1,000 acres and should pay to appellant, as a bonus, the sum of $10 per acre for all acreage selected. The option also provided that the lease should be executed on Form 86-c revised and should have attached to it a rider providing for the payment of this $10 bonus for all acreage selected, less the amount of $2,000 theretofore paid for the option. The option also provided that the payments should be made at the rate of $1,000 every three months from the date of the execution of the lease until the full sum had been paid.

Respondent selected 1,360 acres and the lease in question was executed in June, 1938. As finally executed the lease did not contain a rider using the term "bonus," as provided in the option, but paragraph 31 of the lease does provide for similar payments in quarterly installments and reads as follows:

"It is understood and agreed that $2000.00 has been paid on the above lease, and that there is now due and owing to the Lessors a balance of $11600.00, payable as follows: $1000.00 on August 12, 1938; and $1000.00 on or before each and every three months thereafter until the full amount of $11600.00 has been paid."

In August, 1938, respondent paid the first quarterly payment of $1,000 and thereafter erected a derrick on the land and started drilling operations. On November 8, 1938, he ceased drilling operations and notified appellant that he intended to avail himself of his right to return the property by quitclaim to the possession of the appellant, which right he claimed was given him by paragraph 27 of the lease which provides as follows:

"Lessee may at any time quitclaim this lease in its entirety or as to part of the acreage covered thereby, with the privilege of retaining ten (10) acres surrounding each producing or drilling well, and thereupon Lessee shall be released from all further obligations and duties as to the area so quitclaimed, and all rentals and drilling requirements shall be reduced pro rata. All lands quitclaimed shall remain subject to the easements and rights-of-way hereinabove proved for. Except as so provided, full right to the land so quitclaimed shall revest in Lessor, free and clear of all claims of Lessee, except that Lessor, his successors or assigns, shall not drill any well on the land quitclaimed within three hundred & thirty (330) feet of any producing or drilling well retained by Lessee."

The trial court found that respondent had the right so to quitclaim and entered judgment accordingly, thus rendering unnecessary any finding on the cross-complaint.

Appellant contends that the provision of the lease and option providing for the payment of a bonus of $10 per acre in quarterly payments of $1,000 called for the payment of a cash bonus, in quarterly installments, totaling the aggregate amount prayed for, the obligation to pay which became fixed and final when the lease was executed and, therefore, that respondent did not have the right to avoid this obligation by quitclaiming the property. In support of her position, appellant relies on a number of cases and authorities interpreting the word "bonus" as used in oil and gas leases, to the effect that "bonus" is the consideration for the execution of the oil and gas lease and that it is immaterial whether the bonus is to be paid in installments or in full at the time of execution.

The principal case relied upon by appellant is that of Elsinore Oil Co. v. Signal Oil & Gas Co., 3 Cal.App.2d 570, 40 P.2d 523, but we believe that it is clearly distinguishable from the case at bar. In the Elsinore case the defendant entered into an oil and gas lease under the terms of which he leased from the plaintiff a 40-acre tract of land known as Parcel No. 1. Prior to this the defendant had leased from the plaintiff another tract designated as Parcel No. 2, also for the development of oil and gas. In accordance with the terms of the lease, the defendant lessee agreed "to pay to lessor as a bonus One Hundred Fifty Dollars per acre for the premises above described * * * payable only out of twenty-five per cent of the proceeds derived from the sale of the oil produced, saved and sold" from Parcel No. 2. A provision was also made for one-sixth royalty payment from the oil produced in Parcel No. 1. The lease also contained a quitclaim provision similar in character to that found in paragraph 27 of the lease involved in the case at bar. The defendant quitclaimed the lease after a period of two months. At the time of the quitclaim, 25 per cent of the sale price of oil from Parcel No. 2 equalled $1,854.99. Thereafter the plaintiff waited until sufficient oil had been produced from Parcel No. 2 and then brought suit for the entire sum of $6,000.

In its opinion in the Elsinore case the court regarded the individual lease as a matter of construction and the decision does not establish any hard and fast rule which can be applied to all oil and gas leases in cases where a monetary consideration is provided in addition to royalty and deferred drilling rentals. The court determined that as to the particular lease the evident intention of the parties was that the consideration for the lease was the entire $6,000. In the case at bar it is apparent that no such evident intention is discernible in the lease/and there was an obvious difference in the consideration by reason of the fact that respondent had already paid the sum of $2,000 on the option of the property which was credited on the lease. Furthermore, under the terms of paragraph 31 of the instant lease respondent agreed to pay an additional $1,000 to the appellant for every three months he retained the lease whether any development work was accomplished or not. In the Elsinore case there was no obligation to pay any sums of money at all even though the lessee retained the lease. In the instant case, however, appellant was certain of getting the money as long as respondent remained in possession. The evidence is that appellant actually collected $3,000 for the option and lease of oil lands which proved to be worthless and that the property was tied up under both option and lease for a total period of nine months.

[1, 2] The other cases relied upon by appellant are likewise distinguishable from the case at bar, but it is not necessary to analyze them because no fixed and unvarying meaning can be applied to the term "bonus" without a construction of the particular lease in each case, and in the case at bar, as found by the trial court, paragraph 27 of the agreement clearly gave respondent the right to quitclaim the property at any time without liability for further payments of the quarterly installments.

Not only did the trial court so interpret paragraph 27, but this conclusion is also supported by the testimony. Respondent testified that they had refused to pay the full amount of the cash bonus at one time because they "wanted an opportunity to find out if the land was worth it" and a chance to prove whether it was oil or gas land.

We agree with the trial court's interpretation of the lease and there is ample evidence to support its findings and judgment. Accordingly, the judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

51 Cal.App.2d 520

CHAMBERLAIN CO. v. ALLIS-CHALMERS MFG. CO.

Civ. 12928.

District Court of Appeal, Second District, Division 3, California.

April 28, 1942.

1. Sales 🔑261(1)

Statement in written sales contract that pumice sifter would grade two tons per hour of dry pumice at 98½ per cent. efficiency was an "express warranty" within the definition of the Uniform Sales Act. Civ.Code, § 1732.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Warranty".

2. Sales 🔑261(3)

Under the Uniform Sales Act, the use of the word "warrant" or other form of words is not necessary to the creation of an express warranty in a sales contract. Civ. Code, § 1732.

3. Sales 🔑261(5)

Provision in Uniform Sales Act that no affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty, did not remove statement in contract of sale that sifter would grade two tons per hour of dry pumice at 98½ per cent. efficiency, from classification as an "express warranty". Civ.Code, § 1732.

4. Sales 🔑262

In action for breach of warranty of the efficiency of a pumice sifter purchased by plaintiff under written sales contract, stipulation that the words "at 98½ per cent. efficiency" were inserted in the contract provision relating to the use of the sifter at plaintiff's request established that plaintiff relied on such affirmation of fact in making the contract. Civ.Code, § 1732.

5. Contracts 🔑143

In construing a contract, the whole of it is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other. Civ. Code, § 1641.

6. Sales 🔑261(1)

The provisions in a contract for the sale of a pumice sifter, inserted immediately following the description of the sifter, stating that it was to be used to grade two tons per hour of dry pumice through certain screen meshes at 98½ per cent. efficiency, was a promise by the seller, the natural tendency of which was to induce the purchase thereof and constituted an "express warranty". Civ.Code, § 1732.

7. Sales 🔑261(2)

Under the Uniform Sales Act, an intent to warrant is not a necessary ingredient of an "express warranty". Civ.Code, § 1732.

8. Contracts 🔑147(2)

One who executes a contract must be held to intend whatever on a proper construction is found to be the legal effect of its provisions.

9. Sales 🔑261(2)

Sales contract provision, which declared that all terms and provisions of contract were fully set out therein and that no agent was authorized to bind seller by any warranty not therein expressed, did not exclude implication of an intent to warrant so as to prevent construction of elliptically stated provisions in contract to show existence of express warranty.

10. Sales 🔑260

Provision, in sales contract under which seller agreed and reserved right to repair pumice sifter sold which proved to be defective as to material, workmanship, or design, was not inconsistent with warranty of efficiency of sifter.

11. Appeal and error ⚿882(11)

Where, at trial of action for breach of warranty of efficiency of pumice sifter, parties agreed that, if trial court found that there was no warranty in the sales contract, no evidence of breach of warranty or damage caused thereby would be presented, and trial court ruled that there was no warranty contained in such contract, on appeal defendant could not raise contention that judgment should be affirmed because of plaintiff's failure to prove, or offer to prove such breach or damage.

12. Sales ⚿260

Provision, in conditional sales contract, constituting a separate paragraph excusing seller from delays in performance unavoidable or beyond its control, did not excuse a breach of express warranty, since a "breach of warranty" is not a "delay", nor beyond seller's control.

See Words and Phrases, Permanent Edition, for all other definitions of "Breach of Warranty" and "Delay".

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Chamberlain Company against Allis-Chalmers Manufacturing Company for breach of warranty in written contract of sale of machinery, wherein defendant counterclaimed for balance due under contract. From judgment for defendant, plaintiff appeals.

Reversed.

Salisbury, Robinson & Himrod, of Los Angeles, for appellant.

LeRoy B. Lorenz, of Los Angeles, for respondent.

SHAW, Justice pro tem.

The plaintiff bought from the defendant a sifting machine, the transaction being embodied in a written contract. The machine was delivered to and operated for a time by the plaintiff. Thereafter, the plaintiff brought this action to recover damages for breach of warranties of the machine. The answer denied the existence of the warranties sued on, and also set up a counterclaim for a balance due and unpaid on the purchase price of the machine. Judgment went against plaintiff on its complaint and for defendant on its counterclaim, from which plaintiff appeals.

At the trial it was stipulated that the balance of the price, as alleged in the counterclaim, was due by the terms of the contract and unpaid, leaving for consideration only the questions arising on plaintiff's claims of breach of warranty. In its amended complaint plaintiff alleged both what it claimed to be an express warranty of the efficiency of the sifter, set forth in the contract, and also an implied warranty, raised by the law, of its fitness for the purposes of plaintiff. We conclude that there was an express warranty, and therefore deem it unnecessary to discuss the points made regarding implied warranty.

The provision of the contract upon which plaintiff relies to state an express warranty reads thus: "Allis-Chalmers Manufacturing Company, hereinafter called the Company, proposes to furnish the Purchaser, on the following conditions, the machinery described below, or in the Company's specifications attached, which are made a part of this proposal, f.o.b. cars point of shipment. One (1) Nordyke Square Sifter #4-22 lined with rubber and to be used to grade two tons per hour of Dry Pumice through the following screen meshes at 98½ per cent efficiency. * * *" Following this is a schedule of screen sizes. No specifications appear to have been attached to the contract. At the trial it was stipulated that the words "at 98½ per cent efficiency" were inserted here in the contract at the request and upon the insistence of plaintiff.

[1, 2] Plaintiff contends that the part of the contract above quoted is a warranty that the sifter will grade two tons per hour of dry pumice at 98½ per cent efficiency through the screen meshes listed, and we think this contention is well taken. Section 1732 of the Civil Code, which is a part (section 12) of the Uniform Sales Act, in force in this state since 1931, defines an "express warranty" as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." The terms of this section do not require the use of the word "warrant" or any other

such formal words to create a warranty, and the rule established long before the adoption of the Uniform Sales Law is that no such words are necessary. (Cole v. Weber, 1924, 69 Cal.App. 394, 397, 231 P. 353).

[3, 4] Obviously, the language above quoted from the contract is not and does not purport to be a mere statement of the seller's opinion, so the last sentence of section 1732 does not preclude it from being regarded as a warranty. The stipulated fact that plaintiff insisted on having additional words inserted in this provision is enough to show, if more than its mere wording and plaintiff's signature to the contract were needed, that plaintiff relied thereon in making the purchase.

[5, 6] Defendant argues that the words of the contract beginning with "to be used" are not an affirmation of fact or a promise by the seller, but are "what the buyer informed the seller it intended to do with the goods purchased." Mere reading of the provision as a whole shows that the words referred to by defendant are not cast in the mold suggested. They are, as located in the contract, a part of defendant's proposal to plaintiff and must have been intended by it to convey some idea to plaintiff. Defendant also contends that the words inserted in the contract at plaintiff's request are worth nothing, because of their context. But in construing a contract, the whole of it "is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ.Code, § 1641.) We therefore look for some useful purpose to be served by the clause introduced by the words, "to be used." The words just preceding them are doubtless descriptive of the article sold, and the list of screen sizes serves in part the same purpose. But what purpose can be served by the words, "to be used to grade two tons per hour of Dry Pumice through the following screen meshes at 98½ per cent efficiency," except that of an assurance to the purchaser of the capacity and efficiency of the article described? We see none. Such a provision might reasonably be expected in a contract of sale of a machine, and while possibly more apt words could have been found, those used are not incapable of the meaning that the sifter will have a 98½ per cent efficiency when used as stated. We therefore ascribe that meaning to them. So construed they amount to a promise by the seller, their natural tendency would be to induce the purchase, and by the terms of section 1732 of the Civil Code they are an express warranty.

[7, 8] Defendant also contends that an intent to warrant is a "necessary ingredient of an express warranty," citing Miller v. Germain Seed & Plant Co., 1924, 193 Cal. 62, 75, 222 P. 817, 32 A.L.R. 1215, to that effect. That case and others stating the same rule were decided before the adoption of the Uniform Sales Act in this state. Before the drafting of that act there was much conflict in the decisions in various jurisdictions regarding the necessity for such an intent. (See 2 Mechem on Sales, (1901) § 1237.) The uniform act (Civ.Code, § 1732) does not purport to require any such intent, and its effect is to dispense with the necessity therefor. (See 1 Williston on Sales, (1924) 2d ed., §§ 199-201. See, also, note to draft of § 12 of the Uniform Sales Act in 1903 Report of American Bar Association, vol. 27, p. 509, by Samuel Williston, and same note attached to § 12 of the final draft of the same act in 1906 Report of American Bar Association, vol. 30, p. 351.) These notes state that the purpose of the act is to dispense with the intent to warrant as a necessary ingredient of an express warranty. But if such intent is necessary it need not be stated in express words; it may be inferred from circumstances. (Miller v. Germain Seed & Plant Co., supra.) The statement of capacity and efficiency is, as the court said of the description of seed in that case, a vital fact to the buyer, and from it and the statement of intended use an intent to warrant is inferred. Moreover, one who executes a contract must be held to intend whatever, on a proper construction, is found to be the legal effect of its provisions.

[9] The contract contains this further provision: "All the terms and provisions of the contract between the parties hereto, are fully set out herein, and no agent * * * is authorized to bind the Company by any * * * warranty * * * not herein expressed. * * *" Defendant refers to this provision as excluding any inference or implication of an intent to warrant and any construction of the previously discussed provision as a warranty. We think it has no such effect. It does not declare that the provisions "fully set

out" or "expressed" in the contract are not elliptically stated, or not in need of construction to ascertain their scope and meaning, nor does it prevent any of them from being given their proper effect as thus ascertained.

[10] Defendant also argues that the provision in which we find a warranty cannot be so construed because such construction would render it inconsistent with this provision of the contract: "The company agrees, and shall have the right, to repair f.o.b. works where made * * * any portion of the machinery of its own manufacture which within one year after shipment is proven to have been * * * defective as to material, workmanship or design * * *." Granting that failure of the sifter to operate with the warranted efficiency would be due to defects of either material, workmanship or design, we see no inconsistency between the warranty and the covenant to repair. The latter may cover many defects which do not result in a breach of the warranty, and also gives the defendant an opportunity to make good its warranty if it can; but if defendant cannot or will not do so, as alleged here, there is nothing about this covenant inconsistent with enforcement of the warranty.

[11] Defendant contends that the judgment must be affirmed because plaintiff did not prove or offer to prove either a breach of warranty or any damage caused thereby. It is true, plaintiff's proof and offers did not cover these matters, but this was because of an understanding had at the trial that before going into them the court would determine whether there was an express warranty, and if it determined there was none, as it did, no further evidence would be received. Soon after the beginning of the trial the court ruled that there could be no implied warranty. Thereafter the proceedings at the trial consisted principally of offers of proof by plaintiff. After these had proceeded for some time a discussion arose between counsel on the question whether the contract contains an express warranty, and the court suggested that this question be submitted on briefs, which was done, and the trial was continued some time for that purpose. At the same time the court said: "* * * counsel have informed the court that if the contract is interpreted to contain an express warranty that there will be several days, variously estimated at from one and a half to four or five days of scientific testimony necessary, so it seems that the more expeditious way of handling the matter would be to brief the question of law in reference to the interpretation of this contract, as to whether or not it contains an express warranty. If the court determines that this contract does contain an express warranty it will be necessary then to have evidence presented on behalf of the plaintiff as to where the express warranty was not fulfilled. If the court determines that there is not an express warranty the plaintiff's action falls and there is no need of such testimony. * * * I am asking for that so if the court determines that there is no express warranty it is understood that judgment will be given for the defendant on the counterclaim, however, if the court determines that there is, as a result of your briefs, an express warranty, then the case will come back for the testimony which I have referred to." This was agreed to by both parties, except that plaintiff's counsel indicated a desire to "complete some additional matters of proof" in case of "an adverse ruling on this particular matter." When the trial was resumed the court stated its conclusion that there was no express warranty, the record from which we have just quoted was read, and plaintiff proceeded with further offers of proof on the points last mentioned. Nothing further was said about proof of breach of warranty or of damages, and no objection based on the lack of it was made at the trial. Under these circumstances the question may not now be raised in this court.

[12] Defendant further contends that the damages alleged in the complaint are all consequential in nature, and that the plaintiff is barred from recovering such damages by the following provisions of the contract: "This contract is contingent upon strikes, fires, accidents or other delays unavoidable or beyond the reasonable control of the Company. The Company shall not be held responsible or liable for any loss, damage, detention or delay from any cause beyond its control, or in any event for consequential damages; and the receipt of the machinery by the Purchaser shall constitute a waiver of any and all claims for loss or damage due to any delay." This provision constitutes a separate paragraph of the contract, and it is clearly directed at one subject only, that is, delays in per-

formance by defendant that are "unavoidable or beyond the reasonable control of" defendant. A breach of warranty is not a delay, nor is it, as far as now appears, beyond the defendant's control. (See Excelsior Motor, etc., Co. v. Sound Equipment, Inc., 7 Cir., 1934, 73 F.2d 725, 728.)

The judgment is reversed.

SCHAUER, P. J., and SHINN, J., concurred.

51 Cal.App.2d 492

MEEK v. MEEK.

Civ. 3031.

District Court of Appeal, Fourth District, California.

April 27, 1942.

1. Divorce 🔑309

Where all three of spouses' children were minors at time of entry of decree granting wife divorce and ordering husband to pay her specified sum monthly for support of herself and children, as provided in property settlement agreement made part of decree, and second child became of age after entry of order denying husband's petition for modification of decree by reducing amount of monthly payments and before his institution of further proceedings for modification thereof, there was sufficient change in parties' situation to render "res judicata" doctrine inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Divorce 🔑245(1), 254

An award of alimony to divorced wife is subject to modification by court to meet changed conditions, but property agreement between spouses, though approved by court in divorce action, is not thereafter subject to modification by court. Civ.Code, § 139, as amended by St.1933, p. 1039.

3. Divorce 🔑309

Where spouses' property settlement contract and final decree granting wife divorce provided that husband should pay her stated sum monthly for support of herself and spouses' three minor children, court had jurisdiction to modify decree by reducing amount of monthly payments after two of children reached age of majority.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Suit by S. A. Meek against Ellen C. Meek for divorce. From an order denying plaintiff's petition for modification of a final decree granting defendant a divorce and ordering plaintiff to pay defendant a stated sum per month for support of the parties' minor children, plaintiff appeals.

Reversed, with directions.

Martin Thuesen, of Fresno, for appellant.

Harold M. Child and L. N. Barber, both of Fresno, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from an order denying appellant's petition for a modification of a final decree of divorce.

In May, 1934, respondent was granted an interlocutory decree of divorce from appellant and it was ordered that appellant pay to respondent for the support and maintenance of respondent and the three minor children of the parties the sum of $100 per month, and it was further ordered that "the property settlement heretofore entered into being between the parties hereto be, and the same is hereby, approved and made a part of this decree." The same provisions were incorporated in the final decree entered in May, 1935. Said property settlement agreement provided that appellant would pay to respondent "the sum of $100 per month for the support, maintenance and education of said first party and said minor children."

[1] At the time of the entry of the final decree all three of said children were minors, but at the time of the hearing of the petition for modification only one was still a minor. Several previous petitions for modification had been denied and the trial court in denying the petition and in the order now appealed from, provided:

"5. That the grounds upon which all of said prior applications were made were substantially the same as the grounds set forth in the moving papers herein, and there has been no material change in the situation of the parties since the adjudication of the court upon the previous applications for said orders.

"It is the conclusion of the court from the foregoing facts that the court has no jurisdiction to modify the final decree of divorce upon the grounds set forth in the plaintiff's notice of motion, and that the matter is res judicata, and that It Is Therefore Ordered that the motion for an order modifying said final decree be and it is hereby denied."

After there had been a partial hearing of appellant's petition, respondent renewed her objection, made at the beginning of the hearing, that the court had no jurisdiction to grant the petition because of the provisions in the contract and the decree, and the court thereupon sustained the objection and denied the petition.

The second child of the parties became of age after the prior order and before the present proceedings were instituted. This is a sufficient change so that the doctrine of res judicata could not apply.

[2] It is conceded by both parties that the sole question to be determined upon this appeal is whether the court had power to reduce the amount of $100 per month provided for in the agreement and in the final decree because of the fact that two of the three children of the parties are no longer minors. As was said by our Supreme Court in the case of Miller v. Superior Court, 9 Cal.2d 733, 737, 72 P.2d 868, 871:

"There are certain generally settled distinctions between alimony awarded by the court and payments due by virtue of property settlement between the parties. An award of alimony is subject to modification by the court to meet changed conditions. Ross v. Ross, 1 Cal.2d 368, 35 P.2d 316; Armstrong v. Armstrong, 132 Cal. App. 609, 610, 23 P.2d 50; section 139 Civ.Code, as amended by St.1933, p. 1039. A property agreement, although approved by the court in the divorce action, is not thereafter subject to modification by action of the court. Ettlinger v. Ettlinger, 3 Cal. 2d 172, 44 P.2d 540; Moran v. Moran, 3 Cal.2d 342, 44 P.2d 546; Parker v. Parker, 55 Cal.App. 458, 203 P. 420."

In the case of Hodgson v. Hodgson, 6 Cal.App.2d 496 at page 499, 44 P.2d 544, at page 545, the court said: "We are likewise of the opinion here that upon the authority of the case of Ettlinger v. Ettlinger, supra, the property settlement in the instant case, having been accepted and adopted by the trial court, and incorporated in the interlocutory decree, became a binding settlement and is not subject to modification. What we have said relates only to the provisions of the agreement relating to alimony or support of the former wife—no attempt was made to reduce the amount of the allowance for the support of the minors, and that issue is not before us."

[3] In the instant case it will be noted that the language of the contract and also the final decree is that appellant will pay to respondent the sum of $100 per month for the support, etc., of herself and the minor children. If the agreement and decree had provided that said sum was to be paid to respondent for her support and maintenance, it is clear under the authorities that the court would not have the power to change the amount. But it cannot be doubted that a portion of the said sum of $100 per month was agreed upon and provided for said minor children. There is nothing in the agreement from which we would be justified in concluding that the parties agreed that the respondent wife should continue to receive the said sum of $100 per month for her support and maintenance after the minor children became of age. If such were the intention, it could easily have been written into the agreement. It does not appear from the agreement itself just what property the parties owned at the time of its execution, but it does appear from the agreement that respondent wife received all of the property of the parties except an automobile.

So far as we have been able to discover there is no California case dealing with this precise question. However, in the case of Keith v. Keith, 270 Ky. 655, 110 S.W.2d 424, 427, decided by the Court of Appeals of Kentucky in 1937, the facts are very similar to those of the instant case and the reasoning of that case commends itself to us. In the case cited a decree of divorce was granted to the wife in 1932 and the custody of four minor children was likewise awarded to her, and there was incorporated in the decree of divorce the agreement of the parties whereby the husband was to pay to the wife $90 per month for the support of herself and the said minor children. A petition was filed by the husband in 1936, to reduce the amount required to be paid by him upon the ground that one of the children had reached the age of majority and another was self-supporting. The trial court denied the petition upon the ground that the agreement which was incorporated in the judgment did not contain any reservation authorizing a reconsideration of the matter. In reversing the order of the trial court the Supreme Court of Kentucky said:

"We now come to a consideration of the case on its merits. It is appellee's contention that the judgment being a 'consent' or agreed one between the parties, it is final and not subject to be reopened or reconsidered by the court; on the other hand, it is the argument of appellant that the judgment is controlled by sections 2121 and 2123 of our Statutes, and is subject to review and modification by the court.

"It is the contention of appellee that the judgment was not an allowance for the children but for the wife, and for that reason it is final. We cannot accept such construction of the judgment. It is true that the judgment does not specifically set out that it is for the benefit of the wife alone or the children alone, or for the joint benefit of all of them. The judgment recites that the appellee was to have care and custody of the children and provide for them. No separate allowance was made or mentioned for the children. It is not reasonable to presume that the $90 a month was intended to be for the sole benefit of the wife, appellee, without making any provision for the children. Parks v. Parks, 209 Ky. 127, 272 S.W. 419. Appellee relies upon the case of Keach v. Keach, 217 Ky. 723, 290 S.W. 708. In that case the wife was allowed $150 a month alimony for her sole benefit and in addition thereto the husband was to pay $75 a month for the benefit of their child, a daughter fourteen years of age. Later he sought to have the $150 per month allowance to the wife modified, and it was held that the judgment in favor of the wife was final and could not be reopened except for fraud or mistake. But the child was not involved. To the same effect, see Scott v. Robertson, 212 Ky. 392, 279 S.W. 625, and Jones v. Jones, 216 Ky. 810, 288 S.W. 737. It appears that counsel for appellee has failed to grasp the distinction between the rules applicable where the wife is allowed a definite sum of alimony for her sole benefit, and where the alimony or allowance was allowed for the benefit of children, or wife and children jointly, as was done in the present case. Parks v. Parks, supra. * *

"At the time the original judgment was entered in 1932, all the children were infants, but it appears from appellant's motion and affidavit two of the children have attained their majority, and appellant is under no legal duty to support the two adult children.

"However, we express no opinion as to whether or not the monthy payments which are now for the benefit of appellee and infant children should be reduced, but reserve that question. But our conclusion is that the court erred in dismissing appellant's motion upon the ground that the judgment was final and could not be reopened. The chancellor should have determined appellant's motion upon the evidence and the merits of the case."

We conclude that in the case at bar, the provision in the contract and in the final decree being that appellant should pay to respondent the sum of $100 per month for the support and maintenance of respondent and said minor children, the trial court erred in deciding that it did not have jurisdiction or power to modify said final decree notwithstanding the fact that two of the minors had reached the age of majority. We believe, therefore, that the order of the trial court denying appellant's petition should be reversed and that the trial court should proceed to hear the said petition upon its merits in the light of the changed condition as to the minority of said children, and determine what reduction, if any, should be made in the monthly sum to be paid to respondent. We are, of course, expressing no opinion as to the amount of said reduction, if any, as that is a matter exclusively for the trial court to determine upon its merits.

It is so ordered.

BARNARD, P. J., and MARKS, J., concurred.

51 Cal.App.2d 419

BURKE v. W. R. CHAMBERLIN & CO. et al.

Civ. 13403.

District Court of Appeal, Second District, Division 2, California.

April 25, 1942.

Hearing Denied June 22, 1942.

1. Seamen ⚷29(5)

In action against managing owner of steamship for injuries sustained by seaman, while in hold of steamship, when struck by landing block catapulted from dock, evidence sustained finding that owner's employee was negligent in placing landing block on dock and in leaving block in such position that wheel of lumber carrier rolled upon block and caused it to fly through the air. Jones Act, 46 U.S.C.A. § 688.

2. Appeal and error ⚷1008(1)

In action against managing owner of steamship for injuries sustained by seaman, while in hold of steamship, when struck by landing block catapulted from dock, whether negligence of owner's employee in leaving landing block on dock in such position that wheel of lumber carrier rolled upon the block and caused it to fly through the air was proximate cause of the seaman's injuries was a "question of fact" for the trial court. Jones Act, 46 U.S.C.A. § 688.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Seamen ⚷29(1)

In action against managing owner of steamship for injuries sustained by seaman, while in hold of steamship, when struck by landing block catapulted from dock, where steamship owner's stevedore left block on dock near lanes of travel of lumber carrier which ran over block and caused it to fly through the air, the act of lumber carrier operator in driving on the block did not constitute an "efficient intervening cause" precluding recovery from owner, where the operator had not seen the block. Jones Act, 46 U.S.C.A. § 688.

See Words and Phrases, Permanent Edition, for all other definitions of "Efficient Intervening Cause".

4. Seamen ⚷29(1)

In action against managing owner of steamship for injuries sustained by seaman, while in hold of steamship, when struck by landing block catapulted from dock, where shipowner's stevedore left landing block on dock near lane of travel of lumber carrier and wheel of carrier rolled on block and caused it to fly through the air, stevedore's failure to anticipate the movement of the carrier was negligence which justified finding that such failure constituted the "proximate cause" of the seaman's injuries. Jones Act, 46 U.S.C.A. § 688.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

5. Negligence ⚷62(1)

Where a person has caused a dangerous instrumentality to be placed in a position at which it may effect injurious results to others, the person is answerable for such injuries as may ensue in the ordinary course of events, even though an intervening cause serves as a condition on which the dangerous instrumentality may have acted to effect the injury.

6. Negligence ⚷62(1)

The intervention of any number of agencies may operate upon an original wrongful act to effect an injurious result, but if they could, by the exercise of reasonable care, have been foreseen by the first wrongful actor, his negligent act continues to be a "proximate cause".

7. Seamen ⚷29(1)

In action against managing owner of steamship for injuries sustained by seaman, while in hold of steamship, when struck by landing block catapulted from dock, where steamship owner's stevedore left block on dock near lanes of travel of lumber carrier which ran over block and caused it to fly through the air, even if the act of lumber carrier operator in driving upon the block was negligent, and concurred to cause the seaman's injuries, such fact would not preclude recovery from the steamship owner. Jones Act, 46 U.S.C.A. § 688.

8. Seamen ⚷29(1)

In action against managing owner of steamship for injuries sustained by seaman, while in hold of steamship, when struck by landing block catapulted from dock, where steamship owner's stevedore left block on dock near lanes of travel of lumber carrier which ran over block and caused it to fly through the air, the steamship owner and owner of lumber carrier would be responsible to the seaman if their negligent acts had concurred to cause the injury. Jones Act, 46 U.S.C.A. § 688.

9. Release ⟹37

An agreement that plaintiff should dismiss his action against lumber company, that he would not file suit against lumber company, and that if he filed suit against any other party he would indemnify the lumber company for any loss occasioned thereby, constituted a "covenant not to sue" and not a "release" of tort-feasors whose negligence caused plaintiff's injuries.

See Words and Phrases, Permanent Edition, for all other definitions of "Covenant Not to Sue" and "Release".

10. Dismissal and nonsuit ⟹42

Unless an order for dismissal on file with clerk provides that dismissal is with prejudice, it is a dismissal without prejudice.

11. Dismissal and nonsuit ⟹42

A dismissal of an action operates as a bar to its renewal only when the dismissal is based upon, and entered in pursuance of, an agreement of the parties, and when it is understood by them to amount to an adjustment of the merits of their controversy. Code Civ.Proc. § 581, subd. 1.

12. Dismissal and nonsuit ⟹42

Where it is made to appear from the language of agreement to dismiss that the parties intended a dismissal without prejudice, the plaintiff is at liberty to file a new action. Code Civ.Proc. § 581, subd. 1.

13. Dismissal and nonsuit ⟹29

Where seaman, employed by managing owner of steamship, was injured through alleged concurrent negligence of owner and lumber company and seaman entered into agreement providing that he should dismiss his action against the lumber company, that he would not file suit against the lumber company and that if he filed suit against any other party he would indemnify the lumber company for any loss occasioned thereby, a dismissal entered by the seaman pursuant to the agreement was not a "retraxit" and did not preclude maintenance of personal injury action against the steamship owner. Code Civ.Proc. § 581, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Retraxit".

14. Dismissal and nonsuit ⟹29

To constitute a "retraxit" a judgment of dismissal must be made in open court upon motion of plaintiff's counsel of record when plaintiff understands that he is thereby renouncing forever his cause of action alleged against the defendant.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Geo. A. Dockweiler, Judge.

Personal injury action by James E. Burke against W. R. Chamberlin & Company and others. From an adverse judgment, W. R. Chamberlin appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, and Murray H. Roberts, of San Francisco, for appellant.

Herbert R. Lande, of San Pedro, for respondent.

MOORE, Presiding Justice.

Plaintiff's action is for damages resulting from injuries received while at work in the hold of defendant's steamship moored in Los Angeles Harbor. While so working a 4″ x 4″ timber, four feet long, herein referred to as a landing block, was catapulted from the dock causing the serious bodily bruises of which he has complained. He at first sued San Pedro Lumber Company, whose agent had superinduced the flight of the landing block from the surface of the dock. For a consideration he agreed by a writing to dismiss that action and not to prosecute the Lumber Company again.

We have before us two questions, namely (1) Does the evidence support the finding of the negligence of appellant? (2) Do the agreement and the dismissal of the first action constitute a retraxit of his claim against appellant?

Appellant was the managing owner of the steamship "W. R. Chamberlin, Jr." which, laden with lumber was moored at the dock of the San Pedro Lumber Company. Plaintiff was engaged as a seaman by defendant to assist in the unloading of the cargo from the steamship to the dock. The lumber was lifted from the vessel with a sling. Each sling load was 2 feet high and 2 feet wide. Four of such loads make a load for the lumber carrier, a ten-ton gas propelled machine which removed the lumber from the dock. One Norris Perry, an employee of the San Pedro Lumber Company operated the carrier. In preparing for the arrival of the sling load and the approach of the carrier to its position for receiving its burden, two carrier blocks are placed on the dock. The blocks are made so that the operator of the carrier can project his lifting device underneath the carrier blocks and raise the lumber and the blocks in order to drive the carrier to the place for depositing the lumber. The blocks are placed so that the sling loads lie at right angles across both of them. The events preceding the accident occurred in this fashion: while Perry in his carrier was near the position designated for placing temporarily an extra load of lumber, he instructed the longshoremen, employees of defendant, to put the extra load between the places for the regular carrier load and the edge of the dock. In arranging for extra load, they took two landing blocks (four foot timbers, 4 inches wide and 4 inches thick), and laid them at right angles to, and one end of each upon, the stringer which ran along the edge of the dock and about 6 inches above its asphalt surface. Here the extra load should lie until the usual location for a carrier load would be cleared for a new load upon carrier blocks. On Perry's return the full carrier load lay in position opposite the location at which the men had placed the landing blocks resting on the stringer. After lifting the carrier load off the dock Perry backed his machine and turned his wheels four inches to the right in order to veer away from the gang plank which extended on to the dock about 10 feet. In doing so, the right front wheel of the carrier ran upon the end of one of the landing blocks which Perry had not seen before and which the stevedores had permitted to remain after the extra load had been removed from them. The timber was so pinched by the 10 inch tire of the carrier that it was catapulted from the dock into the hold of the vessel where all the seamen were building up loads. It struck respondent's head and body, causing his injuries.

The finding of the court with reference to the accident is substantially as follows: while the vessel was moored in Los Angeles harbor, plaintiff was at work in its hold, unloading lumber and acting within the scope of his employment; that at the same time the employees of the defendant, acting within the scope of their employment, negligently placed certain timbers in the path of the lumber carrier which was then traveling on the dock and allowed them to remain adjacent to the ship and as a proximate result thereof, the carrier rolled upon one of the pieces and caused it to fly through the air and down into the hold of the vessel and to strike the head and body of plaintiff and to cause his injuries. Said injuries were directly and proximately caused by negligence of said employees of defendant.

[1] (1) Appellant contends that there is not sufficient evidence to support the finding that his employee was negligent in placing the two landing blocks upon the dock. But the evidence is sufficient. It is established that the longshoremen knew of the perils that attended the placing of timbers as large as the landing blocks in close proximity to a load of lumber lying upon carrier blocks. They placed the landing blocks between the place for the regular carrier load and the edge of the dock for the purpose of making a temporary location for an odd load. After Perry had removed the regular load which lay near at hand, a stevedore removed the odd load of lumber from the landing blocks on to carrier blocks and left the landing blocks lying where they had been placed. The same employees of defendant stood by from the time the odd load was removed from the landing blocks. They knew of the risk of leaving those blocks on the dock near the lanes of travel of the carrier. Moreover they had placed them so that they did not lie flat on the dock but so that an end of each lay upon the surface of the stringer some 6 inches higher than the asphalt surface. They knew that space was limited. After they had removed the odd load from the landing blocks, at the edge of the dock to the carrier blocks in their regular positions, they knew that such load would momentarily be taken away by Perry with his carrier. While the driver of the carrier was occupied with the operation of his machine within the narrow confines of the dock, the jury was justified in finding negligence on the part of the longshoremen who left the two landing blocks so near the position for the regular load as to make it probable that a tire would run upon them. Such leaving of these timbers upon the dock might verily have been

the efficient and proximate cause of the flight of one of them into the hold of the steamship as was impliedly found.

[2] The question whether such negligence of the longshoremen was a proximate cause of plaintiff's injuries was a question of fact for the trial court. Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 29 P.2d 781; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044; Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 686, 102 P.2d 422, 428, 104 P.2d 26. "The sequence of facts, one to another, and the relation of negligent precipitous acts or omissions to primary continuing negligent acts, and the determination of whether the causation was independent or concurrent are questions of fact." Mecchi v. Lyon Van & Storage, supra.

[3-6] Appellant argues that the negligence of Perry in ignoring the presence of the landing blocks and in negligently driving upon one of them was an efficient, intervening cause of the accident. But Perry had not seen the blocks while the stevedores knew that it was usual for the carrier to run upon the timbers lying on the dock and they knew that when it did so it was likely to catapult such timber into space. By the exercise of ordinary care, such fact should be anticipated by a person of slight experience. The stevedores had enjoyed long experience on this very dock. They were conscious of the narrow confines within which the carrier must operate and of Perry's pre-occupation with the manipulation of that machine. The extension of the gangway some 10 feet on to the dock required the operator to direct his carrier toward the ends and where the blocks had lain in order to clear the gangway. They knew that they customarily "marked the places on the dock outlining the spots where these blocks were to be placed each time to get them in straight position" as guides for the carrier's driver. They knew that the surface of the dock in that vicinity should be kept clear for the carrier which was due to return at any moment for the purpose of removing the regular load then ready in its usual place. To keep the dock surface clear was one of their duties. They are bound to have known that one of the timbers was likely to be crushed or squeezed by the wheels of the carrier. Hence to leave them in a dangerous location was to render probable the catapulting of the blocks into the air. In the exercise of ordinary care, they should have foreseen not only the return of the carrier but also the probability that it would run over one of the blocks since they were near the waiting load. Their failure to anticipate the movement of the carrier over the timbers was negligence which justified the finding that such failure constituted the proximate and efficient cause of plaintiff's injuries. When a person has caused a dangerous instrumentality to be placed in a position at which it may effect injurious results to others, such person is answerable for such injuries as may ensue in the ordinary course of events even though an intervening cause serve as a condition on which the dangerous instrumentality may have acted to effect the injuries. The intervention of any number of agencies may operate upon the original wrongful act to effect the painful result but if they could, by the exercise of reasonable care, have been foreseen by the first wrongful actor, his negligent act continues to be a proximate cause. Newman v. Steuernagel, 132 Cal.App. 417, 22 P.2d 780; Hale v. Pac. Tel. & Tel. Co., 42 Cal.App. 55, 183 P. 280; Keiper v. Pacific Gas & Electric Co., 36 Cal.App. 362, 172 P. 180.

[7, 8] That Perry's conduct might have been negligent would not necessarily render it an intervening efficient cause. Restatement of Torts, § 449; Prosser on Torts, pp. 354 et seq.; 19 Cal.Jur. 570. Moreover, if we should concede Perry's act to have been negligent and to have been a concurring cause of plaintiff's injury, this would render defendant none the less liable. Lacy v. Pacific Gas & Electric Co., supra; Harmon v. M. H. Sherman Co., 29 Cal.App.2d 580, 85 P.2d 205; Pastene v. Adams, 49 Cal. 87. Appellant and the San Pedro Lumber Company would be responsible to plaintiff if their negligent acts had concurred.

The cases cited by defendant (Kline v. Moyer, 325 Pa. 357, 191 A. 43, 111 A.L.R. 406; Rae v. California Equipment Co., 12 Cal.2d 563, 570, 86 P.2d 352; Johnson v. Union Furniture Co., 31 Cal.App.2d 234, 87 P.2d 917) do not apply. The Kline case attempts to state the law of a sister state. As to the other authorities, they do not apply because the findings in those cases were that the consequences of an intervening cause could not have been reasonably anticipated.

(2) We come now to a consideration of appellant's claim that the dismissal of the

original action filed against the San Pedro Lumber Co. constituted a release or retraxit. The accident occurred May 11, 1939. Two days later plaintiff retained counsel to secure an "adjustment, settlement or judgment" of his claim against S.S. W. R. Chamberlin, and San Pedro Lumber Co. and all others who may be liable by reason of his claim.

He authorized his attorney to take whatever steps he might deem necessary to prosecute his claim including the filing of suit or other action. For such services he was to pay his attorney 40 per cent of all sums secured in any manner from his claim and assigned to his attorney a lien to that extent upon all such moneys so secured or retained; no settlement to be made without the consent of such attorney. Thereafter on May 26, 1939, he filed his action No. L.B. C-9145 in the superior court of Los Angeles county against the San Pedro Lumber Co., John Doe Corporation, and John Doe.

By his complaint he charged the defendants with the identical acts that are alleged in the complaint in the instant case.

After the San Pedro Lumber Company had filed its answer consisting of a denial of any negligence on defendant's part and of the special defenses that the plaintiff's injuries were proximately caused by the negligence of plaintiff and "by the negligence of plaintiff thereunto contributing," the lumber company effected a settlement with plaintiff in words and figures as follows:

"Agreement

"Whereas, on or about the 11th day of May, 1939, the undersigned, James E. Burke, hereinafter sometimes referred to as 'Burke,' while employed on the steamship 'W. R. Chamberlin, Jr.,' sustained injuries occasioned by being struck on the head and back with a piece of timber, and,

"Whereas, Burke claims that the injuries sustained by him as aforesaid were a proximate result of negligence on the part of an employee of San Pedro Lumber Company, a California corporation; and

"Whereas, Burke has heretofore caused to be filed in the Superior Court of the State of California, in and for the County of Los Angeles, an action brought against said San Pedro Lumber Company for damages in the amount of Fifteen Thousand Dollars ($15,000.00) for said injuries so sustained; and

"Whereas, San Pedro Lumber Company denied that it or any of its employees or agents were negligent or responsible for the injuries sustained by Burke.

"Now, Therefore, in consideration of the sum of One Thousand Seven Hundred and Fifty Dollars ($1,750.00) to Burke in hand paid, receipt of which is hereby acknowledged,

"This Instrument Witnesseth:

"(1) Burke agrees that said above mentioned action against the San Pedro Lumber Company shall be forthwith dismissed and Burke does hereby authorize and direct his attorney, Herbert R. Lande, to cause said action to be forthwith dismissed.

"(2) Burke agrees that he will not file suit, or cause suit to be filed, founded on the accident occasioning said injuries, against San Pedro Lumber Company, or its successors in business, or its stockholders or directors in any court and that he will not file or prosecute any claim for damages or other compensation against San Pedro Lumber Company before any Board, Commission, Bureau, or administrative body, for any damages or compensation to which said Burke, save for this agreement, might otherwise be entitled, based on the injuries sustained by him in said accident, or for any other cause whatever arising at any time prior to the date of this instrument.

"(3) Burke agrees that, in the event he brings any action of whatsoever kind or nature, founded on the accident occasioning said injuries, either in any court or before any Board, Commission, Bureau, or administrative body, against any person, firm, corporation or vessel, he will cause notice of such action and the proceedings therein to be given Edward Hervey, Attorney-at-Law, 458 South Spring Street, Los Angeles, California, to the end that said San Pedro Lumber Company may be advised of said proceeding and, in the event any right or subrogation or contribution should eventuate in favor of any such person, firm, or corporation or vessel, against San Pedro Lumber Company, then Burke shall, and he does, hereby agree that he will protect, indemnify and save harmless the said San Pedro Lumber Company from any loss occasioned thereby.

"(4) Burke hereby certifies that he is an unmarried man over the age of twenty-one years.

"The agreements upon the part of Burke to be performed herein set forth shall be binding upon the heirs, devisees, legatees, executors, administrators and assigns of the said Burke.

"(Signed) James E. Burke.
"Approved: Herbert R. Lande,
"Attorney for James E. Burke.
"Edward Hervey,
"Attorney for San Pedro Lumber Company."

Following the execution of the foregoing instrument, respondent filed with the clerk his dismissal of the action against the San Pedro Lumber Company in words and figures as follows (omitting court and title of case): "Dismissal. To the Clerk of said Court: You will enter the dismissal of the above entitled action, as to all defendants. Herbert R. Lande, Attorney for Plaintiff."

Thereafter on the 10th day of January, 1940, respondent filed the present action under the Jones Act, 46 U.S.C.A. § 688, for damages for the same injuries as those described in his action against the San Pedro Lumber Company. He alleged that W. R. Chamberlin was the owner and operator, having full management, direction and control of the steamship and that at all times mentioned plaintiff was employed by the defendant and while acting within the course and scope of his employment in the hold of such vessel, he received his injuries.

As a special defense, defendant Chamberlin pleaded the filing of the action L.B. C-9145, the issuance of summons, the answer of the San Pedro Lumber Company and its agreement with Burke and the filing of the dismissal of the action, and "as a consideration for the execution of said agreement executed on the 25th day of October, 1939, plaintiff received of and from said San Pedro Lumber Company the sum of $1,750" in consideration of which plaintiff dismissed his action against the San Pedro Lumber Company.

Also, by his answer appellant alleged the execution of the agreement between plaintiff and his attorney by which the attorney was employed to prosecute plaintiff's claim and that plaintiff was fully and completely aware of the exact and specific terms of the agreement between plaintiff and attorney Lande. Upon the issue created by the special defense, the finding of the court was as follows:

"It is true that the aforesaid agreement is a covenant not to sue the San Pedro Lumber Company and is not a release given by the plaintiff to the San Pedro Lumber Company. That it is true that the plaintiff received the sum of $1,750 from the San Pedro Lumber Company as consideration for the execution of said agreement. That it is not true that the plaintiff received or intended to receive the said sum of $1,750 as compensation or in satisfaction of his injuries."

Upon such finding the court concluded that the agreement between plaintiff and the San Pedro Lumber Company was a covenant not to sue and is not a bar to the present action and that the sum received by plaintiff by virtue of such agreement inures pro tanto to the benefit of defendant Chamberlin, which sum should be subtracted from the amount of damages found to have been suffered by plaintiff.

[9] The agreement provides that plaintiff shall dismiss his action against the San Pedro Lumber Company; that he will not file a suit against the lumber company; and that if he files suit against any other party, he will protect and indemnify the lumber company for any loss occasioned thereby. Clearly this constituted a covenant not to sue and to indemnify the lumber company. It was not a release of the tort feasors whose negligence had caused plaintiff's injuries. It was nothing more than an agreement to cease his action against the lumber company and not to use it again. Lewis v. Johnson, 12 Cal.2d 558, 563, 86 P.2d 99; Kincheloe v. Retail Credit Co., 4 Cal.2d 21, 46 P.2d 971; Ellis v. Jewett Rhodes Motor Co., 29 Cal.App.2d 395, 84 P.2d 791.

Appellant makes the contention that respondent received the money from the San Pedro Lumber Company as satisfaction for his injuries. This contention finds no support in the record. It is clear to us that the money was not received in settlement of his claim. Appellant supports his argument with that clause in the attorney's contract providing that the attorney should receive a fee from plaintiff only in the event plaintiff should obtain money on a judgment or effect a settlement of the claim. However that is not the only clause in the contract pertaining to counsel's compensation. It is also stipulated that 40 per cent of all sums received by plaintiff in any manner shall be payable to his attorney. It does not suggest that fees to go to the attorney shall be payable only in the event plaintiff recover damages or obtain a settlement of his action against the San Pedro Lumber Company. The fees of counsel became due if sums should be recovered "in any manner."

[10-12] The dismissal filed by plaintiff in action L.B. C-9145 was not a dismissal with prejudice. If it had been such dismissal there would have been no occasion for the provision that plaintiff shall not sue the lumber company. Unless an order for dismissal on file with the clerk provide that the dismissal is with prejudice, it is then a dismissal without prejudice. Lewis v. Johnson, supra. The dismissal of an action operates as a bar to its renewal only when the dismissal is based upon, and entered in pursuance of, an agreement of the parties and when it is understood by them to amount to an adjustment of the merits of their controversy. Westbay v. Gray, 116 Cal. 660, 666, 48 P. 800. Where it is made to appear from the language of the agreement to dismiss that the parties intended a dismissal without prejudice, the plaintiff is at liberty to file a new action.

[13, 14] The contention of appellant that the dismissal entered by plaintiff in the action L.B. C-9145 was a retraxit has no support in the law. In order to constitute a retraxit, a judgment of dismissal must be made in open court upon motion of plaintiff's counsel of record when plaintiff understands that he is thereby renouncing forever his cause of action alleged against the defendant. Westbay v. Gray, supra; Crossman v. Davis, 79 Cal. 603, 604, 21 P. 963; Merritt v. Campbell, 47 Cal. 542; Stoutenborough v. Board of Education, 104 Cal. 664, 667, 38 P. 449.

The facts of Lewis v. Johnson, supra, are parallel to those of the case at bar. In that case, action had been brought against a physician and the hospital as joint tort-feasors. During the progress of the trial, plaintiff received the sum of $5,000 and agreed not to sue the hospital further nor to prosecute any action against it. The dismissal following such agreement not to sue was held to be a voluntary dismissal and not a release or a retraxit. "Unlike a release, a covenant not to sue one joint tort-feasor does not relieve the others." Lewis v. Johnson, supra [12 Cal.2d 558, 86 P.2d 101]. A dismissal entered by a clerk by virtue of section 581, subdivision 1, Code Civ. Proc., without prejudice, is a far cry from a judgment of dismissal ordered by the court following a voluntary renunciation of the action.

Judgment is affirmed.

W. J. WOOD, J., concurred.

McCOMB, Justice (dissenting).

I dissent. It is my belief that the opinion of the majority of this court fails to distinguish between the doctrine applicable in the case of a retraxit and the doctrine which should be applied in the case of the release of one joint tort feasor. It is my view that the latter doctrine is applicable to the facts of the present case. These facts are:

May 11, 1939, the appealing defendant W. R. Chamberlin was the managing owner of the steamship "W. R. Chamberlin, Jr." The vessel was moored alongside a dock in Los Angeles Harbor while lumber was being unloaded from the vessel to the dock. The San Pedro Lumber Company was assisting in the removal of the cargo. One of its employees, while operating a lumber carrier, struck a block of wood which had been placed on the dock, causing the block to fly through the air and strike and injure plaintiff, who was working in the hold of the ship. Subsequently plaintiff filed a complaint against the San Pedro Lumber Company to recover damages for his injury.

Thereafter plaintiff and the San Pedro Lumber Company entered into an agreement reading in part as follows:

"Whereas, on or about the 11th day of May, 1939, the undersigned, James E. Burke, hereinafter sometimes referred to as 'Burke,' while employed on the Steamship 'W. R. Chamberlin, Jr.,' sustained injuries occasioned by being struck on the head and back with a piece of timber; and

"Whereas, Burke claims that the injuries sustained by him as aforesaid were a proximate result of negligence on the part of an employee of San Pedro Lumber Company, a California corporation; and

"Whereas, Burke has heretofore caused to be filed in the Superior Court of the State of California, in and for the County of Los Angeles, an action brought against said San Pedro Lumber Company for damages in the amount of Fifteen Thousand Dollars ($15,000.00) for said injuries so sustained; and

"Whereas, San Pedro Lumber Company denies that it or any of its employees or agents were negligent or responsible for the injuries sustained by Burke;

"Now, Therefore, in consideration of the sum of One Thousand Seven Hundred and Fifty Dollars ($1,750.00) to Burke in hand paid, receipt of which is hereby acknowledged,

"This Instrument Witnesseth:

"(1) Burke agrees that said above mentioned action against the San Pedro Lumber Company shall be forthwith dismissed and Burke does hereby authorize and direct his attorney, Herbert R. Lande, to cause said action to be forthwith dismissed.

"(2) Burke agrees that he will not file suit, or cause suit to be filed, founded on the accident occasioning said injuries, against San Pedro Lumber Company, or its successors in business, or its stockholders or directors in any court and that he will not file or prosecute any claim for damages or other compensation against San Pedro Lumber Company before any Board, Commission, Bureau, or administrative body, for any damages or compensation to which said Burke, save for this agreement, might otherwise be entitled, based on the injuries sustained by him in said accident, or for any other cause whatever arising at any time prior to the date of this instrument.

"(3) Burke agrees that, in the event he brings any action of whatsoever kind or nature, founded on the accident occasioning said injuries, either in any court or before any board, Commission, Bureau, or administrative body, against any person, firm, corporation or vessel, he will cause notice of such action and the proceedings therein to be given Edward Hervey, Attorney-at-Law, 458 South Spring Street, Los Angeles, California, to the end that said San Pedro Lumber Company may be advised of said proceeding and, in the event any right or subrogation or contribution should eventuate in favor of any such person, firm, or corporation or vessel, against San Pedro Lumber Company, then Burke shall, and he does, hereby agree that he will protect, indemnify and save harmless the said San Pedro Lumber Company from any loss occasioned thereby."

On October 26, 1939, plaintiff filed with the clerk of the Superior Court of the state of California a dismissal of the action which he had theretofore filed against the San Pedro Lumber Company.

It is conceded that the latter company paid to the plaintiff as consideration for the above mentioned agreement and dismissal the sum of $1,750. Defendant in the present action pleaded as a defense in its answer the facts relative to the settlement between the plaintiff and the San Pedro Lumber Company.

This is the sole question necessary to be determined:

Did the above stated facts constitute the release of one who was a joint tort feasor with defendant, thereby releasing defendant from any liability to plaintiff on the cause of action set forth in the present complaint?

This question must be answered in the affirmative. It is settled that the release of one joint tort feasor releases all of the joint tort feasors (Bogardus v. O'Dea, 105 Cal.App. 189, 192, 287 P. 149; 22 Cal. Jur. (1925) 763, § 12; vol. 2, Bancroft's Pleading, Practice and Remedies, Ten Year Supp. (1937) 1604, § 537).

It is likewise established that the bar does not arise from any particular form that the proceedings assume but from the fact that the injured party has actually received satisfaction (Urton v. Price, 57 Cal. 270, 272).

In Bogardus v. O'Dea, supra, at page 192 of 105 Cal.App., at page 150 of 287 P., this court said:

"* * * As said in Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704, 707: 'While plaintiff may sue one or all of joint tort feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. * * * The reason is quite obvious. *By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of,* and it would be unjust that he should be allowed double payment for the single wrong. It matters not either whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against them all.' (Italics ours.) In Flynn v. Man-son, 19 Cal.App. 400, 126 P. 181, the action was against several defendants for the recovery of damages for tort. The plaintiff dismissed as to one of the defendants, the dismissal however, containing a provision that it was not the intention of the plaintiff to release the other defendants from liability. The remaining defendants moved for dismissal of the action as to them, upon the same ground as that urged in the instant case. Affirming the judgment of dismissal which followed the order granting this motion, the court held that the release, notwithstanding the saving clause, was a discharge, not only as to the defendant as to whom the dismissal was filed, but as to his codefendants. To the same effect are the decisions in Tompkins v. Clay Street R. R. Co., 66 Cal. 163, 4 P. 1165, and Urton v. Price, 57 Cal. [270], 272."

Applying the foregoing rules to the facts of the instant case, it is evident that the plaintiff intended to receive and did receive satisfaction for the injury he had received from the San Pedro Lumber Company, and intended to and did release such party from any and all liability in connection with the injuries he had suffered. It therefore appears that plaintiff, having released one of two joint tort feasors, as a matter of law released the other tort feasor from further liability, with the result that the trial court was in error in giving judgment to the plaintiff in the present action.

Lewis v. Johnson, 12 Cal.2d 558, 86 P.2d 99, is inapplicable to the facts of the instant case, for the reason that the document in question in such case was denominated, "Covenant not to Sue and Covenant Not to Sue Further," and was in fact a covenant not to sue; while the document in the present case, coupled with the dismissal of the action filed by plaintiff against San Pedro Lumber Company constituted in fact a release of the latter and satisfaction of plaintiff's claim for damages resulting from his injury. Had plaintiff commenced a second action against San Pedro Lumber Company upon the same cause of action set forth in the first complaint, the defendant company could have pleaded the agreement to dismiss the first action for a consideration of $1,750 and the dismissal with the written consent of the attorneys of record in that action as a bar to the subsequent suit. The rule is stated thus in Hawber v. Raley, 92 Cal.App. 701, 704, 268 P. 943, 944:

"It would therefore appear to be a rule of construction that, where two or more tort-feasors are involved and the document is such that the covenantee may plead the same in abatement of any action which the covenantor might subsequently commence in breach of the obligation contained in said document, and the remedy thereunder is not restricted to an action on the covenant, the document constitutes a release and satisfaction, and not a mere covenant not to sue."

The conclusions which I have reached render it unnecessary for me to discuss the various other points presented by counsel.

For the foregoing reasons in my opinion the judgment should be reversed.

WELLS v. LLOYD et al. *

Civ. 13232.

District Court of Appeal, Second District, Division 2, California.

April 25, 1942.

Rehearing Denied May 22, 1942.

Hearing Granted June 22, 1942.

1. Trial 🔑252(17)

In action by building and loan association's bankruptcy trustee for fraud in inducing association to exchange its certificates for bonds of another association, where there was no evidence of any artifice or deception practiced by any defendant by which association was prevented from making a full investigation concerning value of bonds, it was error to give an instruction in that regard.

2. Trial 🔑243

In fraud action, trial court erred in giving instruction that a false representation is legally fraudulent whether knowingly made or whether made through ignorance, carelessness, or mistake, where court also charged that to make false statements fraudulent, it is necessary that they be made in the knowledge that they are false or that representations are not warranted by information of persons by whom they are made.

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* Subsequent opinion 132 P.2d 471.

3. Trial 🔑296(1)

The giving of a correct instruction on a material issue does not cure the vice of a contradictory instruction which tends to confuse the minds of the jury.

4. Appeal and error 🔑1064(1)

Where a clear conflict in instructions occurs and it is impossible to determine which instruction the jury followed in arriving at its verdict, prejudicial error has resulted.

5. Appeal and error 🔑1097(1)

Where it appeared that facts were fully and completely presented to jury on a third trial, and that evidence was insufficient to sustain any verdict for plaintiff, reviewing court was required to look to a just determination of parties' rights and not merely to rules of practice and was required to decide the case without regard to what had gone before, even if it reconsidered questions decided on a former appeal.

6. Fraud 🔑50

In action by building and loan association's bankruptcy trustee for fraud in inducing association to exchange its certificates for bonds of another association, in absence of testimony it could not be presumed that plan whereby other association might promptly obtain a permit to do business contemplated any dishonest action such as a fraudulent sale of securities to bankrupt association.

7. Fraud 🔑20

A building and loan association's bankruptcy trustee was not entitled to recover for fraud in inducing bankrupt association to exchange its certificates for bonds of another association, even if statements concerning bonds constituted actionable fraud and amounted to statements of fact and not mere expressions of opinion, where trustee utterly failed to establish that any reliance was placed on statements by bankrupt association.

8. Fraud 🔑20

One who begins to investigate property offered to him for purchase or exchange or to investigate truth of representations made concerning property and proceeds without hindrance must be held to have gone far enough to be satisfied that he has all the information available on the subject of his search, and if he makes the purchase or exchange he is deemed to have acted on his own judgment and not to have relied on the representation of another.

9. Fraud 🔑22(1)

Where vendor and purchaser stand on equal footing and have equal means of ascertaining the truth, and purchaser's skepticism has not been lulled by representations made by vendor, examination by purchaser will be excused only when he is induced by fraudulent means to forego examination or is prevented from doing so by trick, artifice, or design.

W. J. WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Myron H. Wells, as trustee in bankruptcy of the estate of Bay Cities Guaranty Building & Loan Association, against Elwood Lloyd IV, the Merchants National Trust & Savings Bank of Los Angeles, its successor in interest, Bank of America National Trust & Savings Association, and others to recover damages for fraud. Before the trial, the action was dismissed as to all defendants except the Merchants National Trust & Savings Bank of Los Angeles and its successor in interest, Bank of America National Trust & Savings Association, and from a judgment for plaintiff, those defendants appeal.

Reversed, with instructions.

Rehearing denied; WOOD, J., dissenting.

Freston & Files and James A. McLaughlin, all of Los Angeles, for appellants.

Thurlow T. Taft, of Santa Monica, and Tanner, Odell & Taft and Donald A. Odell, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

This appeal is from a judgment for the plaintiff after verdict. Plaintiff, as trustee in bankruptcy of the estate of Bay Cities Guaranty Building and Loan Association, commenced the action to recover damages alleged to have been suffered by the defunct association upon the claim that defendants had perpetrated a fraud upon Bay Cities in the purchase of its certificates. Prior to trial the action was dismissed as to all defendants except Merchants National Trust and Savings Bank of Los Angeles, hereinafter referred to as the Bank, and its successor in interest, Bank of America National Trust and Savings Association. This is the third appeal.

In the first appeal plaintiffs' judgment against the bank was reversed upon the ground that issues other than the amount of damages should have been submitted to the jury for decision. Wells v. Lloyd, 6 Cal.2d 70, 56 P.2d 517. On the second appeal, judgment of nonsuit was reversed under the doctrine of the law of the case which established in the instant case that there were debatable questions of fact which should have been submitted to the jury. Wells v. Lloyd, 35 Cal.App.2d 6, 94 P.2d 373.

The facts out of which this action arose were stated by the Supreme Court (Wells v. Lloyd, 6 Cal.2d 70, 77, 56 P.2d 517, 521) as follows:

"Lloyd Building & Loan Association was organized as a guarantee capital association, and had issued, without consideration, 1000 shares of guarantee capital stock. The issued stock was held for the benefit of the association, which had no other assets of more than nominal value and had not received a permit from the building and loan commissioner to do business. In order to obtain a permit, without which it could not lawfully engage in business, it was necessary for the Lloyd Company to have at least $100,000 in cash capital and at least $10,000 for organization and operating expense. Under the rules and regulations of the commissioner, a guarantee capital building and loan association, to be qualified to do business, was required to have $100,000 paid-in capital. An applicant for a permit was required to furnish a certificate from its bank showing it to have not less than the sum of $100,000 on deposit to its credit. Lloyd Association obtained a permit in the following manner:

"Defendant Commagere, acting in concert with Lloyd Association, gave Merchants National Bank his thirty-day promissory note for $120,000, interest on which, for said period, was guaranteed by Alvin H. Frank & Co. The bank credited the account of Commagere with the amount of the note. Commagere purchased a cashier's check payable to himself for a like amount, and, with the cashier's check purchased, in the name of Lloyd Association, and the bank issued, its certificate of deposit for $120,000, payable in thirty days. This certificate was indorsed and placed in an escrow with the escrow department of the bank, together with certificates for one thousand shares of the capital stock of Lloyd Association, being all of the outstanding stock. Nine hundred and ninety-five of the shares were in the name of Commagere, and one share in the name of each of five other persons. Escrow instructions were given the bank by Lloyd Association, which provided that the stock might be sold for $120,000 within a thirty-day period; that if this money was provided from stock sales, certificates were to be issued to the purchasers, the money received therefrom was to be used to pay the Commagere note, and the certificate of deposit was to be delivered to Lloyd Association. If the full sum of $120,000 should not be received from stock sales, such sums as had been paid in were to be returned to the persons furnishing the same, the stock was to be returned to Lloyd Association, and the certificate of deposit was to be delivered to the note department of the bank for the purpose of paying the Commagere note.

"The note was given, the certificate issued, and the escrow opened on October 23, 1928, and on the same day a vice president of the bank wrote a letter to the building and loan commissioner, stating that the bank had on that day issued a certificate of deposit to Lloyd Association in the sum of $120,000. By the use of this letter Lloyd Association procured from the building and loan commissioner, on November 9, 1928, a permit under which it became authorized to engage in the building and loan business in Los Angeles.

"On October 22, 1928, defendant Commagere had arranged with a bond house, Alvin H. Frank & Co., to purchase, for cash, bonds owned by the company at their par value of $120,000. Nothing was done toward completing this purchase, nor was anything accomplished toward selling, for cash, the stock of Lloyd Association, as was contemplated when the escrow was opened.

"At about the time the permit was issued, Elwood Lloyd IV and Commagere contacted the officers of Bay Cities Building & Loan Association, a company engaged in the building and loan business in Santa Monica. [Lloyd was also a director of this association.] The Bay Cities company was desirous of acquiring a building and loan association doing business in Los Angeles, and entered into negotiations to acquire the Lloyd Association, under representations that the latter held a permit and had assets of the value of $120,000.

"Alvin H. Frank & Co. agreed to accept certificates of $120,000 par value of the Bay Cities company for the bonds Commagere had agreed to buy, and Bay Cities agreed to accept the bonds and 1000 shares of the outstanding stock of Lloyd Association in exchange for its certificates. This exchange was completed through the same escrow in the bank. Bay Cities thereupon became the owner of the bonds and stock, and Alvin H. Frank & Co. acquired the Bay Cities certificates, which it sold to its customers. The certificate of deposit was delivered to the note department of the bank, together with $700, as interest, and the note was canceled. Defendant Commagere received some $4,400 commission from Frank & Co. The bank received $700 interest and the return of its certificate of deposit and $100 as an escrow fee."

The action was tried on the theory that as a result of conspiracy the defendants falsely represented the value of the bonds and that in reliance upon such representation, Bay Cities purchased bonds which proved to be worth less than 50 per cent of par. The liability of the bank was allegedly predicated upon the proposition that the letter written to the Building and Loan Commissioner by its vice-president contained the statement that the Lloyd Association had $120,000 on deposit; that by such statement the bank falsely represented the actual situation by failing to disclose the truth regarding the escrow and particularly the fact that the deposit of $120,000 was a pretense and not a deposit in good faith of funds actually belonging to the Lloyd Association and that as a natural and probable consequence of such misrepresentations the bank had enabled Lloyd and Commagere to defraud Bay Cities by subsequent representations as to the value of the bonds. The bonds acquired by Bay Cities as a result of the exchange with the Lloyd Association were found by the jury to be worth only $48,200. The difference between that amount and the face value of the Bay Cities certificates, to wit $71,800, was awarded plaintiff by the verdict.

[1] The bank contends that it is entitled to a reversal of the judgment by reason of prejudicial error in the instructions. By plaintiff's instruction 19-D the jury was directed that if it should find that it has been "established by a preponderance of the evidence that artifice or deception was employed by the alleged conspirators which prevented or forestalled a complete investigation as to the truth of such representations, then plaintiff is not bound by the failure of said Bay Cities Association to obtain information or knowledge of facts relating to such representations as should have been discovered in the exercise of ordinary care except for the employment of such artifice or deception." Instruction 19 correctly informed the jury that "if you believe from the evidence that such investigation was begun and that ample opportunity was given for such investigation, and no artifice or deception forestalled a complete investigation, no recovery can be had."

There was no evidence whatever of any artifice or deception practiced by any defendant by which Bay Cities was prevented from making a full and complete investigation concerning the value of the bonds. This was in effect declared by the Supreme Court on the first appeal when it stated (6 Cal.2d page 87, 56 P.2d page 526): "Bay Cities was not hindered in any way in making a full and independent investigation." From this it follows that it was error to give the quoted portion of instruction 19-D.

[2, 3] Also, the court erred in giving plaintiff's instruction No. 17 which in effect instructs the jury that a false representation is legally fraudulent, whether knowingly made or whether made through ignorance, carelessness or mistake. That instruction was in direct conflict with plaintiff's instruction 16 and defendant's 26-G in both of which it is declared that to constitute false statements as fraudulent it is necessary that they be made "in the knowledge that they were false or that such representations were not warranted by the information of the person or persons by whom they were made." Also, it conflicted with the language of defendant's instruction 26-G which declared that "you must assume that all representations, whether true or false, were made in good faith unless the contrary is established by clear proof and satisfactory evidence." The giving of a correct instruction upon a material issue does not cure the vice of a contradictory instruction which tends to confuse the minds of the jury. Zolkoske v. United States Farm & Land Co., 72 Cal.App. 63, 236 P. 344.

[4] We find nothing in the entire charge to the jury to overcome the explicit direction contained in plaintiff's instruction 17. Where a clear conflict in the instructions given by the court occurs and it is impossible to determine which instruction the jury followed in arriving at its verdict, prejudicial error has resulted. Pierce v. United States Gas & Electric Co., 161 Cal. 176, 185, 118 P. 700.

By reason of the prejudice resulting from the instructions a reversal of the judgment could not be avoided.

[5] However, we are not satisfied that a reversal of the judgment is an adequate disposition of this cause. Three trials have already been held. To send it back for a fourth were an imposition upon the judicial process in view of a record whereby we may pronounce a final decision. In making bold to do so, however, we are confronted with the doctrine of the law of the case. In the first trial the jury was instructed to return a verdict for plaintiff in an amount to be fixed by the jury. The judgment based upon such verdict was reversed by the Supreme Court in a decision which holds that there was sufficient evidence on behalf of defendant to justify submission to the jury. In the second trial a nonsuit was granted. That order was reversed by this court (Division One) under the impulsion of the law of the case, indicating that there was sufficient evidence in favor of plaintiff to justify submission to the jury. On the other hand it appears obvious that notwithstanding anything that had occurred before, on the third trial the facts were fully and completely presented to the jury. Upon those facts we are constrained to hold that the evidence is insufficient to sustain any verdict for plaintiff but that, on the contrary, judgment should be ordered for defendant. In deriving this conclusion, we confess that our adherence to the substantive law of frauds transcends our obligation to respect former decisions in this action, before the pronouncement of which the vice of plaintiff's proof does not appear to have been sufficiently emphasized. Under such exceptional circumstances it is our duty to look "to a just determination of the rights of the parties to the litigation and not merely to rules of practice," to "decide the case without regard to what has gone before," even though we should reconsider "questions decided upon a former appeal." England v. Hospital of Good Samaritan, 14 Cal.2d 791, 795, 97 P.2d 813, 815.

[6] Briefly stated, the original plan of the parties, in which defendant bank cooperated, contemplated, in effect, a preorganization scheme. Instead of having a subscription agreement among a number of organizers, with an escrow arrangement pending the obtaining of sufficient subscriptions to meet the statutory requirement of $100,000 capital and $10,000 for organization expenses, before applying for a permit to operate, it was apparently thought that subscriptions could be more readily obtained if the stock to be sold had already been issued. Consequently the plan was devised whereby the Lloyd Association might promptly obtain a permit from the building and loan commissioner to do business. This could be done by placing the money to the credit of Lloyd's. The certificate of deposit, together with the issued shares of Lloyd's capital stock were to be placed in the escrow, from which nothing was to be delivered until sufficient stock sales had been negotiated to provide the required capital. Whereupon the stock was to be issued to the purchasers, the money placed in the association treasury, and the certificate of deposit returned to the bank to cancel the Commagere note. If sufficient funds were not obtained, the money was to be returned from the escrow to the persons who had agreed to buy, and the certificate of deposit returned to the bank to cancel the note. What was to become of the permit to operate, in this event, does not appear—perhaps Commagere and Lloyd, in their optimism, never contemplated such failure. Certainly in the absence of testimony, it cannot be presumed that the plan contemplated any dishonest action such as a fraudulent sale of securities to Bay Cities. This is the plan, *and the only plan,* that has been shown to exist at the time the bank wrote the letter to the commissioner.

While this scheme does not commend itself as one to be approved, yet it does not appear to have contemplated any fraud upon Bay Cities or upon any investor. In fact, the escrow arrangement carefully guarded against the possibility of paying out any money or of delivering any shares until the full amount had been paid in and the statute satisfied. It did, of course, involve an improper and unauthorized short cut to obtain a permit to operate and the action of the bank in writing the letter which did not give the commissioner the whole truth cannot be too strongly condemned.

If, however, the original plan, pursuant to which the bank wrote the letter, involved no fraudulent intent and contemplated no acts concerning future investors, the bank cannot be held responsible for subsequently conceived and executed action by others, which were no part of this plan, unless evidence is presented to connect the bank with such acts. The record discloses an entire absence of such testimony. As the Supreme Court stated: "Nothing was done toward completing this purchase, nor was anything accomplished toward selling, for cash, the stock of Lloyd Association, *as was contemplated when the escrow was opened.*" 6 Cal.2d page 78, 56 P.2d page 521.

"* * * the original plan of the promoters, Lloyd and Commagere, was to qualify the Lloyd Association, and, thereafter, to sell 1000 shares of the stock for cash; the exchange with Bay Cities was agreed upon later. *The thing which was ultimately accomplished was not shown to have been within the contemplation of the parties in the beginning.* [6 Cal.2d page 81, 56 P.2d page 523].

"* * * The bank had no part in the negotiations between Lloyd Association and Bay Cities. It did not know, until a day or two before the exchange of property was made, that Bay Cities was an intending purchaser. It acted only as escrow holder of Bay Cities certificates and the property that was exchanged therefor. It knew nothing of the representations made by Lloyd Association as to the value of the bonds, or of the investigation thereof made by Bay Cities, or the knowledge it acquired. The terms of the exchange it knew by reason of the escrow. *The position of purchasers of stock, under the original plan, would have been very different from that of Bay Cities, after its purchase was concluded.*" 6 Cal. 2d page 82, 56 P.2d page 523. (Emphasis added.)

It is not shown that the bank had anything to do with the side arrangement (which was no part of the original plan) by which Commagere was to purchase certain bonds from Frank & Co., nor with the later substituted arrangement by which the Bay Cities issued its own certificates of par value of $120,000 directly to Frank & Co. in exchange for the bonds owned by the latter company plus all of the capital stock of the Lloyd Association. It is true that the bank *as escrow holder* permitted the stock of the Lloyd Association to be delivered out of escrow on the faith of these bonds received by the Bay Cities for the Lloyd Association, which latter association was then the property of Bay Cities. How can it be said that the Bank as escrowee owed any duty to anyone to forbid the closing of the escrow in the face of the fact that Bay Cities, which was receiving the bonds and the Lloyd Association stock, had made its own independent investigation of the bonds and satisfied itself of their value? It should be observed that in the year following their acquisition not only did Bay Cities cause the Lloyd Association to seek its permit by virtue of the bonds valued at par but the commissioner granted such permit upon the basis of the bonds as an asset of the Lloyd Association. "It does not appear that the bank was under any duty to investigate the value of the bonds or to make inquiry as to any representations that may have been made concerning the same." 6 Cal.2d page 85, 56 P.2d page 524.

The real gist of the Supreme Court's decision is stated in the last paragraph, 6 Cal. 2d page 90, 56 P.2d page 527: "The liability of appellants was not established by evidence of that conclusive nature necessary to warrant an instructed verdict, and appellants therefore were deprived of the right of jury trial." In the numerous instances in which the decision analyzes the points involved and holds that there should have been a submission to the jury, the court was primarily concerned with the question of whether or not the evidence so strongly supported the plaintiff as to justify an instructed verdict for plaintiff. The court was not examining the voluminous record for the purpose of determining whether or not there would have been substantial evidence to support a finding upon each fact vital to plaintiff's cause of action in case of a verdict for plaintiff. It was not necessary for the Supreme Court to do so and it would be pressing the doctrine of the law of the case too far now to preclude such examination upon the basis of that doctrine.

We now direct our attention to an element of the situation, which, disregarding all others, is fatal to plaintiff's case. Neither of the prior holdings passed upon this point. In order more clearly to understand the factual situation involved, we deem it important to set forth here the substance of the representations made by Lloyd and Commagere to the officers of Bay Cities. Sometimes one of them is credited with the representations and sometimes the other, but it may be fairly said that both of them pledged their faith to the following statements:

That all the Lloyd Building and Loan Association had was a charter which had cost $50; that it had an authorized capital of $100,000; that Commagere would underwrite the stock with his deposit of $120,000 in the bank; that the Lloyd Association had a license to do business in the city of Los Angeles; that the Lloyd Association had no assets except the $120,000 on deposit with the bank; that with such money Commagere was buying the entire capital stock of 100,000 shares; that the bonds offered by Commagere and Lloyd in exchange for the certificates of the Bay Cities Building and Loan Association were "legal for savings banks and the bonds would be worth $120,000 and that an escrow could be opened and the bonds placed in escrow * * *"; that while the escrow was open the value of the bonds could be determined by an investigation by the Bay Cities Association before completing the exchange; that Commagere was a very wealthy man; that he had bought all the stock of the Lloyd Association; that he would prefer that Bay Cities take the Alvin Frank bonds instead of cash and that these bonds would be worth $120,000.

The foregoing is the most we have been able to abstract from the record of all the statements made that could fairly be construed as representations by the two men to the officers of Bay Cities.

[7] Assuming, without here deciding, that the above statements constitute actionable fraud, and that they amounted to statements of fact and not mere expressions of opinion, and assuming (although as we have seen, this is not supported by the evidence) that the bank and all the other parties at first accused by plaintiff had made all of the representations accredited to Lloyd and Commagere, yet the plaintiff is not entitled to recover for the reason that there was an utter failure on the part of plaintiff to establish that any reliance was placed by Bay Cities upon the statements made concerning bonds of the house of Alvin Frank. Without contradiction, the evidence shows that Lloyd and Commagere suggested to Bay Cities that an investigation be made of the value of the bonds before consummating an exchange of its certificates for them. The story of the investigation made by Bay Cities of the bonds has already been told in the following language of the Supreme Court (6 Cal.2d page 84, 56 P.2d page 524): "The Bay Cities Association was furnished with a list of the bonds belonging to Alvin H. Frank & Co., which Commagere had agreed to buy and it was willing to take over the Lloyd Association if the bonds were worth par. Bay Cities made some inquiry as to the value of the bonds. Mr. Rishell, president of the company, and one or two others of its directors were appointed by the board [on November 20, 1928] to investigate the value of the bonds. Mr. Rishell inquired of Alvin H. Frank & Co., by whom he was told that the bonds were quoted at par, but that Alvin H. Frank & Co. would not guarantee to sell them at par. On November 26 he went to San Francisco where he interviewed the building and loan commissioner, confirmed the fact that Lloyd's held a permit and learned that the commissioner was not interested in the value of the bonds so long as they were a legal investment for the funds of a building and loan association. [The Commissioner stated that the bonds were a legal investment.] While in San Francisco he [Rishell] interviewed a banker and obtained some information concerning some of the bonds. On the morning he left Los Angeles for San Francisco he delivered the Bay Cities certificates to Mr. Stintin, vice president of Bay Cities, to be placed in escrow. Stintin took the certificates to the bank where he entered into an escrow agreement to exchange them for the stock and bonds. This escrow was closed the second day following. There was testimony to the effect that this exchange was completed before Mr. Rishell intended it should be done."

[8] In view of the fact that Bay Cities commenced its investigation it cannot be said that it placed reliance upon any representations. For the same reason it cannot recover damages because of such representations. When one party to a transaction commences to investigate the property offered to him for purchase or exchange, or begins to investigate the truth of representations made concerning such property and proceeds without let or hindrance, he must be held to have gone far enough to be satisfied that he has all the information

available upon the subject of his search. If he makes the purchase he is then deemed to have acted upon his own judgment and not to have relied upon the representation of another. Hayward v. Widmann, 133 Cal.App. 184, 189, 23 P.2d 762; Hackleman v. Lyman, 50 Cal.App. 323, 326, 195 P. 263; Gratz v. Schuler, 25 Cal.App. 117, 121, 142 P. 899; Carpenter v. Hamilton, 18 Cal. App.2d 69, 71, 62 P.2d 1397. Referring to one who has initiated an inquiry concerning property offered him for purchase or exchange, Mr. Pomeroy says: "The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence * * * He cannot claim that he did not learn the truth and that he was misled." Pomeroy's Equity Jurisprudence, 3rd Ed., § 893 (5th Ed., vol. 3, p. 513, § 893).

[9] Bay Cities by resolution of its board of directors authorized the exchange of its certificates for the bonds offered provided that after investigation its officers should be satisfied. Those officials made inquiry in both San Francisco and Los Angeles. No inquiry evoked a favorable report upon the bonds. Not one defendant suggested a source of information or indicated that a closing of the escrow would be advantageous to Bay Cities. In litigation arising out of a purchase of property, where both parties stand upon equal footing and have equal means of ascertaining the truth and the vendee's skepticism has not been lulled by representations made by the vendor, the examination by the purchaser will be excused only when he is induced by fraudulent means to forego examination or where he is prevented from doing so by trick, artifice or design. Palladine v. Imperial Valley F. L. Ass'n, 65 Cal.App. 727, 755, 225 P. 291; Konda v. Fay, 22 Cal.App. 722, 725, 136 P. 514. It cannot be justifiably maintained that the parties to the transaction involved in this cause did not stand upon equal footing. It was not shown that either Lloyd or Commagere had any peculiar knowledge regarding the bonds offered for the Bay Cities certificates. They made no pretense of possessing such knowledge but on the contrary suggested its own investigation by Bay Cities. Moreover, it must be presumed that a financial institution such as Bay Cities would not accept the mere ipse dixit of strangers as to the value of securities offered for sale. Its officers must have known where and how to gain reliable information and appraisals of such bonds. They had their deal in escrow and their own time within which to investigate and evaluate the paper. Not only were they not fraudulently induced to forego inquiry but on the contrary Bay Cities was actually urged to and did make such inquiry. When the escrow was placed, the bank had nothing whatever to do with it except to close it whenever Bay Cities Building and Loan Association should notify the escrowee that it was satisfied with the proposed exchange.

In view of the conclusions above announced, it is ordered that the judgment be and it is hereby reversed with instructions to the trial court to enter judgment in favor of defendant.

STEPHENS, J., concurred.

W. J. WOOD, Justice (dissenting).

I dissent. In my opinion my associates in ordering judgment for defendant bank have done violence to the thoroughly established doctrine known as the law of the case. This is made apparent by the statement in the majority opinion: "In deriving this conclusion, we confess that our adherence to the substantive law of frauds transcends our obligation to respect former decisions in this action, before the pronouncement of which the vice of plaintiff's proof does not appear to have been sufficiently emphasized." In an attempt to support their position they cite England v. Hospital of Good Samaritan, 14 Cal.2d 791, 97 P.2d 813, 815. In that case there were three trials and three appeals. The plaintiff, who had recovered judgment at the third trial, died shortly before decision was rendered on the third appeal. While an appeal was pending from the judgment at the third trial the Supreme Court rendered a decision in other litigation in which the law governing the liability of hospitals was clarified and definitely established in such manner as to make certain the liability of the appealing hospital to the plaintiff England. Under these circumstances the court held that "rigid adherence to the law of the case would compel a most unjust decision." The facts of the case now before us do not bear even slight similarity to the facts of the England case.

There have been three trials in the present action all on substantially the same evidence. This is apparent from the statement of facts set forth in the majority opinion, which is copied from the statement of facts in the opinion on the first appeal. The question before the court for determination on the first appeal was whether the trial court had erred in directing a verdict for plaintiff and against defendant bank. In passing upon this question the court followed the rule that it "must disregard all conflicts in the evidence and accept as true the evidence which tends to show the defendant blameless, and must draw all inferences from the facts in evidence most strongly in favor of the defendant." 6 Cal.2d 70, at page 81, 56 P.2d 517, at page 523. In concluding that there was evidence from which a verdict in favor of defendant bank would be supported by the evidence if the jury had returned such a verdict the author of the opinion called attention to points in the evidence favorable to the bank, and the majority opinion herein contains quotations taken from the opinion in which points in favor of the bank are emphasized. I find, however, that the opinion on the first appeal contains a number of additional statements which show that it was there decided that the facts would support a verdict against the bank.

In addition to the quotations contained in the majority opinion, the following quotations taken from the opinion on the first appeal should be taken into consideration: "Bay Cities made its purchase in the belief that Lloyd Association had a valid permit to do business, and would not otherwise have purchased. Its loss, however, was sustained because of its belief that the assets of Lloyd Association were worth more than was their actual value. The liability of the defendants can arise only out of fraudulent representation as to the value of Lloyd assets. * * * It is also alleged that all of the same defendants falsely and fraudulently represented the assets of Lloyd Association to be worth $120,000, and that Bay Cities believed and relied upon all of the said acts and statements of the defendants and so doing, and relying especially upon the false representations of the bank concerning the certificate of deposit, exchanged its certificates for the stock of the Lloyd Association, thus acquiring the bonds. Bay Cities was entitled to receive a valid permit and it received one that was invalid. * * * It is to be conceded, that where a conspiracy exists, none of the conspirators are to be exonerated merely because the means employed to accomplish a common purpose were unknown or unanticipated in the beginning, or because they did not join in or know of the acts of their coconspirators, or because the object accomplished differs from the one originally contemplated. But we think the present case is one in which all of these facts must be given consideration in deciding whether the bank entered into any conspiracy and if it did, whether it had a common purpose with the others in the conspiracy to perpetrate the fraud with which it was charged and for which it was held liable by the judgment. * * * Whether the defendants conspired together for any purpose, and, if so, what that purpose was, were questions of fact. And if a conspiracy should be found to exist between the bank and some of the other defendants, it is a question of fact whether the object accomplished, namely, the acquisition of the Bay Cities certificates for the consideration paid, was within the common purpose of the guilty defendants. When we take into consideration the extent of the bank's interest in the transactions, its limited participation in and knowledge of entire scheme of the other defendants, and of the methods employed to put them into effect, we cannot say that the evidence establishes, to the exclusion of every other reasonable conclusion, that the bank conspired to perpetrate the fraud on Bay Cities, which was ultimately accomplished. That question, we think, should have been submitted to the jury. * * * Several other questions of fact were presented which we think should have been submitted to the jury. These related to questions of proximate cause and reliance by Bay Cities Association upon the different representations made. * * * Again, it appears that Bay Cities Association made an independent investigation of the value of the bonds, and superficial as that investigation may have been, it does not appear that the purchaser did not to some extent rely thereon. * * * 'Where it is claimed that the defendant's act was not the proximate cause of injury because the result could not reasonably have been foreseen, it is ordinarily a question for the jury whether the result should reasonably have been foreseen.' * * * There was sufficient evidence upon which the jury might have decided either that Bay Cities Association did, or that it did not, part with its property as the direct and proximate result of the representations made solely by and on behalf of the Lloyd Association. These were questions of fact which the jury should have been allowed to decide. * * * Whether it [the bank] should have anticipated the acts of the other defendants was a question for the jury. * * * We think the jury should have been allowed to decide whether the representations as to values were more than expressions of opinion. Upon the whole evidence we cannot say that there could not be a reasonable difference of opinion on that issue. Furthermore, the question of the fraudulent nature of the statements was in issue. * * * The evidence upon this issue of fraudulent intent called for its submission to the jury."

If there were any doubt as to whether it was held on the first appeal that the evidence was sufficient to support a verdict against the bank, it was entirely dispelled by the decision rendered on the second appeal. At the second trial a nonsuit was granted and on appeal the question was squarely presented to the court whether the evidence was sufficient to support a verdict in favor of plaintiff and against the bank. Mr. Justice White, on behalf of the court, after referring to some of the statements made in the opinion on the first appeal, which are above set forth, held:

"The evidence upon the second trial being practically the same as that presented upon the first trial, we are impressed that the ruling of the Supreme Court upon the first appeal, that the questions of proximate cause and the existence or nonexistence of a conspiracy, so far as the liability of the bank is concerned, were debatable questions upon which reasonable minds might disagree and should have been submitted to the jury, became the law of the case and therefore binding upon the trial court and conclusive of those questions upon appeal. In Re Estate of Baird, 193 Cal. 225, at page 236, 223 P. 974 at page 978, we find the following:

" 'The evidence may be different, and yet unless it is substantially different in a material respect, the doctrine of the law of the case applies, and it applies notwithstanding the fact that in the previous decision evidence contained in the record is not quoted or cited in the opinion.' * * *

"Nor is the doctrine of the law of the case confined to that portion of the opinion of the appellate court which can be said to be strictly essential to the disposition made of the case. People's Lumber Co. v. Gillard, 5 Cal.App. 435, 438, 90 P. 556.

"The Supreme Court, in its opinion upon the former appeal having established the law of the case, the trial court was without authority to reconsider these rulings, and should have denied respondents' motion for a nonsuit * * *." [35 Cal.App.2d 6, 94 P.2d 376.]

It is significant that the Supreme Court denied an application for a hearing after this construction had been placed upon its former opinion.

In my opinion the jury was fully and fairly instructed on the rules of law applicable to the issues before them. There were no inaccuracies in the instructions which were misleading to the jury or which resulted in a miscarriage of justice.

The judgment should be affirmed.

ELLS et al. v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

L. A. 18178.

Supreme Court of California.

April 30, 1942.

Rehearing Denied May 28, 1942.

1. Insurance ⚿755(2)

The provisions of fraternal beneficial order's constitution incorporated in insurance certificate, that no officer of subordinate lodge could waive any provision of constitution and that no knowledge obtained by any member of local organization should be construed as knowledge or notice to the order were binding upon insured.

2. Evidence ⚿66

Insured is charged with full knowledge of provisions of constitution of fraternal beneficial order incorporated in insurance certificate that no officer of subordinate lodge can waive any provision of constitution, and that no knowledge obtained by any member of local organization should be construed as knowledge of the order.

3. Insurance ⚿726

The rules and regulations of a fraternal beneficial order are not construed as strictly as ordinary insurance contracts.

4. Insurance ⚿549

A policy provision requiring that notice of holding of autopsy be given to insurer applies only to unofficial autopsies, and does not require beneficiary to give notice of autopsy made by public officials under statutory authority.

5. Insurance ⚿789(1)

Under fraternal beneficial certificate provision that claim for accidental death should be forfeited if autopsy not requested by insurer was performed without giving notice thereof to insurer's manager of claim department at least 72 hours in advance of intended autopsy, death claim was not forfeited because of beneficiaries' failure to give notice of holding of autopsy, where autopsy was performed by public official without beneficiaries' knowledge.

6. Contracts ⚿318

Forfeitures are not favored.

7. Insurance ⚿748

Under fraternal beneficial certificate provision that claim for accidental death should be forfeited if insured's remains were cremated without first giving notice thereof to insurer's manager of claim department at least 72 hours before intended cremation, beneficiaries' claim for accidental death was not forfeited because insured's body was cremated two days after insured's death and no notice of intended cremation was given to manager, where beneficiaries knew nothing of forfeiture provision until after body had been cremated.

8. Insurance ⚿817(3)

Beneficiaries suing on beneficial certificate indemnifying against accidental death had burden to establish that death resulted from an accident as defined by insurance contract, and it was not incumbent on insurer to prove that death was not caused by accident.

9. Insurance ⚿787

Where 78 year old insured who had been in good health fell on bathroom floor sustaining bruises and died two days thereafter from contusion of the right lung with "traumatic pneumonia", which is a classification of pneumonia where an injury causes pneumonia, death was covered by fraternal beneficial certificate indemnifying insured against death "effected solely through external, violent and accidental means".

> See Words and Phrases, Permanent Edition, for all other definitions of "Effected Solely Through External, Violent and Accident Means" and "Traumatic Pneumonia".

In Bank.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Harry C. Ells and others against the Order of United Commercial Travelers of America, a fraternal beneficial order, to recover death benefits under an insurance certificate issued by defendant to plaintiffs' father. From a judgment for plaintiffs, defendant appeals.

Affirmed.

For prior opinion, see 117 P.2d 383.

Newlin & Ashburn and Paul Sandmeyer, all of Los Angeles, for appellant.

Thomas P. Walker and Alfred R. Meyers, both of Los Angeles, for respondents.

CURTIS, Justice.

This is an appeal from a judgment in favor of respondents in an action to recover death benefits under an insurance certificate issued by the appellant fraternal beneficial order.

On January 2, 1914 appellant issued an insurance certificate to James Fisk Ells, respondents' father, which provided that he was accepted as an insured member under "Class A" and as such entitled to all the rights and benefits provided in the constitution of appellant for such insured members. The certificate contained the following provision: "This Certificate, the Constitution, By-laws and Articles of Incorporation of said Order, together with the application for insurance * * * shall constitute the contract * * * and shall govern the payment of benefits." Under the constitution, "Class A" insured members were to be indemnified against the results of bodily injury or death caused by accidental means. On April 2, 1939 the insured accidentally fell in the bathroom of his home and sustained injuries which resulted in his death on April 4, 1939. At the time of his death he was in good standing, having paid all dues, assessments and other charges called for under the terms of the insurance certificate from its date of issuance up to the time of his death, a period of over 25 years. On April 5, 1939 an autopsy was performed upon the body of the insured by the autopsy surgeon of the county of Los Angeles at the request of the county coroner, which revealed that death was caused by contusion of the right lung with traumatic pneumonia. The autopsy was performed without the knowledge of respondents or either of them. On the same day, but following the post mortem examination, A. J. Loeslein, secretary-treasurer of Los Angeles Council No. 82, the local council of appellant, was informed by respondents of the facts concerning the autopsy and of their intention to have the body cremated on the following day. No other notice of the autopsy or cremation was given to the appellant. On April 6, 1939, with the express permission of Loeslein, the body of the insured member was cremated. Respondents, as beneficiaries under the insurance certificate, submitted a claim for the death benefits, which was rejected by appellant on the ground that the right to the death benefits was forfeited by respondents' failure to give the manager of appellant's claim department 72 hours' notice of the intended autopsy and cremation as required by the constitution.

[1, 2] Preliminary to the discussion of the questions involved herein, it might be well to refer to the evidence that the local lodge had given Mrs. Barnes permission to have the body cremated immediately following the funeral. The constitution of the appellant, which we have seen was made a part of the contract of insurance, expressly provides that no officer of a subordinate lodge shall have power to waive any provision of the "constitution of the order relating to insurance" and that no knowledge or information obtained by any member of the local organization shall be construed as "knowledge or notice to the order." These provisions of the constitution incorporated in the terms of the insurance certificate are held to be binding upon the insured (Marshall v. Grand Lodge A. O. U. W., 133 Cal. 686, 66 P. 25; Valentine v. Head Camp, P. J., W. O. W., 180 Cal. 192, 180 P. 2, 3 A.L.R. 380), and the insured is charged with full knowledge of these provisions of the constitution. Valentine v. Head Camp, P. J., W. O. W., supra; Supreme Lodge v. Price, 27 Cal.App. 607, 150 P. 803.

The basis of these decisions is that since the *insured* is a party to the contract of insurance, he is charged with knowledge of all its terms, including the constitution of the order, as the latter was made a part of the contract. However, we wish to add at this time that these cases are of doubtful authority in determining whether the *beneficiaries* named in the insurance certificate but not parties to the contract are charged with knowledge of its terms.

It might be further said that the trial court did not base its decision upon any alleged waiver by the secretary of the local lodge, as it appears from its remarks in ruling upon a motion to strike out the evidence of waiver. In ruling upon that motion it stated: "Because Mr. Loeslein [the secretary] says 'go ahead and do something' that it is O. K. with him, that certainly does not bind the company from that standpoint."

We are not, therefore, basing our decision of any question involved herein on any asserted waiver of the terms of the insurance certificate by any act of the secretary or other officer of the local lodge.

Appellant first contends that respondents' claim for death benefits was forfeited and rendered null and void by the failure of respondents to notify the manager of the claim department of the appellant 72 hours before said autopsy was held that said autopsy was to be held. As noted above, the insurance certificate issued to the insured makes the constitution of appellant a part of the contract between the insured and the appellant Article XV, section 21 of this constitution reads in part as follows: "Any claim for death alleged to have been caused by accident shall be forfeited and rendered null and void should an autopsy not requested by the Supreme Executive Committee, or any representative authorized by it, be held without notice thereof being first given to the Manager of Claim Department at least seventy-two (72) hours in advance of the intended autopsy. Any claim for death alleged to have been caused by accidental means shall also be forfeited and rendered null and void should the remains be cremated without first giving notice thereof to the Manager of Claim Department at least seventy-two (72) hours in advance of the intended cremation."

[3] It will be noted that the above provision of the constitution expressly excepts autopsies "requested by the Supreme Executive Committee" from the requirement of the 72 hours' prior notice, and appellant insists that the expression of one exception excludes all others. Accordingly, it contends that any autopsy on the body of a deceased member, even when performed by public officials without the knowledge of the beneficiary named in the certificate, works a forfeiture of the insurance and renders any claim thereunder null and void unless the beneficiary gives the 72 hours' notice as provided in the constitution. Such a construction of this section would appear to be extremely harsh and of the strictest character. It might be well to call attention to the fact that appellant, as appears from its name, is a "fraternal beneficial order" and that one of its objects, as appears from its constitution, is "To give all moral and material aid in its power to its members and those dependent upon them, also to assist the widows and orphans of deceased members." The rules and regulations of such an order are not given the strict and rigid construction applied to the interpretation of ordinary contracts of insurance. In the case of Journeymen Butchers' P. & B. Association v. Bristol, 17 Cal.App. 576, at page 578, 120 P. 787 at page 788, the principle was announced in the following language: "As before stated, the object of a society of this kind is to assist and benefit the families and heirs of deceased members; and courts are bound to construe its rules and regulations liberally to effect the benevolent purposes of the order. 3 Am. & Eng. Ency. of Law, 1067; Niblack, §§ 160–175; Keener v. Grand Lodge, 38 Mo. App. [543] 553."

Niblack on Benefit Societies and Accident Insurance states in section 17, page 32: "The by-laws of mutual benefit societies should be construed liberally, and with a view to effectuate the benevolent purposes of their organization." The same author further states in section 23, page 44: "* * * their by-laws must be reasonable, and all which are vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation, are void."

[4] However, aside from the rule announced in these authorities, it appears in this case that the autopsy was performed by the county coroner without the consent or even the knowledge of either of the beneficiaries. The rule is well settled that a provision in a policy of insurance requiring that notice of the holding of an autopsy be given to the insurer applies only to unofficial autopsies, and does not require the beneficiary to give notice of an autopsy made by public officials under statutory authority. 8 Couch, Cyclopedia of Insurance Law, § 1958, p. 6506; O'Brion v. Columbian Nat. Life Ins. Co., 119 Me. 94, 109 A. 379; International Travelers' Ass'n v. Melaun, Tex.Civ.App., 270 S.W. 246; Loesch v. Union Casualty & Surety Co., 176 Mo. 654, 75 S.W. 621.

In the case of O'Brion v. Columbian Nat. Life Ins. Co., supra, in an action to recover on an insurance policy containing a clause which required notice to the company of a proposed autopsy, the court held that where the autopsy was performed by public officials, no notice of the autopsy was required to be given to the insurer. In so holding the court at page 98 of 119 Me., at page 381 of 109 A., stated: "The autopsy contemplated by that provision is unofficial—one made at the instigation of the beneficiary—and then it is only fair, as prescribed, that seasonable notice thereof be given to the company. Here, however, no autopsy was made at the instigation of the beneficiary or at her request. * * * She had no part in the proceedings. The brother was wholly responsible therefor, and therefore no notice could be given by her."

In Loesch v. Union Casualty & Surety Co., supra, recovery was sought under an insurance policy containing a like clause requiring notice to the insurer in case an autopsy was performed. The court sustained a judgment in favor of the beneficiary and in so doing stated at page 667 of 176 Mo., at page 624 of 75 S.W.: "It is a reasonable requirement under reasonable interpretation, and a violation of its terms under circumstances reasonably showing disadvantage to the company would work a forfeiture of the policy. But there is nothing in this case to indicate any such disadvantage. In the first place, it is very doubtful if the plaintiff was responsible for the act. If it occurred without her knowledge or consent, it would be no defense to the suit. She testified that she did not know what the word meant, and did not know what the physicians were doing."

In the case of International Travelers' Ass'n v. Melaun, supra, the court stated at page 249 of 270 S.W.: "The latter part of clause 8 copied above, 'and if an autopsy be made, the association shall be given timely notice thereof and the right and opportunity for its representative to attend and participate,' evidently means that if any autopsy is made with the consent of the surviving wife, and especially when she is the sole beneficiary named in the policy." The court further stated at page 249 of 270 S.W.: "If it was the intention of the company, as seems to be expressed in said clause, and as is urged by appellant, that the rights of the surviving wife and beneficiary should be swept away by the unauthorized act of a third party in ordering an autopsy without her consent, then said clause, so construed, would be wholly void and unenforceable."

These authorities appear to refute appellant's contention that the claim of respondents was forfeited by reason of respondents' failure to give appellant notice of the holding of the autopsy.

Appellant relies upon a number of authorities in support of its contention that respondents are barred from recovering upon said insurance certificate by reason of the clause contained therein (requiring notice to be given to the insurer 72 hours before any autopsy is made upon the body of the insured). The principal authority so relied upon by appellant is the case of Sheehan v. Commercial Travelers', etc., Ass'n, 283 Mass. 543, 186 N.E. 627, 629, 88 A.L.R. 975. That case may readily be distinguished from the instant action. In that case the clause in the policy of insurance respecting notice of autopsy provided that the insured should have the right "to be present in any case at an autopsy performed on the body of a member *under the direction of a public officer,* or by the authority or consent of his beneficiary or family." (Italics ours.) In that case the insurance was made payable to the insured's estate. He left no wife, but evidently left a sister. On page 554 of 283 Mass., at page 631 of 186 N.E., it is stated: "If the insured in this case left no wife and the sister, to whom reference is made in the record, was his nearest kin, the plaintiff, to establish that the autopsy, if made as testified to, was not within the terms of the policy, was required to prove that it was not performed by the authority or consent of the sister. The evidence reported did not justify this conclusion * * *."

It will be noted in the first place that the policy of insurance in that case provided for notice of an autopsy performed "*under the direction of a public officer.*" (Italics ours.) No such provision is to be found in the insurance certificate involved in this case. However, it does not appear that the court in that case was greatly concerned with that provision of the policy. The decision seems to be based upon the conclusion that the evidence failed to show that the autopsy was performed without the authority or consent of the sister who was the insured's nearest relative. In the case now before us there is evidence, and the trial court found, that the beneficiaries did not authorize nor consent to the autopsy and that they knew nothing of the autopsy until after it had been performed. This factual situation in the two cases destroys the Sheehan case as an authority in favor of appellant. On the other hand, we think its decision may well be considered favorable to respondents. The court clearly intimates that had the autopsy been performed without the knowledge or consent of the sister, the nearest relative of the insured, the defense of failure to give notice of the autopsy to the insurer would not have been a defense to the action on the policy.

The other cases relied upon by appellant are Howes v. United States Fidelity &

Guaranty Co., 9 Cir., 73 F.2d 611; Maryland Casualty Co. v. Harris, 3 Cir., 60 F.2d 810; Clay v. Aetna Life Ins. Co., D.C., 53 F.2d 689; Standard Accident Ins. Co. v. Rossi, 8 Cir., 35 F.2d 667; Hurley v. Metropolitan Life Ins. Co., 296 Mass. 130, 5 N.E.2d 16; and Dvorkin v. Commercial Travelers' Mutual Accident Ass'n, 283 N.Y. 629, 28 N.E.2d 34. In these cases the policy or insurance certificate contained a provision in respect to an autopsy similar to that contained in the insurance certificate in the instant action, and in each of these cases a demand was made for an autopsy by the insurance company and refused by the beneficiary. It was held that on account of such refusal no recovery could be had on the policy or certificate. It is apparent that these cases are not controlling in a case like that now before us where the autopsy was performed without the consent or knowledge of either of the beneficiaries and no opportunity was given to either of them to notify appellant before the autopsy was performed.

[5] We are satisfied that the great weight of authority both in this state and elsewhere sustains the position of the respondents that the provision in a policy or insurance certificate respecting a claim for death and rendering it null and void in case an autopsy not requested by the insurer be held without previous notice to the manager of the claim department of the insurer, has no application to an autopsy performed by a public official without the knowledge or consent of the beneficiaries.

We might also refer to a case against this same appellant, entitled Gibbs v. United Commercial Travelers of America, 14 Ohio App. 439. In that case the contract of insurance provided for a seven day notice if an autopsy, not requested by the supreme executive committee or any representative authorized by it, were held. The case was decided upon the pleadings. As a defense the insurer alleged that an autopsy was held and no notice thereof was given to it by the plaintiff. Plaintiff replied admitting this allegation, but alleged that she did not know of any such provision until after the autopsy had been held. The trial court sustained a demurrer to this reply. The appellate court reversed the judgment on other grounds but further held at page 455 of 14 Ohio App. respecting said forfeiture provision "that the terms and conditions in the policy with reference to an autopsy are unreasonable and unwarranted, and that forfeiture of the policy cannot be declared for failure to give such notice." There is nothing to indicate the basis of the court's decision, whether the court declared this provision of the policy unenforceable upon the ground that the length of time specified therein was unreasonable, or upon the ground that the beneficiary had no knowledge of the insurance until after the autopsy was held. The court was particular to call attention to the fact that the beneficiary had no knowledge of the insurance until after the autopsy was performed. After this decision the appellant changed its contract of insurance so as to provide for the 72 hours' notice, but so far as we are advised, no court has passed upon the reasonableness or validity of its insurance contract as so modified.

Appellant further contends that the cremation of the body of the insured without giving notice thereof as provided by the terms of the insurance certificate worked a forfeiture of respondents' claim and rendered it null and void As stated above, the insurance certificate issued by the appellant to the insured, James Fisk Ells, made the constitution of said order a part of the contract of insurance between the insurer and the insured. We have hereinbefore set out a copy of the provision of the constitution which provides that any death claim under said certificate shall be forfeited and rendered null and void should the remains be cremated without first giving notice thereof to the manager of the claims department of the insurer at least 72 hours in advance of the intended cremation. It is admitted that the body of Mr. Ells was cremated two days after his death and that no notice of the intended cremation was in fact given to the manager of said claims department. It was satisfactorily established at the trial that the beneficiaries knew nothing of this provision in the insurance certificate until after the body had been cremated.

In support of its contention, appellant cites the cases of Howes v. United States Fidelity & Guaranty Co., supra; Clay v. Aetna Life Ins. Co., supra; Standard Accident Ins. Co. v. Rossi, supra, and Dvorkin v. Commercial Travelers' Mutual Accident Ass'n, supra.

The facts in each of these cases show that the policy of insurance which was the subject of each action contained a provision giving the insurer the right to demand an autopsy on the body of the deceased. In each of these cases it was shown that an autopsy was demanded but refused by the beneficiary, and it was generally held in these cases that the refusal of the *beneficiary* to consent to an autopsy reasonably and seasonably demanded was a breach of the contract, defeating the right of the beneficiary to recover on the policy of insurance. In each of these cases the beneficiary knew of the provision in the policy of insurance providing for an autopsy, at the time of the refusal to permit the insurance company to perform the same, and deliberately denied the company this right given it by the contract of insurance. By this breach of the contract on the part of the beneficiary, the latter was denied recovery, provided the demand for an autopsy was reasonably and seasonably made.

The distinction between those cases and the instant action is that the beneficiary, in each of those cases wherein the judgment was adverse to the beneficiary, knowing of a material provision in the contract, deliberately refused to comply with it. In the case now before us, the beneficiaries without any knowledge of the requirements of the policy that notice be given to the appellant of their intention to cremate the body of the deceased, innocently had the body cremated after the funeral and without any previous notice to the appellant.

The industry of counsel in this action has failed to discover any case (with one exception) bearing directly upon the question presented by the facts of this case. We have been equally unsuccessful. The exceptional case is another action against the present appellant, entitled Kroner v. Order of United Commercial Travelers, 176 Wis. 151, 184 N.W. 1037. In that case is appears that an insurance certificate was issued containing a clause forfeiting the policy in case of cremation without first giving seven days' notice to the company. The body of the deceased member of the order was cremated two days after his death. Plaintiff, the wife of the deceased, had no knowledge of the existence of the insurance until after cremation. The trial court held "* * * that under the evidence and facts as found in this case it is unreasonable to declare and to enforce a forfeiture of the plaintiff's claims under the insurance certificate on the ground that the body was cremated without first giving notice; that the beneficiary was excused from giving such notice; and that as to the plaintiff, under the facts and circumstances shown in this case, the provision as to cremation in said certificate is inapplicable, null, and void." The Supreme Court of Wisconsin affirmed the judgment of the trial court, but by a divided court. The court consisted of seven members, one of whom was disqualified and did not participate in its decision. Of the other members, three favored the affirmance and three a reversal of the judgment. The rule of the court required an affirmance of the judgment and it was so declared. While that case, on account of the even division of the court, may lose much of the weight to which it would be entitled had there been a majority of the court in favor of the affirmance of the judgment, nevertheless it cannot be ignored as a decision of the highest court of a sister state holding that it was unreasonable to enforce a forfeiture of an insurance certificate on the ground that the body was cremated without the beneficiary first giving notice as required by the insurance certificate, in the absence of knowledge on the part of the beneficiary of such requirement.

The only difference between that case and the instant action is that the insurance certificate before the Wisconsin court provided for a seven day notice while the one issued to Mr. Ells required a three day notice, but in each case the body was cremated two days after death. As stated above, appellant has changed its insurance certificate so as to provide for the 72 hours' notice. As we read this decision, it is not based upon the unreasonable length of time required to be given by the beneficiary before the body could be cremated, as cremation took place two days after death, but the court was of the opinion that it was unreasonable to enforce the forfeiture for failure to give the required notice as to the plaintiff under the facts of the case. These facts were that the beneficiary (plaintiff) had no knowledge of the existence of the insurance, and therefore knew nothing of the forfeiture clause in the policy. It was further held by said court that the beneficiary was excused from giving notice. The only possible reason the court should so hold, it seems to us, would be predicated upon the fact that the beneficiary had no knowledge of the insurance until after the body was cremated.

[6] It is apparent in the case before us that the appellant seeks to enforce the forfeiture clause in the insurance certificate respecting cremation of the body of the deceased without notice to the appellant. It is well settled in this state as well as in other jurisdictions that forfeitures are not favored by either courts of law or equity. 12 Cal.Jur., section 3, page 634, states: "statutes and contracts are construed strictly against forfeitures or as liberally as possible to prevent them." This rule against forfeitures is so well established that further citation of authority is, we think, unnecessary.

[7] In the case of International Travelers' Association v. Melaun, supra, respecting a clause in an insurance certificate requiring that notice of an autopsy be given to the insurer as recited in a previous portion of this opinion, it was said that such a clause would be wholly void and unenforceable if construed to apply to an autopsy by the act of an unauthorized third party without the consent of the beneficiary. It seems equally unreasonable to hold that a clause in an insurance certificate providing for a forfeiture of all claims thereunder if the body of the insured is cremated without notice to the insurer, is applicable in a case like that before us, where the beneficiaries had no knowledge of such a provision in the insurance certificate and had the body of the deceased cremated two days after his death without giving the insurer any notice of their intention to do so. In the Melaun case the court held that the forfeiture clause in the policy there involved was void and unenforceable, as under the facts in that case, to construe it as the insurer contended, the rights of the wife and beneficiary would be swept away by the unauthorized act of a third party. There is a marked similarity between the contention made by the insurer in that case and the present contention of the appellant. If it was the contention of the insurer, as now argued by appellant, that the cremation of the body of the insured under the circumstances should in this case work a forfeiture of the insurance, the rights of the beneficiaries would be swept away by their innocent and unintentional violation of one of the terms of the insurance certificate of which they had no notice or knowledge. In the Melaun case it was held that to construe the policy as contended by the company would render it wholly void and unenforceable. We are of the opinion that the same conclusion should govern in the present case.

We are not unmindful of the importance nor of the necessity to the insurer of a forfeiture clause in the insurance certificate, nor of the reasonableness of a proper requirement that notice be given to the insurer of an intention to cremate the body of the insured, in order that the insurer may if it deem it necessary have an autopsy held, or other examination of the body of the insured made prior to cremation. But to enforce this forfeiture against the beneficiary without either actual or constructive notice to him of its existence as an integral part of the insurance certificate is contrary to every principle of equity and fair dealing. This does not, however, leave the insurer without the means of properly protecting itself against a hasty cremation of the body without reasonable notice to it. If the beneficiary had knowledge of said clause and deliberately violated its requirements, the insurer would not be liable for the payment of any claim under the insurance certificate. It does not seem to be an unreasonable burden cast upon the insurer, if it intends to hold beneficiaries to this provision of the insurance certificate, to require it to notify them of such provision. The insurer has the names and addresses of all beneficiaries and it would be a simple matter for the insurer, when a certificate is issued, or the name of a beneficiary is changed, to notify the beneficiary of those provisions of the contract of insurance, the violation of which by the beneficiary would work a forfeiture of any claim under the contract. The contention of appellant that the respondents herein forfeited all rights under the insurance certificate issued to their father cannot be sustained.

Finally the appellant contends that respondents failed to prove that the death of the deceased was caused by external, violent, and accidental means alone and independent of all other causes. The evidence shows that the deceased was 78 years of age, that on April 2, 1939, and for some time prior thereto he had enjoyed good health and did work around the garden and home. Mrs. Barnes and the deceased lived together in a small house. They had been visiting with some friends who had called to see them. When the friends left, the deceased went to the bath room which was but a few feet from where Mrs. Barnes was sitting at the time. A moment after he entered the bath room, Mrs. Barnes heard the door slam, the gas heater "scratch" across the floor of the bath room, and immediately the sound of a falling body. She immediately went to the bath room and found her father lying on the floor by the side of the gas heater. The gas heater was connected to the wall by a small rubber hose. It was not in its accustomed place near the wall but was out in the room a foot or a foot and a half from the wall. The deceased was fully conscious at that time and said to her: "Don't get excited. I am all right." She moved a little stool in the bath room over to her father and he put his hands on the rounds and got up. He was put to bed. Dr. Alsberg was called that evening, examined him and prescribed medicine for him to take. The next day he suffered considerable pain and Mrs. Barnes tried two or three times to call Dr. Alsberg but he was busy. She phoned another doctor who said he would call at noon. The patient died at 11 o'clock before the doctor arrived. This was on April 4, two days after his fall in the bath room. As stated above, an autopsy was performed on the body of the deceased the next day. The autopsy surgeon testified, after describing the condition of the body of the deceased and certain bruises found on the body: "That means altogether that there were two bruises, one on the forehead, and one on the chest at the level of the seventh rib on the inside, and there was pus in the right lung on that same side, and that there were also some natural conditions including nephritis of the kidneys and congestion of the liver."

The doctor stated that in his opinion the cause of his death was contusion of the right lung with traumatic pneumonia; that the cause of the traumatic pneumonia was a contusion of the right lung, and that it was an external injury. In answer to a request that he explain what was meant by traumatic pneumonia, the doctor stated: "It is a classification of pneumonia where an injury causes the pneumonia." The doctor on cross examination testified that the deceased had chronic nephritis (inflammation of the kidneys) but that he did not consider this ailment sufficiently severe to be a contributing cause of the death of the insured.

[8, 9] The constitution of appellant, which we have seen was made a part of the contract of insurance issued by the order to the deceased, protected and indemnified the insured "against the results of bodily injury * * * effected solely through external, violent and accidental means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes." The burden was on the respondents to establish as a part of their case that death resulted from an accident, as defined by the terms of the contract of insurance, and it was not incumbent on the appellant to prove that death was not caused by accident. Rock v. Travelers' Ins. Co., 172 Cal. 462, 156 P. 1029, L.R.A.1916E, 1196. That the deceased met his death by reason of the fall in the bath room we think is satisfactorily established by the evidence in the case. Whether the deceased tripped on the rubber hose or stumbled against the gas heater, or for any other reason fell to the floor of the bath room, he sustained an injury by reason of the fall which in the opinion of the doctor was the cause of his death. The injury was external in origin and independent of all other causes was the cause of his death. The evidence clearly and definitely brings the cause of his death within the provision of the insurance certificate which insured the deceased "against the results of bodily injury * * * effected solely through external, violent and accidental means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes."

In the case of Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, at page 22, 83 P. 1013, at page 1014, 9 Ann.Cas. 916, the court stated: "When death by unexplained violent external means is established. The law does not presume suicide or murder; it does not presume that injuries are inflicted intentionally by the deceased, or by some third person; and hence, with the proof indicated, by reason of the presumption which attaches against self-destruction or the violation of the law, prima facie proof is also made of the fact that the injuries were accidental, without direct or positive testimony on that point."

In the case of Losleben v. California State Life Ins. Co., 119 Cal.App. 556, at page 562, 6 P.2d 1012, 1014, the court stated: "* * * this evidence of a man in normal health suddenly stricken, with the evidence that the condition in which he was found could have been caused by a jolt or sudden strain, taken in connection with the place and circumstances in which he was working, with the absence of the only other things that could be expected to have caused his condition, and with the natural inferences and presumptions that may be drawn from the evidence introduced, was sufficient to make out a prima facie case, and that the motion for a nonsuit should have been denied. Nor is the result different because the deceased may have been injured while doing something he intended to do such as jumping from the bench. While he may have intended to jump from the bench, he may have slipped and fallen while so doing, and it can hardly be presumed that such slipping or falling was an intentional act."

It is appellant's position that while the insured may have met his death as a result of an accident, yet the evidence fails to show that his death "was effected by accidental means." Probably as clear and concise an exposition of the meaning of an injury "effected by accidental means" as may be found in any of our reports is contained in the syllabus of the decision in the case of Rock v. Travelers' Insurance Co., supra, which reads as follows: "Under a policy insuring against death or injuries effected by 'accidental means,' it is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the death or injury." The preceding act or occurrence which led to the death of the insured in the instant case was his fall upon the bath room floor, which, it must be conceded, was most unexpected. In the Rock case the death of the insured resulted from the exertion by him in carrying a heavy casket down a flight of stairs. It was held that his death was not effected by accidental means. The court stated at page 468 of 172 Cal. at page 1031 of 156 P., L.R.A.1916E, 1196: "In carrying it down he did not slip or stumble, nor did the casket fall against him. The entire operation was carried out in precisely the manner intended and designed by Rock."

The instant case presents an entirely different situation from the Rock case, as the evidence before us clearly shows that the preceding act which led to the injury and death of the insured was entirely unexpected.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 379

BORENSTEIN v. BORENSTEIN.

L. A. 16497.

Supreme Court of California.

May 5, 1942.

1. Divorce 🔑168

Where a motion to vacate interlocutory and final divorce decrees is not based upon extrinsic fraud and is made three years after entry and finality of decrees, motion is governed by rules applicable to collateral attack and must be presented and determined upon the judgment roll alone, and every presumption is in favor of validity of decrees.

2. Divorce 🔑168

Where papers relied on by defendant as disclosing invalidity of interlocutory and final divorce decrees formed no part of judgment roll, and there was no claim of extrinsic fraud, such papers could not be used on defendant's motion to vacate decrees three years after they were entered.

3. Divorce 🔑168

On motion to vacate interlocutory and final divorce decrees, three years after they were entered, it would be presumed that appropriate proof was introduced satisfying trial court of fact of plaintiff's residence in state and county for necessary period prior to institution of divorce proceedings and of the continued existence of the marital status at that time.

4. Divorce 🔑183

Even if Supreme Court could go beyond face of judgment roll on defendant's appeal from order denying a motion to vacate interlocutory and final divorce decrees, it was

still necessary for defendant to bring up a properly authenticated record, either a reporter's transcript or bill of exceptions, showing that documents relied on by defendant were actually submitted to trial court upon motion to vacate.

* * *

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Divorce proceedings by Jeanette Borenstein against David Borenstein wherein interlocutory and final decrees of divorce were entered for plaintiff. From an order denying defendant's motion to vacate the decrees, defendant appeals upon a transcript certified to by clerk of the trial court.

Affirmed.

Albert A. Albeck, of Los Angeles, for appellant.

Nat Recht, of Hollywood, for respondent.

GIBSON, Chief Justice.

This is an appeal from an order denying a motion to vacate an interlocutory and a final decree of divorce.

Respondent filed her complaint for divorce in Los Angeles County in April, 1933. Appellant was personally served and filed an answer denying the material allegations of the complaint. Respondent thereafter requested leave to file an amended complaint which was denied. Upon the subsequent issuance of an order to show cause, proceedings were had with respect to the custody pendente lite of the two minor children of the parties. The cause came on for trial in October, 1933, respondent appearing in person and by counsel. Appellant appeared by counsel only and offered no evidence in opposition to respondent's showing. The trial court found that respondent had resided in the state and county for the requisite period, that the parties were husband and wife, and that respondent's allegations of cruelty were true. Accordingly, an interlocutory decree of divorce was given in favor of respondent on January 16, 1934, together with an award of the custody of the children, with provision for their support, and for alimony, counsel fees and costs. The final decree was entered on January 18, 1935. No appeal was taken from either decree.

On June 28, 1937, nearly three years after entry of the final decree, appellant moved to vacate both the interlocutory and final decrees. In his affidavit in support of the motion, he stated that the proposed amended complaint, submitted by respondent and rejected by the trial court, tended to disclose that the marriage of the parties had been terminated in 1932 by a Mexican decree and that a report filed pending the action with respect to the custody of the children disclosed that respondent did not satisfy the residence requirements at the time of institution of suit. The motion was denied, and this appeal was taken.

The appeal is prosecuted upon a transcript certified to by the clerk of the trial court. Contrary to the appellant's contention, the asserted invalidity of the decrees does not appear on the face of the judgment roll, which alone may be authenticated by the clerk's certificate. Inspection of the transcript discloses that it contains many matters forming no proper part of a clerk's transcript, including copy of the affidavit in support of motion to file amended complaint, copy of the proposed, but unfiled, amended complaint, copy of the purported Mexican decree, and copy of the custody report.

[1] Where, as here, the request to vacate is not based upon extrinsic fraud and is made approximately three years after entry and finality of the decrees, the motion is "governed by the rules applicable to collateral attack, and must therefore be presented and determined upon the judgment roll alone" and "every presumption is in favor of the validity of the judgment, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it." City of Salinas v. Luke Kow Lee, 217 Cal. 252, 255, 18 P.2d 335, 336; In re Morehouse, 176 Cal. 634, 636, 169 P. 365. See, also, Estate of Estrem, 16 Cal.2d 563, 570-572, 107 P.2d 36.

[2-4] Inasmuch as the papers relied on by appellant as assertedly disclosing the invalidity of the decrees form no part of the judgment roll, they can not be used on this attack. It will be presumed that appropriate proof was introduced satisfying the trial court of the fact of respondent's residence in the state and county for the necessary period prior to institution of the divorce action and of the continued existence of the marital status at that time. But even if we could go beyond the face of the judgment roll, it would still be neces-

sary for the appellant to bring up a properly authenticated record, either a reporter's transcript or bill of exceptions, showing that the documents relied on by appellant were actually submitted to the court upon the motion to vacate. Sutcliffe v. Sutcliffe, 220 Cal. 398, 401, 31 P.2d 195; Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 458, 274 P. 748.

The order denying motion to vacate is affirmed.

SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 332

DAVIS v. STATE BAR.

L. A. 17656.

Supreme Court of California.

May 1, 1942.

Rehearing Denied May 28, 1942.

1. Attorney and client 🔑54

Under statute requiring Board of Governors to make findings of fact in all disciplinary proceedings resulting in a recommendation to the Supreme Court for disbarment or suspension, board may adopt or reject findings of a local administrative committee in whole or in part, and may also take additional evidence and make other findings. St.1939, pp. 351, 356, §§ 6043, 6080.

2. Attorney and client 🔑53(1)

In a disbarment proceeding, intendments are in favor of the accused attorney.

3. Attorney and client 🔑39

An attorney, to whom client pledged diamond rings to secure payment of attorney's fees for services rendered to others, could not sell the rings without notice to client and a reasonable opportunity to redeem the rings, and in failing to give notice of their sale notwithstanding client's demand for return of rings attorney embezzled his client's property, on issue whether attorney was guilty of conduct involving moral turpitude authorizing disbarment.

4. Attorney and client 🔑44(2)

In dealing with property pledged by a client, attorney's professional duty requires him to act toward client in the utmost good faith as well as to comply with the law concerning bailments.

5. Attorney and client 🔑123(1)

An agreement between an attorney and his client by which attorney receives any advantage is presumed to be void, and burden is upon attorney to prove that client really entered into the agreement.

6. Attorney and client 🔑53(2)

Where attorney, charged with having verified cross-complaint to client's replevin action against attorney to recover rings pledged to secure attorney's fees knowing that allegations in cross-complaint were false, gave conflicting explanations of his action, the Board of Governors in disbarment proceedings against attorney was not obliged to accept attorney's last explanation.

7. Attorney and client 🔑38, 39

An attorney who embezzled client's diamond rings which client pledged with attorney to secure payment of attorney's fees, and who signed a verification in blank which was thereafter used in connection with a cross-complaint containing false allegations filed in a replevin action against the attorney, and who gave false testimony in his deposition in a replevin action, was disbarred.

CARTER, J., dissenting.

In Bank.

Proceeding by Harold L. Davis to review the recommendations of the Board of Governors of the State Bar of California that petitioner be disbarred from practice of law.

Petitioner disbarred.

For prior opinions, see 110 P.2d 659, 118 P.2d 818.

Rehearing denied; CARTER, J., dissenting.

Morris Lavine, of Los Angeles, for petitioner.

Claude Minard, of San Francisco, and Guy Richards Crump, Louis W. Myers, B. E. Ahlport, and Paul Vallée, all of Los Angeles, for respondent.

PER CURIAM.

This proceeding was brought to review the recommendations of the Board of Governors of The State Bar that the petitioner be disbarred from the practice of law.

The petitioner's difficulties arose out of his dealings with Mrs. Marie Monast, who was arrested and placed in jail on a charge of possessing narcotics. Through a man named Evans, a self-styled "bouncer" in a Hollywood night club, she employed the petitioner and another lawyer to represent her. To secure the payment of their fee of $2,000 she pledged with them three diamond rings having a value in excess of that amount. Two of those rings were left in the possession of the petitioner; the third was deposited with his associate.

The petitioner signed a typewritten receipt for the two rings he received which, as originally written, recited that they were deposited as security for attorneys' fees "and bond." When the receipt was offered in evidence, a line had been drawn through the words "and bond."

Davis procured a bail bond from a surety company and Mrs. Monast was released from jail. She paid the premium on the bond. The attorneys' fee was paid in three instalments, the last of which was made on May 26, 1937, to the petitioner's associate, who, at that time, returned to Mrs. Monast the ring which she had left with him.

On July 19, 1937, when Mrs. Monast failed to appear for trial in the superior court, the bond was forfeited. Later, upon representations of Davis that she was ill, the matter was continued one week. She was then tried and convicted. She immediately filed an application for probation, which was granted the same day. A condition of probation was that she should leave California and not return. After a few days she sailed for Honolulu. Upon this disposition of the case her bond was exonerated.

On July 17, 1937, Irene Davidson and Catherine Wall were arrested and jailed in Los Angeles on charges of grand theft. They, too, through Evans, retained Davis and his associate as counsel. Shortly after their arrest, Davis filed a petition for a writ of habeas corpus and secured their release on bail by posting a bond of $1,000 for each one of them. These bonds were secured by Davis from the same surety company which had posted bail for Marie Monast. When arraigned in the municipal court, the bail of each defendant was increased to $3,500. This they were unable to furnish, and in consequence they were remanded to the county jail where they remained until they were convicted and sentenced.

When these two women were arrested, Marie Monast had paid the premium on her bond and all of her attorneys' fees in her case. One of the rings which she had pledged had been returned to her. On the day after she was to appear for trial, the petitioner pawned for $350 the two diamond rings which he had in his possession. Approximately two months after Mrs. Monast left for Honolulu, Davis sold the pawn ticket for $200, and the purchaser subsequently redeemed the rings from the pawn broker. Thereafter Mrs. Monast brought a replevin action against Davis to secure possession of the rings. Davis then repurchased the rings and after the institution of the disciplinary proceedings against him, returned them to her.

All of the facts which have been stated stand undisputed. But there is a direct conflict between the petitioner and Mrs. Monast concerning the agreement under which she pledged the rings with him. He testified that when he signed the receipt for the rings the words "and bond" had not been crossed out. Mrs. Monast testified positively that she refused to accept it until this was done.

In further explanation of his action in disposing of the jewelry the petitioner testified that "they were to be returned to her when the bond was either exonerated or otherwise had been disposed of and the fee had been paid." He also testified that he represented Catherine Wall and Irene Davidson upon the representation of Evans "that he had talked to Mrs. Monast and that she was willing to take care of their case and for me to come and get them out [of jail]." Later, he said, he talked with Mrs. Monast and told her Tom Evans had called him in connection with the case of these women. "And did she indicate," he was asked, "in any wise whatsoever that she was not going to be responsible for their bond and attorneys' fees?" "No," was his reply. "If she had, I wouldn't have gone ahead with them." According to his testimony, he told Mrs. Monast "in the beginning" that his fee would be $250 for each woman and that he was going to keep the jewelry. But he also related a conversation he had with Mrs. Monast at the county jail when "she apparently was highly dissatisfied and said that these two girls were dissatisfied the way the preliminary hearing had been handled; said they were going to get other counsel and that she didn't intend to pay for their fee or bond."

The testimony of Mrs. Monast, taken by deposition, is in direct contradiction to that of petitioner. She said: "I never talked to Mr. Davis concerning Catherine Wall and Irene Davidson. * * * I am positive that I never told Harold L. Davis, or anyone else, that I would pay the fees for [them] * * * or either of them, as I had no reason for assisting these women. * * * I never told [them] * * * that I would be responsible for their bonds, or attorney's fees at any time in the county jail in Los Angeles, or any place else."

The charges made against the petitioner are that he improperly disposed of the diamond rings pledged with him, that he filed a false and improper cross-complaint in the replevin action, and that he gave false testimony in a deposition taken in connection with that litigation. The local administrative committee of The State Bar before whom the issues were tried found in petitioner's favor on all charges with the exception of that concerning the allegations of the cross-complaint. On that issue it found that such allegations were due to the error of Davis' associate in preparing the cross-complaint and through the careless conduct of the petitioner in signing a verification of it in blank. Upon these findings the committee recommended that Davis be given a private reprimand. When the Board of Governors received the findings and recommendations of the administrative committee it set a time at which the matter would be heard and notified the petitioner to appear and show cause why a greater degree of discipline than that fixed by the committee should not be recommended to the Supreme Court. Following the hearing, at which the petitioner testified in his own behalf, the board adopted findings of fact contrary to those of the committee and recommended his disbarment.

[1] Petitioner contends that without a trial de novo the Board of Governors was without jurisdiction to do more than accept the determination of the local administrative committee. But the State Bar Act requires the Board of Governors to make findings of fact in all disciplinary proceedings resulting in a recommendation to the Supreme Court for disbarment or suspension. § 6080, Business & Prof. Code, St. 1939, p. 356. In fulfillment of this duty, the board may adopt or reject the findings of a local administrative committee in whole or in part and it may also take additional evidence and make other findings. See Smallberg v. State Bar, 212 Cal. 113, 297 P. 916; Sawyer v. State Bar, 220 Cal. 702, 707, 32 P.2d 369. The authority given the board by section 6043 of the State Bar Act, St.1939, p. 351, to take additional evidence without a trial de novo would have no purpose if the board, after hearing that evidence, could not make additional findings or findings different from those of the committee.

The conclusion of the Board of Governors that the petitioner violated his oath as an attorney at law and is guilty of conduct involving moral turpitude rests upon its findings that although the agreement of Mrs. Monast, to secure the performance of which she had pledged the rings, had been fully performed, Davis sold them as his own property; that he testified falsely upon the taking of his deposition concerning the transaction; and that he swore to certain allegations in a cross-complaint which were false and untrue. In reaching its decision, the Board of Governors considered not only the record of the proceeding before the local administrative committee, but also the testimony of the petitioner given when this record was under review.

[2] The State Bar recognizes the rule that in a disbarment proceeding the intendment should be in favor of the accused attorney. But it insists that, deciding every question of fact upon which there was the slightest conflict in testimony in favor of the petitioner, his testimony shows that he embezzled his client's property and in his deposition in the replevin suit committed perjury. His testimony also shows, says The State Bar, that as a basis for his defense to that suit, he endeavored to induce the bail bondsmen to falsify their records concerning the bonds of Wall and Davidson. It also contends that the record justifies its finding that the petitioner's verification of his cross-complaint was not an inadvertence.

[3] The circumstances under which Davis disposed of the rings were related by Irving Glasser. He declared Davis told him "he had these rings in pawn, that he wanted to dispose of the ticket, and thereby sell the rings." His testimony is uncontradicted, and is corroborated by that of the petitioner, who stated in his deposition that when he sold the ticket to Glasser it was understood the latter could "take

it and sell it or do as he pleased with it." And on cross-examination in this proceeding, the petitioner stated that his transaction with Glasser "was just an ordinary sale." Assuming that Mrs. Monast had told the petitioner she would pay for his services in behalf of Catherine Wall and Irene Davidson and that he might hold her rings therefor, he had no authority to sell the rings without notice to her. The law required him to give her notice and a reasonable opportunity to redeem her property. The petitioner admits that she had demanded the return of her rings and that he gave her no notice whatever of their sale. Under these circumstances, it conclusively appears from his own testimony, that he embezzled his client's property. People v. Fleming, 220 Cal. 601, 32 P.2d 593; People v. Tambara, 192 Cal. 236, 219 P. 745.

[4, 5] In dealing with the property pledged by his client, the petitioner's professional duty required him to act toward her in the utmost good faith as well as to comply with the law concerning bailments. An agreement between an attorney and his client by which the attorney receives any advantage is presumed to be void and the burden is upon the attorney to prove that the client freely entered into the agreement. The record in the present case shows, without contradiction, that Mrs. Monast, because of her addiction to morphine, was not responsible at all times between her arrest and her departure for Honolulu; indeed, the petitioner testified that on one occasion when he talked with her concerning the rings, she had not fully recovered from the effects of the drug. Moreover, when Mrs. Monast demanded the return of the rings and commenced suit against him, he attempted to justify his actions by having the books of Irving Glasser, the bail bond broker who procured the bail bonds of Irene Davidson and Catherine Wall, show a charge of $500 for them, instead of $200, which was the premium fixed at the time they were issued. But neither the original premium nor the increased amount was ever charged to the petitioner.

[6] By a verified cross-complaint in the replevin action, the petitioner pleaded a cause of action for attorney's fee of $500 and an additional $500 for bail bond premiums. He admits that these allegations were untrue. His excuse for the falsification, as stated before the Board of Governors, was that he signed the pleading in blank. But it is significant that this explanation was not made when the petitioner's deposition was taken in the replevin action. Nor did he justify his action upon that ground when he testified before the committee. At that time he said he did not read the cross-complaint very well before he swore to it. He was then asked if it was possible that he had signed the form of verification before the cross-complaint was prepared. His reply was: "If I did that, I am still wrong anyway. * * * As a lawyer, if that was done, I wouldn't get another lawyer into trouble."

The Board of Governors was not obliged to accept the petitioner's last explanation of his conduct and it found that "the allegations of said cross-complaint were wholly false and were known by said Harold L. Davis to be false when he verified the same." His own testimony and that of Irving Glasser fully support this finding.

[7] Concerning the charge of perjury, the petitioner testified by deposition, taken in connection with Mrs. Monast's replevin action, that he had delivered the rings to the bail bond company as security for its bond. But the evidence in regard to the rings after they were left with him by Mrs. Monast shows conclusively that this testimony was false. According to the testimony of the petitioner, Mrs. Monast's bail was forfeited on July 19th. On the same day, the judge who made that order refused to set it aside but he agreed to finally dispose of the bail matter on July 26th, the date to which Mrs. Monast's case was continued when she failed to appear. The petitioner also testified that he pawned the rings at the Provident Loan Company on July 20th, the day after the court had ordered Mrs. Monast's bail forfeited.

From this evidence it appears that the petitioner not only did not deposit the rings with the bonding company as collateral security for the bond, but that he pawned them and converted the money to his own use at a time when the court had forfeited the bail. They came into the possession of Irving Glasser, the bail bond broker, at a later time, but this was in a personal transaction between him and the petitioner, and after Mrs. Monast's bail had been exonerated. Under these circumstances, the conflict between the testimony of the petitioner when he was examined upon the taking of his deposition and when he was a witness in the present proceeding warrants disciplinary action even if his version of the agreement with Mrs. Monast concerning the rings is accepted. Authority to dispose of them, conceding it to exist, does not justify perjury committed in an explanation of the manner of exercising that authority.

It is, therefore, ordered that the petitioner be disbarred from the practice of the law in California and that his name be stricken from the roll of attorneys, this order to become effective thirty days after it is filed.

CARTER, Justice (dissenting).

I dissent. In ordering the disbarment of petitioner, the majority of this court has violated at least two well settled rules in proceedings of this character, namely: (1) "That all intendments should be in favor of the accused attorney." Hildebrand v. State Bar, 18 Cal.2d 816, 117 P.2d 860; Golden v. State Bar, 213 Cal. 237, 2 P.2d 325; Aydelotte v. State Bar, 209 Cal. 737, 290 P. 41; Furman v. State Bar, 12 Cal.2d 212, 83 P.2d 12. And, (2) that the findings of the local administrative committee on issues of fact are of greater weight than those of the Board of Governors. Werner v. State Bar, 13 Cal.2d 666, 91 P.2d 881.

This is the third opinion of this court in this case; two rehearings having already been granted. The first opinion ordered a six month's supension of petitioner's license to practice law, and the second ordered his disbarment. This situation alone indicates uncertainty on the part of at least a majority of the members of this court of the correctness of the conclusions reached on the prior hearings. Yet, notwithstanding such uncertainty, and the elaborate and positive findings and opinion of the local administrative committee to the contrary, a majority of this court has again ordered petitioner's disbarment. I am firmly convinced that such result is not justified by the record in this case.

The local administrative committee after extended hearings made comprehensive findings, and determined that a private reproval was appropriate discipline. Those findings present the factual picture of the controversy; the committee was convinced of the unreliability of the testimony of Mrs. Monast which formed the chief basis of the Board's action. The committee found that on May 18, 1937, petitioner and another lawyer were employed by Mrs. Monast in their capacity as attorneys at law, she being then held in the Los Angeles County Jail on a charge of a violation of the State Narcotic Act, Gen. Laws 1937, Act 5323. She agreed to pay them a fee of $2,000, and as security therefor delivered three diamond rings to them. They were also to obtain a bail bond for her release. Two of the rings were left with petitioner and the third with his associate. Petitioner signed a receipt for the rings reciting that they were deposited as security for attorney's fees "and bond." The latter words had been crossed out without petitioner's knowledge. He obtained a bond and Mrs. Monast was released. She paid the premium on the bond and the attorney's fee of $2,000 in three installments, the last being on May 26, 1937; petitioner's associate returned the third ring to her when these payments were made. Petitioner did not then return the two rings held by him. Her bond was declared forfeited on July 19, 1937, when she failed to appear for trial but due to petitioner's efforts was exonerated. She was later tried and convicted, granted probation and she left for Hawaii.

On July 17, 1937, Irene Davidson and Catherine Wall were arrested and imprisoned in Los Angeles on charges of grand theft. Shortly thereafter Mrs. Monast, through her agent, requested petitioner to represent them and authorized him to hold the rings as security for his fee for such service and for the procurement of bail bonds for their release. He obtained the bonds for their release, but the amount of bail was later increased, and they were remanded to custody.

On July 20, 1937, the day after Mrs. Monast was to appear for trial petitioner pawned the two rings for $350. About two months later, and while Mrs. Monast was in Hawaii, he sold the pawn ticket for $200, and the purchaser subsequently redeemed the rings. Thereafter Mrs. Monast brought action against him to replevy the rings. He repurchased them and returned them to her after this disciplinary proceeding had been commenced.

The charges against petitioner are that he improperly disposed of the rings, that he filed a false and improper cross-complaint in the replevin action, and that he gave false testimony in a deposition taken in connection with that action. The local committee found in his favor on all charges except with respect to the cross-complaint which it found he had carelessly verified without reading it. The Board of Governors of The State Bar found against petitioner although there was no testimony taken before them which substantiated the charges. The only person with any knowledge of the transactions who appeared before them was petitioner.

Keeping in mind the conclusion of the local committee that the testimony of Mrs. Monast was not worthy of credit, it appears that petitioner testified that Mrs. Monast had advised him that he could do as he wished with the rings in connection with his fee and the bonds for Wall and Davidson. The local committee found: "Prior to said sale (of the pawn ticket for the rings) the respondent (petitioner herein) had been told by Marie Monast that he could use the jewelry to take care of the obligations to him. It is not true that Marie Monast demanded the return of the rings before she left for Honolulu pursuant to her probation. It is not true that on the occasion of any such demand respondent represented to her that he would forward the rings to Marie Monast as soon as she had arrived in Honolulu and he, respondent, could assure her bondsmen that she had complied with the terms of her probation. It is not true that respondent was not authorized to hold the rings for any purpose other than as security for fees, but, as previously stated in these findings, respondent was authorized in the first instance to hold the jewelry as security for the balance of the fee to him from Marie Monast and as security for the bond of Marie Monast. Subsequently respondent was authorized by Marie Monast to hold said rings as security for fees due him for representing two women acquaintances of Marie Monast's—Catherine Wall and Irene Davidson." With reference to the charge of embezzlement of the rings the pivotal point in the case is whether the pledge thereof originally made to pay the fee for representing Mrs. Monast was changed from that relation to one in which petitioner had authority to dispose of them. The evidence which the local committee believed, shows that there was such a change. Petitioner testified that he represented Wall and Davidson upon the representation of a man named Evans "that he had talked to Mrs. Monast and that she was willing to take care of their case and for me to come and get them out (of jail)." Later, he said, he talked to Mrs. Monast and told her Tom Evans had called him in connection with the case of those women. "And did she indicate," he was asked, "in any wise whatsoever that she was not going to be responsible for their bond and attorneys fees?" "No," was his reply. "If she had, I wouldn't have gone ahead with them." According to his testimony, he told Mrs. Monast "in the beginning" that his fee would be $250 for each woman and that he was going to keep the jewelry. But he also related a conversation he had with Mrs. Monast at the county jail when "she apparently was highly dissatisfied and said that these two girls were dissatisfied the way the preliminary hearing had been handled; said they were going to get other counsel and that she didn't intend to pay for their fee or bond."

In addition to the above testimony by petitioner, the following also appears:

"Q. * * * that you made the following statement, quoting, 'I was seeing her (Mrs. Monast) off and on from day to day, and I don't know whether it was in the hospital or in the office, and she told me that she had spent all the money she had getting herself out of trouble, and she had to pay her way back. She expected to be released on condition that she go to Honolulu. She told me to take those' * * * the rings, I take it * * * 'that if she couldn't pay them, to *use them as I saw fit to take care of the bond and my fee.*' Is that a correct statement that Mrs. Monast told you that *if she didn't pay you for the girls' (Davidson and Wall) bond and fee, that you could use them as you saw fit?* A. That is the substance of it, yes.

"Q. By what right, Mr. Davis, did you think you could sell that jewelry. A. That I had a right to sell it, it was mine; that *was the understanding* in the original agreement. Q. By that you mean what? That she had agreed with you or told you that if she didn't pay *for these girls, (Davidson and Wall) the fee and bond, that you could dispose of the jewelry?* A. That was my understanding; yes." (Emphasis added.)

That evidence clearly shows that petitioner honestly believed the arrangement to be that he was free to dispose of the rings. The circumstance that after he was given such authority by Mrs. Monast she attempted to change her mind in regard to being responsible for the representation of Davidson and Wall, is obviously of no force because it was merely an attempt to repudiate a previous agreement.

Mrs. Monast had given petitioner carte blanche authority to dispose of the jewelry as he saw fit. He therefore was justified in pawning or selling it, and even if it were only a pledge, the authority granted to him was sufficiently comprehensive to constitute a waiver of any notice of the sale of the pledged property. There is therefore no basis for the conclusion that petitioner was guilty of embezzlement. There is no creditable showing of any fraudulent intent on petitioner's part; nor of fraud or bad faith. Even if it be conceded that he was guilty of a technical conversion, that is not sufficient. It is said in Re Marvin, 180 App.Div. 778, 168 N.Y.S. 555, 563: "That is not very material here on an inquiry based upon the allegation that Marvin has acted dishonestly and in bad faith and defrauded his clients. Those questions are to be settled by *considering the acts done by him and the intent with which they were done.* They do not rest upon the technical question whether or not an equitable or a legal action is the proper remedy in a certain case, *or whether certain acts may or may not constitute a technical conversion of money without regard to intent.* Marvin can be convicted here only for an intentional fraud, an intentional and wicked violation of his professional duties, and in determining that question we must consider his acts and motives with reference to the situation as it existed and the injury his clients are suffering from his wrongful acts." (Emphasis added.)

In Barbee v. State Bar, 213 Cal. 296, 299, 2 P.2d 353, 354, this court said: "But in this case also the record does not satisfactorily establish an intent to defraud. Petitioner was, we believe, stubbornly but honestly mistaken in his understanding of his rights in the matter. We are not prepared to hold that such a dispute over the fixing of a fee is grounds for the drastic punishment inflicted by the order herein."

It is stated in Re Irwin, 162 Or. 221, 91 P.2d 518, 524: "The defendant argues that a technical conversion alone does not afford a sufficient basis for disciplinary action against him and that it is essential that fraud or dishonesty must have accompanied the conversion. With that we agree."

See, also, 7 C.J.S., Attorney and Client, § 23.

Petitioner's answer and cross-complaint filed in Mrs. Monast's replevin action, claimed attorney's fees. Although that answer and cross-complaint was verified by petitioner it does not appear that he was aware of the allegations of the cross-complaint inasmuch as that instrument was prepared by his counsel who misunderstood the facts of the case and incorrectly pleaded them. On that subject the local committee found that: "The allegations of said cross-complaint were due to the error of an associate of respondent's in preparing said cross-complaint and through the careless conduct of respondent in signing a verification in blank which was filled in and filed in connection with said cross-complaint. Respondent, on the face of said pleading, verified its contents. Such conduct on the part of respondent in signing a verification in blank is to be severely condemned and has been by our courts declared, and is by this committee declared, to be reprehensible. However, this committee does not find that thereby respondent intentionally swore falsely." The record bears out that finding. There is no satisfactory evidence that he wilfully swore to false allegations.

The perjury charge turns chiefly upon testimony with reference to petitioner's reason for not returning the jewelry to Mrs. Monast. There were other instances charged but the local committee found that the testimony was true. It appears that petitioner testified by deposition in the replevin action that he had delivered the rings to the bail bond company as security for its bail bond issued for the release of Mrs. Monast. It is claimed that his testimony in this regard is false, being contrary to the evidence developed at the hearing before the local committee. But that committee had the opportunity to observe the witnesses, and was convinced that if there was any variance in his testimony it was inadvertent and did not constitute wilfull false swearing. They were in the most favorable position to arrive at a proper conclusion. In their written opinion filed in addition to their findings they stated: "The charges of false swearing on the giving of several depositions in the main are based on the assumption that the story told by Marie Monast is true and that of respondent false. We have found it the other way, and accepting respondent's story, as we do, for the reasons hereinbefore set forth, such charges of false swearing fall. Respondent was not as precise and accurate in his testimony on the depositions as many witnesses might have been expected to be, but judging by his testimony before us it is evident that the respondent is slow in thinking and does not have a ready command of language to meet and describe situations which occurred in the past. His testimony as given in such depositions, when they are considered together, was substantially as given before the committee. In those depositions, as before us, he claimed he was 'within his rights' in turning the jewelry to Irving Glasser."

The Board of Governors found that Mrs. Monast did not agree to pay petitioner the fee for representing Davidson and Wall, or the expense of procuring bail bonds; that she did not authorize him to dispose of the rings; that petitioner wrongfully pawned the rings and later sold the pawn ticket; that petitioner falsely alleged in his cross-complaint in the replevin action that Mrs. Monast was indebted to him for $1,000 for attorney's fees; that he gave false testimony in the deposition taken in the replevin action in particulars relating to the pawning of the rings with the bonding company, and his employment to represent Davidson and Wall. Those findings are dependent for the most part on the testimony of Mrs. Monast which the local committee refused to accept as creditable. There are findings of minor instances of falsity in petitioner's testimony which was not dependent on Mrs. Monast's testimony but most of them involve matters of conclusions rather than questions of fact.

The square conflict between the findings of the local committee and those of the Board of Governors clearly shows that there was a grave doubt as to petitioner's guilt. Two examining groups came to opposite conclusions on the same evidence. The matter turned upon the credibility of witnesses. The Board of Governors had nothing but the record before it, while the local committee actually conducted the hearings. What was said by this court in Werner v. State Bar, 13 Cal.2d 666, 676, 91 P.2d 881, 886, is pertinent: "To pass upon the weight to be given the testimony of any witness when only the written record is before a reviewing body is always a most difficult undertaking. In this connection we think it proper to refer to the findings of the local administrative committee, not that its findings are binding upon us but simply to aid the court in determining the weight of the evidence upon which we are called to act. * * * This committee personally contacted the witnesses at the hearing. They observed their conduct and demeanor while testifying, and the character of their testimony, and no doubt took into consideration the interest of the petitioner in the result of said hearing. * * * The members of the committee were in far better position to pass upon the truthfulness of petitioner's testimony than were either the members of the Board of Bar Governors, or are the members of this court."

The local administrative committee in this case consisted of three of the ablest and most outstanding members of the Los Angeles bar. That they gave more careful and thorough consideration to this case than is given to the ordinary disciplinary proceeding is manifest from an examination of the record in this case and the carefully prepared findings and opinion in which the members of said committee unanimously concurred. In my opinion, it is impossible for any fair-minded individual to review the proceedings in this case and not entertain a reasonable doubt as to the guilt of the petitioner of any of the charges contained in the notice to show cause, which is the basis of this proceeding.

A review of the proceedings in this case before the Board of Governors discloses that petitioner was asked a few questions by some of the members of the board. The transcript of his testimony at the hearing before the Board of Governors consists of only six pages and no fact was developed by such examination to justify a different conclusion than that reached by the local administrative committee. In fact, petitioner's testimony before the Board of Governors was substantially the same as that which he gave before the local administrative committee. However, the Board of Governors made findings directly contrary to those made by the local administrative committee and found against petitioner in almost every instance where his testimony was contrary to that of Mrs. Monast.

At the conclusion of the hearing before the Board of Governors, twelve members of said board voted in favor of disbarring petitioner, one voted against disbarment and one declined to vote.

I think I am justified in assuming that the record of the proceedings in this case before the local administrative committee was not read by all of the members of the Board of Governors, and I think it is obvious that even if the record had been read by each member of the board, he would still not be in as favorable a position to pass upon the credibility of the witnesses as the members of the local administrative committee who heard these witnesses testify. See Werner v. State Bar, supra.

From the foregoing, I am forced to conclude that to sustain the findings and recommendation of the Board of Governors in this case is not only denying to petitioner any intendments which may arise in his favor from the record in this case, but is resolving all of such intendments against him which is contrary to the settled rule of this court in cases of this character.

While I would be disposed to join with a majority of this court in an order imposing some discipline on petitioner for his conduct in connection with the entire transaction involved in this proceeding, I am firmly convinced that disbarment is altogether too severe and is wholly unjustified by the record before us. It is regrettable that results of this character occur, especially when they can only be accomplished by disregarding rules which this court has announced in many of its prior decisions, but such appears to be the will of the majority of this court in this case.

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20 Cal.2d 319

RANCHO SANTA ANITA, Inc., v. CITY OF ARCADIA.

L. A. 16964.

Supreme Court of California.
May 1, 1942.

1. Municipal corporations ⇨956(2)

Where municipal tax ordinance adopted in 1913 stated that provisions of title 9 of the Political Code should govern all matters not specifically provided for in the ordinance, the city was not required to comply with provisions of title 9 adopted after 1913 restricting amount of taxes to budgetary requirements. Pol.Code, § 3714.

2. Statutes ⇨51

When one statute incorporates the provisions of another by a specific reference to the title, the latter is incorporated as it then exists and not as it is subsequently modified.

3. Municipal corporations ⇨956(1)

A city in fixing tax rate was not required to take into account cash on hand and incoming revenues, in absence of any constitutional or statutory requirement that incoming revenues and cash be deducted from anticipated expenditures or that tax be levied only for an amount sufficient to produce difference between estimated expenditures and cash on hand plus anticipated income. Gen.Laws 1937, Act 5233, §§ 862.9, 862.11, 862.12, 873, 878; Const. art. 11, § 12.

4. Municipal corporations ⇨956(1)

The taxing power of city of the sixth class and all limitations thereon were derived from the Constitution and statutes. Gen.Laws 1937, Act 5233, §§ 862.9, 862.11, 862.12, 873, 878; Const. art. 11, § 12.

5. Municipal corporations ⇨956(1)

If funds are ultimately utilized for a municipal purpose, a city of the sixth class is free to acquire by taxation more funds than are necessary for expenditures in any given year, and thereby to accumulate a surplus available for expenditures or tax reductions in later years. Gen.Laws 1937, Act 5233, §§ 862.9, 862.11, 862.12, 873, 878; Const. art. 11, § 12; St.1939, p. 1361, § 4806.

6. Municipal corporations ⇨63(1), 956(1)

In absence of constitutional or statutory limitation, the amount of revenue necessary for needs of municipality is within sole discretion of legislative authorities, and that discretion is not subject to judicial interference.

7. Municipal corporations ⇨956(1)

The fact that council of a city of the sixth class adopted a budget setting forth estimated expenditures for the ensuing year did not require the council to levy taxes at a rate that would yield no more than was necessary to meet such expenditures. Gen. Laws 1937, Act 5233, §§ 862.9, 862.11, 862.12, 873, 878; Const. art. 11, § 12.

8. Constitutional law ⚷68(4)

The economic and social considerations underlying municipal policy of levying a tax that would yield a surplus were properly subject to legislative discretion rather than to judicial review.

9. Municipal corporations ⚷964

The Municipal Bond Act under which city of the sixth class levied taxes that went into bond interest and sinking funds required levy of a tax sufficient to meet annual interest and principal payments on bonds, but did not prohibit city from levying taxes that would yield more than was necessary to meet interest and principal payments accruing during year for which levy was made. Gen. Laws 1937, Act 5178, § 7.

10. Municipal corporations ⚷986

An appropriation in city budget from five of bond funds of an amount owed to the water fund and the levy of taxes to meet that obligation did not violate provision of Municipal Bond Act that taxes levied for bond interest and sinking funds should not be used for any other purpose, where appropriation merely provided for repayment of sums advanced from water fund to bond funds and there was nothing to show that advances were for any purpose other than payment of bond principal and interest. Gen.Laws 1937, Act 5178, § 7.

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Rancho Santa Anita, Inc., against the City of Arcadia to recover a portion of municipal taxes paid to the city. From a judgment of dismissal, following the sustaining of a demurrer to the complaint without leave to amend, the plaintiff appeals.

Judgment affirmed.

Prior opinion, 110 P.2d 126.

Stater & Dawson and Williamson, Hoge, Sargent & Judson, all of Los Angeles, for appellant.

James C. Bone, City Atty., of Arcadia, and Burke, Hickson, Burke & Marshall, of Los Angeles, for respondent.

J. H. O'Connor, County Counsel, and G. V. O. Prichard, Asst. County Counsel, both of Los Angeles, as amici curiæ, on behalf of respondent.

TRAYNOR, Justice.

Arcadia, a city of the sixth class, levies and collects its own taxes by virtue of section 871 of the Municipal Corporations Act. Deering's Gen.Laws, 1937, Act 5233, § 871. In 1913 the city council adopted an ordinance providing: "All provisions of title IX of the Political Code of the state of California in regard to revenue and taxation which are not inconsistent with the provisions of this ordinance shall apply to and govern all matters of revenue and taxation which are not herein specifically provided for, substituting where necesssary the proper city officer for any county officer therein referred to." At that time section 3714 of the Political Code, included within title IX, provided: "The board of supervisors of each county must, on the third Monday in September, fix the rate of county taxes, designating the number of cents on each one hundred dollars of property levied for each fund, and must levy the state and county taxes upon the taxable property of the county; provided, that it shall not be lawful for any board of supervisors of any county in the state to levy, nor shall any tax greater than fifty cents on each one hundred dollars of property be levied and collected in any one year, to pay the bonded indebtedness, or judgment arising therefrom, of this state, or of any county or municipality in this state." Subsequent amendments, extending the section to six and one-half pages, require each county board of supervisors to adopt a budget and to levy taxes in accordance with the budgetary requirements after all cash on hand and incoming revenues have been applied toward meeting the necessary expenditures.

In 1937 the city council of Arcadia adopted a budget that set forth the estimated expenditures for the ensuing fiscal year, and the taxes levied by the city for that fiscal year went into the general fund, the library fund, and the bond funds. Plaintiff, an Arcadian landowner, paid its taxes under protest, and when its claim for refund was denied, brought this action in the Superior Court to recover a portion of the taxes. The defendant city's demurrer was sustained without leave to amend, and plaintiff has appealed from the judgment of dismissal.

Plaintiff contends that the taxes paid by it under the 1937 levy were illegal because the city council failed to consider available cash on hand and other revenue in fixing the tax rate. The complaint alleged that in view of these revenues the tax rate as fixed by the council yielded almost double the amount necessary to meet the estimated expenditures for the general and library fund and the bond obligations. Plaintiff also contends that appropriations and tax levies were made in five of the bond interest and sinking funds for purposes not authorized by law.

[1, 2] Title IX of the Political Code is concerned only with state and county taxation and therefore does not apply to the defendant city except insofar as it is incorporated by reference into the city ordinance of 1913. The provisions restricting the amount of taxes to budgetary requirements were added to the Political Code subsequent to the passage of that ordinance. Plaintiff contends that the ordinance incorporated title IX not only as it then existed but as afterwards revised. It is not necessary to decide whether the city council had the constitutional authority to adopt unknown, future enactments of the state legislature because the ordinance makes clear the council's intention to adopt article IX only as it then existed. When one statute incorporates the provisions of another by a specific reference to the title, the latter is incorporated as it then exists and not as it is subsequently modified. Ramish v. Hartwell, 126 Cal. 443, 58 P. 920; Vallejo, etc., R. R. Co. v. Reed Orchard Co., 177 Cal. 249, 170 P. 426; Thoits v. Byxbee, 34 Cal.App. 226, 167 P. 166; Culver v. People, 161 Ill. 89, 43 P. 812. See San Luis Obispo v. Pettit, 87 Cal. 499, 25 P. 694; In re Yick Wo, 68 Cal. 294, 9 P. 139, 58 Am.St.Rep. 12; 2 Sutherland, Statutory Construction, 2d Ed., 787-789; and cases cited in 59 C.J. 1060. The 1913 ordinance refers specifically to title IX of the Political Code and makes no reference to subsequent modifications. The defendant city was therefore not required to comply with those provisions of title IX adopted after 1913.

[3, 4] Plaintiff maintains, however, that even if defendant is not bound by the amended provisions of section 3714, the failure of the city council to take into account cash on hand and incoming revenues in fixing the taxes rendered the latter illegal. The taxing power of the city and all limitations thereon are derived from the Constitution and statutes. Article XI, section 12 of the Constitution provides: "Except as otherwise provided in this Constitution, the Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Pursuant to this section the legislature enacted the Municipal Corporation Law, section 862.11 of which authorizes a city of the sixth class "To levy and collect annually a property tax, which shall not, without the assent of two-thirds of the qualified electors of such city voting at an election to be held for that purpose exceed one dollar on each hundred dollars * * *." Deering's Gen.Laws, 1937, Act 5233, § 826.11. Section 871 of the same statute provides that "The city council shall have the power, and it shall be its duty, to provide by ordinance a system for the assessment, levy and collection of all city taxes not inconsistent with the provisions of this chapter. Nothing herein shall prevent the city council from exercising the power granted by general laws of the State relative to the assessment and collection of taxes by county officers." Deering's Gen.Laws, 1937, Act 5233, § 871. Other sections provide for the collection of license fees, street poll taxes, fines, penalties, and forfeitures; impose debt limitations; and require the city clerk to prepare an annual summary of receipts and disbursements for the past fiscal year. Deering's Gen.Laws, 1937, Act 5233, §§ 862.12, 862.9, 873, 878. At the time of the levy in question, there was no constitutional or statutory requirement that the defendant city prepare a budget or estimate its expenditures for an ensuing fiscal year, that incoming revenues and cash on hand be deducted from anticipated expenditures, or that the tax be levied only for an amount sufficient to produce the difference between estimated expenditures and cash on hand plus anticipated income.

[5] Article XI, section 12 of the Constitution quoted above provides that the taxing power conferred upon cities by the legislature may be exercised only for municipal purposes, but this limitation does not require a city to spend all its tax funds during the year for which they are collected. So long as the funds are ultimately utilized for a municipal purpose, the city is free to acquire by taxation more funds than are necessary for the expenditures of any given year and thereby to accumulate a surplus available for municipal expenditures or for purposes of tax reduction in later years. Compare Rev. & Tax. Code, § 4806, St.1939, p. 1361.

[6] In the absence of constitutional or statutory limitations the amount of revenue

necessary for the needs of a municipality is within the sole discretion of the legislative authorities and this discretion is not subject to judicial interference. See cases cited in 24 Cal.Jur. 43-46, §§ 26, 27. See Stull v. De Mattos, 23 Wash. 71, 62 P. 451, 51 L. R.A. 892. "The power of courts to interfere in matters of taxation, except as permitted by statute, is limited. The courts cannot pass upon the question of the policy of a tax law or the expediency of the exercise of the taxing body or the wisdom or fairness of the method of distributing the burden of taxation where no provision of the Constitution is violated." 4 Cooley, Taxation, 4th Ed., p. 3220.

[7, 8] The fact that the city council did adopt a budget setting forth estimated expenditures for the ensuing year did not oblige the council to levy taxes at a rate that would yield no more than was necessary to meet such expenditures. Since there was no constitutional or statutory requirement that the tax rate conform to estimated budgetary expenditures, the council was free to levy a tax that would yield a surplus. The economic and social considerations that underlie such a course of action are properly subject to legislative discretion rather than to judicial review.

In the case of Otis v. Los Angeles County, 9 Cal.2d 366, 70 P.2d 633, cited by plaintiff, a tax levy was held invalid because the county had violated Political Code, section 3714. Since the defendant city is not governed by that section the case does not apply to the present situation. Madary v. City of Fresno, 20 Cal.App. 91, 128 P. 340, and Redman v. Warden, 92 Cal.App. 636, 268 P. 686, are also distinguishable from the instant case. In the Madary case a taxpayer was permitted to recover a portion of his taxes when the state board of equalization increased assessed property valuations after the city had fixed its tax rate on the basis of the old valuations. The increased valuations resulted in the collection of a much higher tax than the city had intended to levy. In the Redman case a tax levy was held invalid because part of the property in the tax district was omitted from the levy, thereby increasing the tax burden upon the remainder of the property in the district. In the present case the city intended to levy the taxes in question and there was no discrimination against any taxpayer. In the case of Southern Service Co., Ltd., v. Los Angeles County, 15 Cal.2d 1, 97 P.2d 963, this court upheld the validity of section 3804.1 of the Political Code which denies the right to recover taxes levied at an excessive rate in violation of Political Code, section 3714, when the taxes are used in a succeeding year to reduce the tax levy or applied for a public purpose, thereby indicating that there are no constitutional limitations upon the right of a city to levy taxes in excess of current fiscal requirements.

[9] The taxes that went into bond interest and sinking funds were levied under the authority of the Municipal Bond Act of 1901, Stats.1901, p. 27; Deering's Gen.Laws, 1937, Act 5178, section 7 of which provides: "The legislative branch of said city, town or municipality shall at the time of fixing the general tax levy, and in the manner for such general tax levy provided, levy and collect annually each year until said bonds are paid, or until there shall be a sum in the treasury of said city, town or municipality set apart for that purpose to meet all sums coming due for principal and interest on such bonds, a tax sufficient to pay the annual interest on such bonds, and also such part of the principal thereof as shall become due before the time for fixing the next general tax levy. Provided, however, that if the maturity of the indebtedness created by the issue of bonds be made to begin more than one year after the date of the issuance of such bonds, such tax shall be levied and collected at the time and in the manner aforesaid annually each year, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof on or before maturity. The taxes herein required to be levied and collected shall be in addition to all other taxes, levied for municipal purposes, and shall be collected at the time and in the same manner as other municipal taxes are collected, and be used for no other purpose than the payment of said bonds and accruing interest."

Plaintiff contends that under this section taxes levied by the defendant city for the payment of interest and principal on bonds may not yield more than is necessary to meet the interest and principal payments accruing during the year for which the levy is made. The provision in the section, however, that the city must levy a tax sufficient to meet the annual interest and principal payments on bonds is a minimum, not a maximum, requirement. The city must levy at least enough taxes in any given year to meet the annual interest and principal requirements, but it may, in its discretion, levy sufficient taxes to meet in whole or in part the balance of the bond issue, including both principal and interest. Its latitude in this regard is evident from the fact that no further taxes need be levied when there is a sum in the city treasury set apart to meet all sums coming due for principal and interest on the bonds, and there is no restriction upon the right of the council to create this fund. Likewise, there is no restriction upon the amount that may be placed in the sinking fund to meet future principal payments on bonds that begin to mature more than one year after the date of issuance. Since the taxes that went into the various bond interest and sinking funds did not exceed the entire unpaid balance of principal and interest due from each fund, they were not excessive in amount even if, taking account of cash on hand and delinquent tax payments, they yielded more than was necessary to meet the annual interest and principal payments.

[10] Included within the budget adopted by the city council was an appropriation from five of the bond funds of an amount owed to the water fund. Plaintiff contends that this appropriation and the taxes levied to meet it are in violation of the last part of the section quoted above providing that "the taxes herein required to be levied and collected shall be * * * used for no other purpose than the payment of said bonds and accruing interest." The appropriation, however, simply provided for the repayment to the water fund of sums advanced from it to the bond funds. There is no allegation in the complaint that the sums advanced from the water fund were used for any purpose other than the payment of bond principal and interest. In effect the sums appropriated were used to pay bond principal and interest by repaying the advances made from the water fund for this purpose.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS and CARTER, JJ., concurred.

EDMONDS, Justice (dissenting).

I agree with the conclusion that the ordinance of the city of Arcadia did not require the city council to follow the requirements of section 3714 of the Political Code in levying its assessment for the fiscal year 1937-38 but, in my opinion, the allegations of the plaintiff's complaint clearly show that the council levied taxes at a rate designed to produce more revenue than was required for governmental purposes during the ensuing fiscal year and that such levy is void as to the excess.

In considering the validity of a tax levy, the courts will consider two important elements: (1) whether the power exists to make the levy; and (2) whether that power has been exercised within statutory limitations. "In all such cases, the authority of the judiciary is confined to an inquiry into the jurisdictional question, and if it appears that the political or legislative body has kept within the limits of its authority, the judiciary must pause there, and admit its incompetency to inquire into wrongs which, within these limits, may have been committed." 4 Cooley's Taxation, 4th Ed. p. 3218; San Christina, etc., Co. v. City and County of San Francisco, 167 Cal. 762, 141 P. 384, 52 L.R.A.,N.S., 676. Unlike the sovereign state, counties and other municipal subdivisions possess no inherent power of taxation. The Constitution itself does not grant them the taxing power, but the legislature is authorized to "* * * by general laws, vest in the corporate authorities thereof the power to assess and collect taxes * * *." for county, city, town, or other municipal purposes. Const. art. XI, § 12. Pursuant to this constitutional authority, the legislature has authorized the council of a city of the sixth class "To levy and collect annually a property tax, which shall not, without the assent of two-thirds of the qualified electors of such city voting at an election to be held for that purpose exceed one dollar on each one hundred dollars * * *." Stats.1935, p. 2070, § 862.11; Deering's Gen.Laws, 1937, Act 5233.

By the same statute, "The city council shall have the power, and it shall be its duty, to provide by ordinance a system for the assessment, levy and collection of all city taxes not inconsistent with the provisions of this chapter. Nothing herein shall prevent the city council from exercising the power granted by general laws of the State relative to the assessment and collection of taxes by county officers." (§ 871.)

The specifically mentioned general limitations upon municipal power to tax are (1) that the municipal levy be annual; (2) that in the absence of special election, the maximum levy shall not exceed $1 for each $100 assessed value; and (3) that a system shall be established by ordinance for the assessment, levy and collection of such taxes.

But in addition to these express provisions is the limitation inherent in the nature of the taxing power itself, that is, public necessity. "Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty." Cooley's Constitutional Limitations, vol. 2, 8th Ed., p. 986. And as an eminent authority on municipal corporation law has stated: "* * * the substantial foundation of the power is political, civil, or governmental necessity. * * *" Dillon, Municipal Corporations, vol. 4, 5th Ed., pp. 2313, 2314.

This inherent limitation upon the taxing power of municipal corporations has been recognized by the courts of this state and stated in one case as follows:

"The power of government to exact from the citizen a part of his property in way of taxation is indeed vast, but it is not unlimited. It may be exercised only for the public good and for a public purpose.

"Cooley's definition of taxes as 'enforced contributions levied for public needs' states concisely both the nature and limitation of taxes. Taxes are the property of the citizens demanded and taken by the government to enable it to discharge its functions. In his work on Tax Titles, Blackwell defines taxes as 'burdens imposed by the legislative power upon persons or property to raise money for public purposes.'

"The needs of the government constitute then both the occasion and limitation of the taxing power. To take from the citizen a dollar beyond the needs of government is not taxation; it is extortion." Madary v. City of Fresno, 20 Cal.App. 91, 97, 128 P. 340, 343.

In a more recent case, the county of Los Angeles contended that a levy which produced considerably more money than its budget requirements was not pro tanto invalid in the absence of arbitrary or capricious action. Following the Madary case and Redman v. Warden, 92 Cal.App. 636, 268 P. 686, this court decided to the contrary and held that where the taxing body, either through inadvertence or design, excludes from its computations amounts which will be available to the municipality during the period then being provided for, an excessive levy resulting from such action is invalid. Otis v. Los Angeles County, 9 Cal.2d 366, 70 P.2d 633. Although that determination was reached in an attack upon an assessment which was levied in a county operating under the provisions of section 3714 of the Political Code, the reasoning of the court is applicable to the present controversy. All of the authorities support the rule that where there has been an official determination of governmental need by the legislative body, an assessment levied at a rate which will produce a return substantially in excess of that previously determined need is, to the extent of that excess, invalid. As stated in Madary v. City of Fresno, supra, 20 Cal. App. at page 98, 128 P. at page 343, and approved in Otis v. Los Angeles County, "It seems eminently just that this money, collected by the city in excess of its needs as determined by the constituted authorities, should be returned to those upon whom the unnecessary burden was imposed, and no merely technical objection should stand in the way."

As the basis of its cause of action, the appellant in the present action alleged: "That the needs and requirements of the city general fund, being the fund for current operating expenses and general government purposes, for the fiscal year 1937-1938 was the sum of $141,061.14; that the taxing officials and taxing body of said city determined and fixed such needs, requirements and appropriations in such amount on or about the 7th day of September, 1937; that on said date resolution No. 878 of the city of Arcadia, entitled, 'A resolution of the city council of the city of Arcadia adopting budget for the fiscal year 1937-1938,' was adopted and by such resolution the needs, requirements and appropriations for said fund for said fiscal year were fixed and determined in the aforesaid amount of $141,061.14. * * *" This resolution constituted the official determination of the city's governmental need, as specified in a budget, so far as its current operating expenses and general governmental purposes were concerned, entirely independent of any unappropriated money in its treasury, and there is no basis for any judicial implication that the council considered the cash on hand as a necessary reserve. Such an implication would invade the discretion vested in the city council.

The complaint also includes these additional facts upon which the appellant relies: "That at the beginning of said fiscal year there was cash on hand on deposit in the designated depositories, belonging to the credit of said fund for said fiscal year, in the sum of $92,720.13; that there were no legal or valid outstanding claims, warrants, liabilities or obligations against said cash or fund balance * * * that the said cash or fund balance was available for the purpose of meeting the said appropriations, needs or requirements aforesaid * * * that at the beginning of said fiscal year, as well as at the time of levying said tax, the taxing officials of said city knew and were charged with knowledge of such cash or fund balance, and knew and were charged with knowledge of the availability thereof to meet the said needs, requirements and appropriations aforesaid; that, however, the said cash or fund balance was not considered either in the adoption of said budget nor in the computation, fixing and levying of said tax, but was arbitrarily omitted."

Other allegations of the complaint are that there was miscellaneous income and revenue belonging to said fund for the fiscal year in question of $56,334.58, against which there were no outstanding obligations, warrants or liabilities. And the appellant has pleaded that no part of the cash on hand or the miscellaneous income and revenue was considered either in the adoption of the budget or in the computation of the tax rate.

The doctrine that taxation is based upon necessity rejects the authority of the legislative body to accumulate unnecessary surpluses from taxes collected by municipal corporations, and requires that they confine their levies to the amounts actually needed to be determined annually. People v. Baltimore & O. R. Co., 1941, 376 Ill. 393, 33 N.E.2d 604, 605. This principle was recognized in Stuart Arms Co. v. City and County of San Francisco, 203 Cal. 150, 263 P. 218, 219, where the court in effect held that any excess funds collected during one fiscal year should be carried over into the next fiscal year and considered in the computation fixing the rate for such year. The controversy decided by that case arose in connection with the levy made by the City and County of San Francisco for the fiscal year 1925-1926. At that time there were no mandatory budget provisions in section 3714 of the Political Code. Since two and one-half fiscal years had intervened subsequent to the filing of the action, said this court, the question was moot by lapse of time. "If there was an excess for the year 1925–1926, the presumption is that it was carried over into the next year, and entered into the computation of the fixing of the rate for said following year. No presumption of irregularity or failure to perform official duty may be indulged against municipal or public officers."

The Supreme Court of Washington has also held taxing authorities to the same rule, stating the rule to be applied as follows: "It is to be considered also that, apart from the creation of sinking funds to meet outstanding funded obligations, there is no need for the accumulation of a surplus, since the resource of taxation is always available within the limitations fixed by law to meet the current needs of the county. In short, any considerable surplus represents money taken from the taxpayer in advance of its need." Weyerhaeuser Timber Co. v. Roessler, 2 Wash.2d 304, 311, 97 P.2d 1070, 1073, 126 A.L.R. 882, 886.

Accepting the determination of the city council as to the gross amount required for general and library purposes during the fiscal year, so far as the complaint shows, there is no reason why the unappropriated money and incoming revenues should not have been taken into consideration by the city council in fixing the tax rate. Reserves are justified by sound business practices and recognized by law. But for a municipality to tax its citizens for the purposes of government while having in its treasury unappropriated money available to meet its needs and revenues presently available is economically unsound and governmentally unjust.

Turning to the allegations relating to the levy for bond purposes, it appears that the city has six bond issues outstanding and maintains a separate fund for the payment of interest and principal payments accruing on each of them. The complaint sets out in detail the amount of cash in each of these funds and the incoming revenue creditable during the fiscal year 1937–1938. According to the complaint, neither the cash nor the incoming revenue was considered by the city council in fixing the tax levy and for the reasons which have been stated the appellant's complaint states a good cause of action upon that ground.

In urging that the city exceeded statutory limitations in its levy, the appellant relies upon the Municipal Bond Act of 1901 which provides that a municipal legislative body has power to levy and collect "a tax sufficient to pay the annual interest on such bonds, and also such part of the principal thereof as shall become due before the time for fixing the next general tax levy." Stats. 1901, p. 27; Deering's Gen.Laws, 1937, Act 5178, § 7. The statute also provides that the taxes levied and collected for the purpose of meeting interest and sinking fund requirements on bond issues shall be used "for no other purpose than the payment of said bonds and accruing interest." (§ 7.)

Unquestionably these limitations upon the authority of the city were enacted for the protection of both the property owner and the bond holder. Taxes may be levied for the purpose of paying interest and installments of principal upon the bonds, but that money may not be diverted into other channels. The appellant's allegations of fact showing a violation of this statute state a cause of action.

For these reasons the general demurrer of the city should have been overruled. The special demurrer presented many grounds of asserted ambiguity and uncertainty relating to the failure to plead the statute under which stated funds were created by the city, the amount of principal and annual interest required on its bonds, and the balances in the general and specific funds. All of these are matters which are primarily within the knowledge of the city and were sufficiently pleaded. Other grounds urged in the special demurrer relate to the form and manner of pleading the thirty-two asserted irregularities and admitted failures of the city council to comply with the terms of section 3714 of the Political Code, which, it is held, does not apply to the levy in controversy.

The judgment, in my opinion, should be reversed with directions to overrule the demurrer and allow the respondent to answer.

* * *

20 Cal.2d 366

PIPOLY et al. v. BENSON et al.

L. A. 18150.

Supreme Court of California.

May 1, 1942.

Rehearing Denied May 28, 1942.

1. Appeal and error 🔑110, 782

An order denying a motion for new trial in a civil case is not an "appealable order", and purported appeal from such order was dismissed. Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Appeal and error 🔑215(1)

In action for death of pedestrian struck by automobile, failure to object to admission of ordinance in evidence, or to giving of instruction based on the ordinance, did not constitute a "waiver" of question regarding validity of ordinance and did not preclude plaintiff from questioning the instruction on appeal. Code Civ.Proc. § 647.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

3. Trial 🔑243

The giving of conflicting instructions where one is based on provisions of an invalid ordinance constitutes error.

4. Municipal corporations 🔑65

Where municipal affairs are concerned, the Constitution gives authority to local governments to make and enforce laws and regulations subject only to the provisions of their charters and as to such matters local regulations are superior to the provisions of a state statute if there is a conflict between the two. Const. art. 11, § 6.

5. Automobiles 🔑9

The regulation of traffic upon the streets of a city is not a "municipal affair" over which local authorities are given power superior to that of the Legislature. Const. art. 11, § 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

6. Automobiles 🔑9

The state's control over regulation of traffic includes the reciprocal rights and duties existing between motor vehicle traffic and pedestrian traffic where conflict between state and local regulation is concerned.

7. Automobiles 🔑9

Local regulations regarding motor vehicle and pedestrian traffic may be enforced only if they are not in conflict with general laws. Const. art. 11, §§ 6, 11.

8. Municipal corporations 🔑592(2)

Where Legislature has assumed to regulate a given course of conduct by prohibitory enactment, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable where the local regulations are not in conflict with provisions of the general law. Const. art. 11, §§ 6, 11.

9. Municipal corporations 🔑592(1)

Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute. Const. art. 11, §§ 6, 11.

10. Municipal corporations 🔑592(1)

An ordinance and a statute which fully occupies a field may be identical and yet the ordinance is invalid because within constitutional provision it is in "conflict" with the statute, since by only such a broad definition of "conflict" is it possible to confine local legislation to its proper field of supplementary regulation. Const. art. 11, §§ 6, 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Conflict".

11. Automobiles 🔑9

The regulation of pedestrian traffic at crosswalks is a field intended to be fully occupied by state legislation, and therefore municipal ordinance regulating pedestrian traffic is unconstitutional as in "conflict" with state legislation. Vehicle Code, §§ 458, 459, 472, 560–564, St.1935, pp. 164, 169, 188; Const. art. 11, §§ 6, 11.

12. Appeal and error 🔑1064(1)
Trial 🔑241

In action for death of pedestrian struck by automobile, instruction, based on municipal ordinance which was in conflict with state statute regulating pedestrian traffic at crossings, was erroneous and the error required reversal of the judgment. Vehicle Code, §§ 458, 459, 472, 560–564, St.1935, pp. 164, 169, 188; Const. art. 11, §§ 6, 11.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Wrongful death action by Edna Pipoly and another against Frank Benson and others. From an adverse judgment, plaintiffs appeal.

Reversed.

For prior opinion of District Court of Appeals, see 116 P.2d 654.

Laurence B. Martin and Samuel Reisman, both of Los Angeles, for appellants.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, White McGee, Jr., and Richard Reese, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

Plaintiffs, the widow and son of Eugene Pipoly, deceased, brought this action to recover damages for his wrongful death. The deceased was struck after dark by an automobile operated by the defendant Frank Benson while Pipoly was crossing Central avenue near the intersection of East Seventy-eighth street in Los Angeles. At the time of the accident Benson was driving an automobile owned by his wife and co-defendant, Myrtle Benson, and was acting within the scope of his employment as her employee. Pipoly died as a result of his injuries and plaintiffs brought this action alleging that his death was caused by the negligence of defendant Frank Benson. Defendants denied the material allegations of the complaint and alleged as affirmative defenses that the death of deceased was caused by his own contributory negligence or by unavoidable accident. The jury found for defendants and a judgment was given in their favor.

[1] Plaintiffs appealed from the judgment and also sought to appeal from the court's denial of their motion for a new trial. Since an order denying a motion for a new trial in a civil case is not appealable (Hughes v. De Mund, 195 Cal. 242, 233 P. 94; Drummond v. Drummond, 39 Cal.App.2d 418, 421, 103 P.2d 217; Code of Civ.Proc., sec. 963), plaintiffs' purported appeal from that order must be dismissed and only the appeal from the judgment need be considered.

The main ground which plaintiffs urge upon this appeal is that the instructions of the trial court respecting deceased's statutory obligations as a pedestrian were so conflicting as to constitute prejudicial error. The jury was instructed that under the Vehicle Code it is the duty of a pedestrian to yield the right of way to all vehicles on the roadway if crossing at any point other than within a marked crosswalk. This instruction sets forth the provisions of section 562(a) of the Vehicle Code, St. 1935, p. 188: "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." The court, however, also instructed the jury in the language of the Municipal Code of Los Angeles, section 80.38: "No pedestrian shall cross a roadway other than by a crosswalk in a central traffic district or in any business district." The jury was told that if they found that deceased violated the ordinance he was presumptively guilty of negligence since it was stipulated that the accident occurred within a business district as defined by the ordinance. Plaintiffs argue that the ordinance is unconstitutional. It is said to conflict with the provisions of the Vehicle Code because it prohibits a pedestrian from crossing a roadway outside a crosswalk while the statute merely imposes upon the pedestrian an obligation to yield the right of way if he crosses outside the crosswalk. Since the trial court based its instructions to the jury upon the ordinance and also the statute, plaintiffs contend that the conflicting instructions require a reversal of the judgment for defendants.

[2] A preliminary question is whether plaintiffs may raise this contention. No objection was made at the trial to the admission of the ordinance in evidence or to the giving of the instruction based upon the ordinance. Defendants argue that the failure to object to the introduction of the ordinance in evidence or to the giving of the instruction constitutes a waiver on the part of plaintiffs. The authorities cited by defendants, however, deal with failure to object to the admission of evidence. Since plaintiffs' contentions are directed at the giving of a particular instruction, we think their right to question the instruction on appeal is secured by Code of Civil Procedure, section 647, which states: "* * * Giving an instruction, although no objection to such instruction was made, refusing to give an instruction, modifying an instruction requested * * * are deemed to have been excepted to." Cf. Cook v. Los Angeles Ry. Corp., 13 Cal.2d 591, 593, 91 P.2d 118.

[3] The decisive issue presented by this appeal, therefore, is whether the Los Angeles ordinance regulating the conduct of pedestrians at crosswalks is in conflict with the provisions of the Vehicle Code and is for that reason invalid. If so, the giving of conflicting instructions where one is based upon the provisions of an invalid ordinance clearly constitutes error. Borum v. Graham, 4 Cal.App.2d 331, 335, 40 P.2d 866.

[4-8] Where "municipal affairs" are concerned the Constitution gives authority to local governments to make and enforce laws and regulations subject only to the provisions of their charters. Const. art. XI, § 6. As to such matters local regulations are superior to the provisions of a state statute if there is conflict between the two. Ex parte Helm, 143 Cal. 553, 77 P. 453; City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745; cf. West Coast Adver. Co. v. City and County of San Francisco, 14 Cal.2d 516, 519-521, 95 P. 2d 138. The regulation of traffic upon the streets of a city, however, is not one of those municipal affairs over which the local authorities are given a power superior to that of the legislature. Ex parte Daniels, 183 Cal. 636, 641, 192 P. 442, 21 A.L.R. 1172; Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334; cf. Morel v. Railroad Commission, 11 Cal. 2d 488, 500, 81 P.2d 144. The state's control over the regulation of traffic includes the reciprocal rights and duties existing between motor vehicle traffic and pedestrian traffic where conflict between state and local regulation is concerned. Mann v. Scott, 180 Cal. 550, 182 P. 281; In re Murphy, 190 Cal. 286, 212 P. 30; Quinn v. Rosenfeld, 15 Cal.2d 486, 102 P.2d 317. In such a field as that presented in this case where the particular matter is outside the limited group of "municipal affairs," it is clear that local regulations upon the subject may be enforced only if they "are not in conflict with general laws." Const., art. XI, § 11. The applicable rule in these situations where state control is dominant has been stated as follows: "Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable." Mann v. Scott, supra, 180 Cal. page 556, 182 P. page 283. The cases in this state have consistently upheld local regulations in the form of additional reasonable requirements not in conflict with the provisions of the general law. Mann v. Scott, supra; In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am.St. Rep. 75; In re Iverson, 199 Cal. 582, 250 P. 681; In re Simmons, 199 Cal. 590, 250 P. 684; Grant, "Municipal Ordinances Supplementing Criminal Laws," [1936] 9 So. Cal.L.Rev. 95, 98.

[9, 10] This general rule permitting the adoption of additional local regulations supplementary to the state statutes is subject to an exception, however, which is im-

portant in the present case. Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute. Thus, it has been held from an early date that an ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute. In re Sic, 73 Cal. 142, 14 P. 405; In re Mingo, 190 Cal. 769, 214 P. 850; cf. Stanislaus County, etc., Ass'n v. Stanislaus County, 8 Cal. 2d 378, 384, 65 P.2d 1305; Grant, op.cit. supra pp. 95, 96. The court said in the Sic case, supra, 73 Cal. pages 146, 148, 14 P. page 407: "The section plainly covers the same ground as the Penal Code. It was probably intended to cover some supposed defects in the Penal Code; still it denounces as criminal precisely the same acts which are attempted to be prohibited by the Code. * * * It would seem that an ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law." Paradoxical as it may seem, it is apparent that an ordinance and a statute may be identical under this rule and yet the ordinance is invalid because within the constitutional provision it is in conflict with the statute. Ex parte Daniels, supra, 183 Cal. page 645, 192 P. 442, 21 A.L.R. 1172. The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground. Only by such a broad definition of "conflict" is it possible to confine local legislation to its proper field of supplementary regulation.

Where a statute and an ordinance are identical it is obvious that the field sought to be covered by the ordinance has already been occupied by state legislation. The exception to the general rule permitting additional local regulation has been also applied, however, in situations where it is not so apparent that the field is already occupied by a statute. In Ex parte Daniels, supra, it was held that, if such was the intent of the legislature, a statute setting up a general scheme for the control of motor vehicles on the highways might constitutionally occupy the entire field so that local ordinances on the subject would be invalid. In re Murphy, supra; Atlas Mixed Mortar Co. v. City of Burbank, supra; Grant, op. cit. supra 95, 99, 100. "The effect of these several decisions is to declare that, whenever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned." Atlas Mixed Mortar Co. v. City of Burbank, supra, 202 Cal. page 663, 262 P. page 336. Under these circumstances, the ordinance is invalid because there is no room left for supplementary local regulation of the particular subject and any such legislation is necessarily inconsistent with the state law. The difficult question in such cases is whether the state law was intended to occupy the entire field. Where the statute contains language indicating that the legislature did not intend its regulations to be exclusive, the general rule permitting additional supplementary local regulations has been applied. In re Iverson, supra, 199 Cal. page 588, 250 P. 681; Natural Milk Prod. Ass'n v. City and County of San Francisco, 20 Cal.2d 101, 124 P.2d 25; In re Simmons, supra, 199 Cal. page 593, 250 P. 684. Conversely, where the statute contains express provisions indicating that the legislature intends its regulations to be exclusive within a certain field, the courts have given effect to this intention. Ex parte Daniels, supra, 183 Cal. pages 641, 642, 192 P. 442, 21 A.L.R. 1172; Grant, op. cit. supra p. 95, 102. As was pointed out in the Daniels case, a mere prohibition of local regulation on a particular subject without any affirmative act of the legislature occupying that field would be ineffective. But where such a declaration accompanied a general scheme for the control of motor vehicles, the court said (183 Cal. pages 642-643, 192 P. page 445, 21 A.L.R. 772): "It was clearly the intention of the Legislature to declare that the limitation upon speed fixed in the law shall be the only limitation controlling the conduct of the driver of a motor vehicle upon the streets and highways of the state. * * * It cannot be doubted that the Legislature * * * intended to occupy the whole field of traffic regulation, and in construing these prohibitory clauses relating to the powers of local legislative bodies, such provisions should not be ignored as unconstitutional, if a reasonable or even a strained construction can be adopted which would give them a constitutional effect. * * * Indeed * * * the purpose of the Legislature to prevent a reduction of speed limits, and a consequent lack of uniformity in such, is apparent. If this was the legislative purpose, such enactment is clearly within the scope of their constitutional power, and local ordinances, fixing other and different rates of speed, ipso facto conflict with the state legislation." See People v. Huchstep, 114 Cal.App.Supp. 769, 772, 300 P. 448.

On this appeal plaintiffs urge that the ordinance involved is unconstitutional since it invades a field of traffic regulation which the legislature intended to occupy fully. We think this contention is correct. Vehicle Code, section 458, which is found in division IX, chapter II of that code, provides: "The provisions of this division are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein." Express authorization has been granted for local control over such matters as regulating processions, the operation of vehicles for hire and regulating traffic by means of officers or traffic signals. Vehicle Code, § 459. Local authorities are also authorized to enact special rules and regulations dealing with parking of vehicles. Vehicle Code, § 472. The regulation of pedestrian traffic in its use of the public roadways, however, is not a matter concerning which express authorization has been given for local regulation. See Quinn v. Rosenfeld, 15 Cal.2d 486, 490, 102 P.2d 317. It follows that if the use of public roadways by pedestrian traffic is a "matter covered" by the provisions of division IX of the Vehicle Code, the legislature's intent to occupy that field of regulation fully is clearly indicated by section 458 of that code.

Chapter X of division IX, Vehicle Code, §§ 560-564, is entitled "Pedestrians' Rights and Duties." Section 560 requires the driver of a vehicle to yield the right of way to a pedestrian crossing the roadway within a crosswalk. Section 561 provides that where a pedestrian tunnel or overhead crossing is available, any pedestrian who crosses a roadway by means other than the tunnel or overhead crossing must yield the right of way to vehicles on the highway. Section 562 provides: "(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. (b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." Section 563 states: "(a) At intersections where traffic is controlled by a traffic control signal device or by police officers, pedestrians shall not cross the roadway against a red or stop signal. (b) Between adjacent intersections so controlled pedestrians shall not cross at any place except in a crosswalk." Section 564 requires that a pedestrian walk upon his left-hand edge of the roadway outside business or residence districts. It is apparent from an examination of this chapter that the subject of pedestrian rights and duties at crosswalks is a matter covered by division IX of the Vehicle Code. Giving effect to the declaration of intention set forth in section 458, therefore, it is necessary to hold that the regulation of pedestrian traffic at crosswalks is a field intended to be occupied fully by the state legislation. Within such a field there is no scope for the supplementary local regulation ordinarily permissible, and the Los Angeles ordinance must be held invalid under the principles laid down in Ex parte Daniels, supra.

Cases cited by defendants and amici curiae in opposition to the conclusions announced herein are cases which uphold the generally recognized right of local authorities to enact additional local regulations. In re Iverson, supra; In re Hoffman, supra; Mann v. Scott, supra; Borum v. Graham, supra; Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26. While the principle thus announced is the general rule, as recognized herein, it does not have application where the legislature has clearly indicated its intention of occupying the field completely. In Mann v. Scott, supra, 180 Cal. page 559, 182 P. 281, the court clearly stated that the supplementary local regulations of motor vehicle traffic were permissible in the Motor Vehicle Act of 1913 which was there involved, but indicated that under the Act of 1915 the legislature's declaration of its intention to occupy the field fully might result in a contrary conclusion. When that act was presented to this court for consideration in Ex parte Daniels, supra, the court gave effect to the legislature's intent (as has already been stated) and held that additional local regulation in such a field would be improper. Likewise, the decision in Borum v. Graham, supra, involved the Vehicle Act as it existed in 1928, before the legislature first enacted regulations dealing with pedestrian rights and duties in 1931. Under those circumstances, additional local regulation was undoubtedly proper since pedestrian rights and duties were not at that time within the field covered by the state legislation. A similar situation was presented in Mecchi v. Lyon Van & Storage Co., supra. Defendants also rely upon our decision in Quinn v. Rosenfeld, supra, but the local ordinance there involved was not the basis for the decision. No instructions to a jury were involved in that case, and the decision concluded that since the ordinance made no attempt to prohibit the plaintiff's conduct, it was unnecessary to decide whether the ordinance was invalid on the ground that it related to a matter covered by division IX of the Vehicle Code. Quinn v. Rosenfeld, supra, 15 Cal.2d page 490, 102 P.2d 317. The case was decided solely with reference to the provisions of the Vehicle Code and is not in conflict with our conclusions herein. It is suggested that local authorities must have power over pedestrian traffic in order to meet local conditions. If that is the case, the legislature's authorization might be sought to permit local authorities to make supplementary regulations upon this particular phase of traffic regulation as has already been done with such matters as parking and the designation of one-way streets. Furthermore, it should be noted that the Vehicle Code already requires pedestrians to cross roadways within crosswalks where the adjacent intersections are controlled by traffic signals or police officers. Vehicle Code, § 563(b).

[11, 12] For the reasons set forth herein, we conclude that section 80.38 of the Municipal Code of Los Angeles must be held to be unconstitutional since it conflicts with the Vehicle Code by attempting to legislate upon a subject intended to be covered fully by an act of the legislature. The instruction given by the trial court which was based upon the provisions of the Los Angeles ordinance, therefore, was erroneous and since it conflicted with the instruction based upon the provisions of the Vehicle Code, the error requires a reversal of the judgment. Westberg v. Willde, 14 Cal.2d 360, 369-371, 94 P.2d 590; Borum v. Graham, supra, 4 Cal.App.2d page 335, 40 P.2d 866; 24 Cal.Jur. 820.

The purported appeal from the order denying a new trial is dismissed. The judgment for defendants is reversed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 375

PORTNOY et al. v. SUPERIOR COURT OF RIVERSIDE COUNTY et al.

L. A. 18151.

Supreme Court of California.

May 1, 1942.

1. Criminal law 🔑1070

In certiorari proceeding to review judgment of conviction which was entered in proceedings in justice court and which was affirmed by superior court, the justice court was not a "proper party".

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party".

2. Criminal law 🔑260(2)

If any excess of jurisdiction on part of justice court was committed in proceeding resulting in conviction for violation of county ordinance making it unlawful to conduct gambling games, the remedy of appeal was sufficient for correcting it.

3. Criminal law 🔑260(2)

An appeal to the superior court may be taken from a judgment of conviction in justice court and writ of certiorari may not be used as a means of challenging the jurisdiction of the justice court.

4. Criminal law 🔑1011

A writ of certiorari is available as a means of challenging jurisdiction of superior court which affirms conviction in justice court, since no further appeal lies from judgment of superior court.

5. Criminal law 🔑260(4)

The jurisdiction of the superior court upon an appeal from a proceeding in justice court is the same as that of any appellate court unless the superior court seeks to conduct a new trial of the action on appeal.

6. Criminal law ⟹260(4)

Where superior court did not conduct a new trial of action on appeal from judgment of justice court of conviction for violating county ordinance making it unlawful to conduct gambling games, but merely affirmed the judgment of conviction, the appellate jurisdiction of the superior court was the same as that of any appellate court.

7. Criminal law ⟹260(4)

Regardless of whether justice's court had jurisdiction of prosecution for violating county ordinance making it unlawful to conduct gambling games, it was within the jurisdiction of superior court to affirm the judgment of conviction on appeal.

8. Constitutional law ⟹45

A trial court is not deprived of jurisdiction to determine the constitutionality of a particular ordinance or statute by virtue of the fact that it may decide the question erroneously.

9. Criminal law ⟹90(1), 260(4)

Justice court determining that county ordinance making it unlawful to conduct gambling games, and superior court on appeal from judgment of conviction for violation of such ordinance did not exceed their jurisdiction in determining that the ordinance was constitutional.

10. Criminal law ⟹1011

Where justice court judgment of conviction for violation of county ordinance making it unlawful to conduct gambling games was affirmed by superior court, certiorari would not lie as a means of bringing the constitutionality of the ordinance before a higher court.

11. Habeas corpus ⟹32

One imprisoned under a judgment of conviction based upon an unconstitutional ordinance may secure release by habeas corpus, not on the theory that the lower courts have exceeded their jurisdiction, but on the ground that habeas corpus will lie to test the issue of constitutionality regardless of whether jurisdictional question is involved.

12. Action ⟹6

The validity of an ordinance on which a judgment of conviction is based may be challenged in an action for declaratory relief.

CARTER, J., dissenting.

In Bank.

Certiorari proceeding by Frank Portnoy and others against the Superior Court of the County of Riverside and others, to review a judgment of the Superior Court affirming a judgment of the Justice's Court of Township of Riverside convicting petitioners of violating a county ordinance making it unlawful to conduct gambling games.

Judgment of Superior Court affirmed.

See, also, 116 P.2d 804.

Clifford Thoms and Leonard Wilson, both of Los Angeles, for petitioners.

Earl Redwine, County Counsel, of Riverside, for respondents.

GIBSON, Chief Justice.

Petitioners seek this writ of certiorari to review judgments of conviction entered against them in a proceeding in the Justice's Court of the Township of Riverside. The judgments of conviction were affirmed by the Superior Court of Riverside County and petitioners sought a writ of review in the District Court of Appeal, Fourth District, directed to both the justice's court and to the superior court. After the writ was discharged in the District Court of Appeal, 116 P.2d 804, a hearing was granted in this court. Petitioners were convicted of violating the provisions of ordinance No. 248 of the county of Riverside making it unlawful to conduct gambling games. In this proceeding it is contended that both the justice's court and the superior court acted in excess of their jurisdiction because the statute under which petitioners were convicted is unconstitutional and in conflict with the state laws.

[1-4] The Justice's Court of Riverside Township is not a proper party in the present proceeding. If any excess of jurisdiction on the part of that court was committed, the remedy of appeal was a sufficient method for correcting it. Since an appeal to the superior court may be taken from a judgment of conviction in a justice's court, the writ of certiorari may not be used as a means of challenging the judgment of the lower court. Redlands High

School District v. Superior Court, Cal. Sup., 125 P.2d 490, this day decided; Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Roberts v. Police Court, 185 Cal. 65, 195 P. 1053; Sears v. Superior Court, 133 Cal. App. 704, 24 P.2d 842. Since no further appeal lies from the judgment of the superior court, however, the writ of certiorari is available as a means of challenging the jurisdiction of that court. Redlands High School Dist. v. Superior Court, supra; Olcese v. Justice's Court, supra; Sherer v. Superior Court, 94 Cal. 354, 29 P. 716.

[5-9] Petitioner's contention that the Superior Court of Riverside County exceeded its jurisdiction in affirming the judgments of conviction in the present case is based primarily upon the theory that the ordinance under which they were convicted is unconstitutional because it invades a field fully occupied by state legislation. This question, which was discussed in some detail in our recent opinion in Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, need not be determined in the present case since it is our conclusion that despite the contention that the ordinance is unconstitutional, no excess of jurisdiction on the part of the superior court exists under the facts of this case. In Redlands High School Dist. v. Superior Court, supra, it was stated that the jurisdiction of the superior court upon an appeal from a proceeding in a justice's court was the same as that of any appellate court unless the superior court sought to conduct a new trial of the action on appeal. Since the superior court in the present case did not conduct a new trial of the action but merely affirmed the judgments of conviction, it follows that the appellate jurisdiction of the superior court was the same as that of any appellate court. Culver v. Superior Court, 185 Cal. 144, 195 P. 1055; Roberts v. Police Court, supra. Regardless of whether the trial court had jurisdiction, therefore, it was within the jurisdiction of the superior court to affirm the judgments of conviction upon appeal. Culver v. Superior Court, supra; Redlands High School Dist. v. Superior Court, supra; 2 Cal.Jur. 127. Furthermore, as we had occasion to point out in a recent opinion, even a trial court is not deprived of jurisdiction to determine the constitutionality of a particular ordinance or statute by virtue of the fact that it may decide the question erroneously. See Ex parte Bell, 19 Cal.2d 488, 122 P.2d 22, and authorities cited therein. In the present case both the justice's court and the superior court on appeal have held that the ordinance is constitutional, and it cannot be said that in so holding they have exceeded their jurisdiction.

[10-12] The fact that certiorari will not lie as a means of bringing the constitutionality of the ordinance before the higher courts in this case does not deprive persons whose rights have been prejudiced by the action of inferior tribunals under unconstitutional statutes of all recourse to the higher courts. One imprisoned under a judgment of conviction based upon an unconstitutional ordinance may secure relief by habeas corpus, not on the theory that the lower courts have exceeded their jurisdiction, but on the ground that habeas corpus will lie to test the issue of constitutionality whether or not a jurisdictional question is involved. Ex parte Bell, supra; Hovey v. Elliott, 145 N.Y. 126, 39 N.E. 841, 39 L.R.A. 454; Yutze v. Copelan, 109 Ohio St. 171, 142 N.E. 33, 32 A.L.R. 1054. Similarly, if a question involving the Constitution of the United States is presented, the case may be appealed to the United States Supreme Court, as was done in Edwards v. People of California, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119, where that court reversed the decision of a California superior court affirming the judgment of a justice's court. In that case the Supreme Court of the United States noted that no appeal to a higher state court was open. A like result was reached in Carlson v. People of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104. The validity of such an ordinance may also be challenged in an action for declaratory relief. La Franchi v. City of Santa Rosa, 8 Cal.2d 331, 65 P.2d 1301, 110 A.L.R. 639.

In view of our conclusion herein, it is unnecessary to discuss the other points urged upon this petition. The judgment of the superior court is affirmed.

SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

CARTER, Justice.

I dissent. In my opinion, the ordinance under which petitioners were convicted is unconstitutional and the judgments of conviction against petitioners are therefore void. For the reasons stated in my concurring opinion in the case of Redlands High School District v. Superior Court, Cal.Sup., 125 P.2d 490, this day filed, a writ of certiorari should issue annulling said judgments.

20 Cal.2d 348

REDLANDS HIGH SCHOOL DIST. et al. v. SUPERIOR COURT OF SAN BERNARDINO COUNTY.

L. A. 18059.

Supreme Court of California.

May 1, 1942.

1. Certiorari 🔑1

The writ of certiorari is available only if there exists an excess of jurisdiction on the part of an inferior tribunal, no right of appeal, and no other plain, speedy and adequate remedy. Code Civ.Proc. § 1068.

2. Certiorari 🔑45

Where superior court after trial de novo affirmed justice court judgment in personal injury action, writ of certiorari was properly directed to judgment of superior court rather than to judgment of justice court, since existence of right to appeal from judgment of justice court made the writ to review its judgment unavailable. Code Civ. Proc. § 1068.

3. Justices of the peace 🔑194

Certiorari will not lie to annul a void judgment of a justice's court where the void judgment has been affirmed on appeal to the superior court without a trial de novo. Code Civ.Proc. § 1068.

4. Certiorari 🔑5(1)

After an appeal to superior court from a justice court judgment in personal injury action against school district, no further appeal to higher courts of state existed, and therefore if superior court exceeded its jurisdiction, the absence of a speedy and adequate remedy by appeal or otherwise entitled judgment debtor to writ of review for purpose of annulling the action of the superior court. School Code, § 2.801; Code Civ.Proc. §§ 973–982, 1068; Const. art. 6, §§ 4, 4b, 5.

5. Justices of the peace 🔑139, 164(6), 187

A party who is dissatisfied with justice court judgment may, within 30 days, appeal upon questions of law and the case is determined by the superior court upon a statement of the case settled by the justice who rendered the judgment, and on such an appeal, the superior court may affirm, reverse or modify the judgment and may direct proper judgment to be entered or direct that a new trial be held. Code Civ.Proc. §§ 975, 980.

6. Justices of the peace 🔑139, 171(1)

A party dissatisfied with justice court judgment may appeal on questions of fact or questions of fact and law, and in that event no statement of case is needed but the case is tried anew in the superior court. Code Civ.Proc. §§ 976, 980a.

7. Justices of the peace 🔑172

Where case is tried anew in superior court on appeal from justice court judgment, the proceeding is conducted in all respects as any other trial in the superior court would be conducted and the same statutory provisions are applicable except for the requirement of written findings and conclusions of law. Code Civ.Proc. §§ 976, 980a.

8. Justices of the peace 🔑141(1)

Where, on appeal from justice court, the superior court is engaged in reviewing questions of law and where there is no problem involving the conduct of a new trial, the appellate jurisdiction of the superior court is determined by the same considerations which govern jurisdiction of higher appellate courts. Code Civ.Proc. §§ 973–982.

9. Justices of the peace 🔑141(2)

Where an appeal on question of law is taken from justice court judgment to superior court, the superior court has authority to affirm or reverse a judgment of the justice court regardless of whether the justice court had jurisdiction at the original trial of the action.

10. Justices of the peace 🔑171(3)

Absence of jurisdiction in the justice court will not bar new trial on appeal in the superior court if jurisdictional defect has been corrected in the meantime.

11. Schools and school districts 🔑115

A personal injury action against a school district can be maintained only in accordance with the School Code. School Code, § 2.801; Gen.Laws 1937, Act 5150.

12. Counties ⚷213
Municipal corporations ⚷741(1)
Schools and school districts ⚷115

The liability of municipalities, counties and school districts for negligent acts of officers and employees is derived solely from statutory provisions and therefore any plaintiff must fulfil the "mandatory" requirement that a verified claim be filed as a prerequisite to maintaining an action, and failure to file such a claim is fatal to the action. School Code, § 2.801; Gen.Laws 1937, Act 5150.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

13. Certiorari ⚷29
Schools and school districts ⚷115

Under School Code making liability of school district for negligence dependent upon filing of claim within 90 days after accident, the requirement does not restrict the power of the court but is a "condition precedent" to the establishment of plaintiff's cause of action so that superior court's rendition of judgment for plaintiff, after trial de novo on appeal from justice court, notwithstanding absence of verified claim, constituted an "error of law" rather than an "excess of jurisdiction" and could not be corrected on certiorari. School Code, § 2.801.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent", "Error of Law" and "Excess of Jurisdiction".

CARTER, J., dissenting in part.

In Bank.

Certiorari proceeding by Redlands High School District and others against the Superior Court of San Bernardino County to review a judgment of the Superior Court affirming a judgment of the Justice Court in a personal injury action.

Judgment of Superior Court affirmed.

Hunter & Liljestrom and Hunter, Dunn & Liljestrom, all of Los Angeles, for petitioners.

Grant Holcomb and Alden Reid, both of San Bernardino, for respondent.

GIBSON, Chief Justice.

An action was commenced in the Justice's Court of San Bernardino Township against Redlands High School District and the trustees of the district, petitioners herein, to recover damages for personal injuries incurred by a pupil in the school while playing a game under the direction of a teacher. The petitioners contended in the justice's court that the plaintiff was barred because no verified claim had been filed with the secretary or clerk of the school district within ninety days after the accident, as required by section 2.801 of the School Code. Judgment was rendered for the plaintiff, however, and petitioners (defendants) took an appeal upon both the law and the facts to the Superior Court in San Bernardino County, contending that no cause of action had been stated and that the superior court had no jurisdiction because no verified claim had been filed. The superior court, after a trial de novo, found that no verified claim was filed but rendered a judgment for the plaintiff nevertheless. Petitioners then applied to the District Court of Appeal, Fourth Appellate District, for a writ of certiorari to annul the judgment of the superior court upon the ground that the filing of a verified claim is a jurisdictional prerequisite under the statute, in the absence of which the superior court had no power to render a judgment for the plaintiff. Petitioners also contended that no appeal would lie from the judgment of the superior court and that they had no adequate remedy other than by a writ of review. The district court of appeal denied the petition and thereafter a hearing was granted in this court.

[1-4] The writ of certiorari is available in this state only if the following conditions are present: (1) An excess of jurisdiction on the part of an inferior tribunal; (2) no right of appeal; and (3) no other plain, speedy and adequate remedy. Code Civ.Proc. § 1068; Noble v. Superior Court, 109 Cal. 523, 42 P. 155; see, also, Howaldt v. Superior Court, 18 Cal.2d 114, 114 P.2d 333; Young v. Superior Court, 16 Cal.2d 211, 105 P.2d 363; Estrin v. Superior Court, 14 Cal.2d 670, 96 P.2d 340. In the present case the writ of certiorari was properly directed to the judgment of the superior court rather than to the judgment of the justice's court since the existence of a right of appeal from the judgment of the latter court makes the writ to review its judgment unavailable. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Associated Credit Exch. v. Barnett, 85 Cal.App. 255, 259 P. 95; Kempton v. Superior Court, 3 Cal.App.2d 374, 39 P.2d 846; see, also, Ivory v. Superior Court, 12 Cal.2d 455, 459.

85 P.2d 894; Gray v. Schupp, 4 Cal. 185; 4 Cal.Jur. 1052, et seq. After an appeal to the superior court from a judgment in a justice's court as provided in Code of Civil Procedure, sections 973–982, no further appeal to the higher courts of the state exists in cases such as the present one under our constitutional and statutory provisions. Const. art. VI, §§ 4, 4b, 5; Code Civ.Proc. §§ 973–982; 6 Cal.Jur. 10 Yr.Supp. 699-701. If, therefore, the superior court has exceeded its jurisdiction in this case, the absence of a speedy and adequate remedy by appeal or otherwise entitles petitioners to a writ of review for the purpose of annulling the action of the superior court. See Olcese v. Justice's Court, supra, 156 Cal. page 86, 103 P. 317; Sherer v. Superior Court, 94 Cal. 354, 29 P. 716; Shealor v. Superior Court, 70 Cal. 564, 11 P. 653; 4 Cal.Jur. 1042 et seq.; 6 Cal.Jur. 10 Yr. Supp. 711.

[5-7] The jurisdiction of a superior court upon an appeal from the justice's court is dual in nature and the question whether the court has exceeded its jurisdiction in a given case depends, to a large extent, upon which of the two kinds of appeal is involved. A party who is dissatisfied with a judgment rendered in a justice's court may, within thirty days, appeal upon questions of law and the case is determined by the superior court upon a statement of the case settled by the justice who rendered the judgment. Upon such an appeal the superior court may affirm, reverse, or modify the judgment and may direct the proper judgment to be entered or direct that a new trial be held. Code Civ.Proc. §§ 975, 980. The dissatisfied party, however, may also appeal upon questions of fact or questions of fact and law and, in that event, no statement of the case is needed, for the case is tried anew in the superior court. Upon such a new trial the proceeding is conducted in all respects as any other trial in the superior court would be conducted and the same statutory provisions are applicable, except for the requirement of written findings and conclusions of law. Code Civ.Proc. §§ 976, 980a. The cases indicate that the extent of the superior court's jurisdiction upon appeal from a justice's court depends upon which of these two forms of procedure is involved.

[8, 9] Where the superior court is engaged in reviewing questions of law and where there is no problem involving the conduct of a new trial in the superior court, the appellate jurisdiction of the superior court is determined by the same considerations which govern the jurisdiction of the higher appellate courts in this state. Thus, where an appeal on questions of law is involved, it has been held that the superior court is within its appellate jurisdiction to affirm or reverse the judgment of the justice's court regardless of whether the justice's court had jurisdiction at the original trial of the action. Culver v. Superior Court, 185 Cal. 144, 195 P. 1055; Southern Pac. R. Co. v. Superior Court, 59 Cal. 471; Sherer v. Superior Court, supra; Roberts v. Police Court, 185 Cal. 65, 67, 195 P. 1053; Moyer v. Superior Court, 29 Cal.App.2d 330, 333, 84 P.2d 240; cf. Maxson v. Superior Court, 124 Cal. 468, 57 P. 379. In Culver v. Superior Court, supra, the superior court affirmed the judgment of a justice's court and when certiorari was sought this court said (page 145 of 185 Cal., page 1055 of 195 P.): "If it did not state such facts [facts sufficient to show the commission of a public offense], the superior court erred in affirming the judgment; but that was mere error in the exercise of its lawful jurisdiction. If for any reason the judgment of the justice's court is void for want of jurisdiction, the superior court nevertheless had jurisdiction to affirm it." This is the ordinary rule where an appeal is involved if it is contended that the trial court was without jurisdiction. 2 Cal.Jur. 127. Similarly, in Southern Pac. R. Co. v. Superior Court, supra, where neither the justice's court nor the superior court acquired jurisdiction over the person of the defendant and where the appeal was on issues of law alone, this court said (page 474 of 59 Cal.): "If, therefore, the Superior Court had reversed the judgment of the Justice's Court, we would have refused this writ [prohibition], whether we agree with the former Court or not. So if the Superior Court had affirmed the judgment of the Justice's Court, not because such judgment would have been right, but because the Superior Court had jurisdiction to reverse or affirm it." Under these cases, if the action of the superior court here had involved an appeal on questions of law alone, it is clear that although in error, the court would have had jurisdiction to affirm the judgment in favor of plaintiff rendered by the justice's court regardless of whether

the filing of the verified claim is considered to be a jurisdictional prerequisite to such an action in a justice's court.

The appeal in the present case, however, was taken upon questions of fact and law, and the superior court conducted a new trial as required by the code. Where a superior court is exercising its jurisdiction under the statute to conduct a new trial on appeal many cases have held that the trial jurisdiction of the superior court is derivative in nature and is as limited in extent as is the jurisdiction of the justice's court. See 6 Cal.Jur. 10 Yr.Supp. 626. In such cases, if the justice's court is without jurisdiction to conduct an original trial of the action, the superior court is likewise without jurisdiction to conduct a new trial of the action on appeal. Southern Pac. R. Co. v. Superior Court, supra, 59 Cal. page 475; Ballerino v. Bigelow, 90 Cal. 500, 27 P. 372; Will v. Sinkwitz, 39 Cal. 570; City of Santa Barbara v. Eldred, 95 Cal. 378, 30 P. 562; Hoban v. Ryan, 130 Cal. 96, 62 P. 296; Shealor v. Superior Court, supra; Bates v. Ferrier, 19 Cal.App. 79, 124 P. 889; Bartnett v. Hull, 19 Cal. App. 91, 124 P. 885; Tracy v. Sumida, 31 Cal.App. 716, 161 P. 503; Couldthirst v. Southern Pac. R. Co., 49 Cal.App. 525, 193 P. 796. "Thus, the measure of the jurisdiction of justice's courts in these matters is fixed and determined by law. The appeal from the justice's to the superior court does not enlarge the jurisdiction as to such cases." Ballerino v. Bigelow, supra, 90 Cal. page 503, 27 P. page 373. In a certiorari proceeding this court held, "The value of the property having been averred in the complaint to be $319 * * * neither the justice's court, nor the superior court on appeal, [for purposes of a new trial] had jurisdiction of the action. The judgment of the superior court must be annulled and quashed." Shealor v. Superior Court, supra, 70 Cal. page 565, 11 P. page 654. The court said, in Tracy v. Sumida, supra, 31 Cal.App. page 717, 161 P. page 504, "* * * where jurisdiction of an action is derived from a justice's court on appeal from a judgment rendered therein, the superior court may not, by permitting an amendment of the complaint, acquire jurisdiction in excess of that of the justice's court from which the appeal is taken * * *. In our opinion, since the jurisdiction of a justice of the peace in an action to recover money upon contract is limited to an amount not in excess of $300, the jurisdiction of the superior court on appeal from a judgment rendered therein is likewise limited to such an amount. In other words, the superior court by virtue of the appeal acquires only such jurisdiction as the justice of the peace had."

It is at once apparent that the jurisdiction of a superior court to conduct a new trial on appeal following a judgment in a justice's court is materially different from the ordinary appellate jurisdiction involved in an appeal upon questions of law. The new trial on appeal is, in fact, a substitute for the ordinary appeal and the superior court is substituting itself for the justice's court. Cf. Maxson v. Superior Court, supra, 124 Cal. page 470, 57 P. 379; People ex rel. Hitchcock v. Freelon, 8 Cal. 517, 518. This unusual type of appeal in the form of a new trial in the appellate court has been used in California upon appeals from justices' courts from the earliest days. Stats.1853, p. 276; Stats.1854, ch. 54, p. 66; Practice Act of 1851 (1863 ed.) §§ 366, 367. With the adoption of the Code of Civil Procedure in 1872 these provisions were continued as sections 974 through 980 of the code where they are still found. Where this particular procedure is involved, the ordinary rules governing appellate jurisdiction are not always applicable although it is held to be an exercise of appellate power. Raisch v. Sausalito Land, etc., Co., 131 Cal. 215, 218, 63 P. 346; Townsend v. Brooks, 5 Cal. 52. Thus the courts have recognized a distinction between it and a true appeal on issues of law. Southern Pac. R. Co. v. Superior Court, supra; People ex rel. Hitchcock v. Freelon, supra; Armantage v. Superior Court, 1 Cal.App. 130, 81 P. 1033. In discussing the new trial proceeding on appeal the concurring opinion in Armantage v. Superior Court, supra, 1 Cal.App. page 134, 81 P. page 1034, said: "* * * the proceeding is not, properly speaking, an appeal; nor is the judgment said to be appealed from reversed, as it would be, if found erroneous, on appeal. But the judgment is vacated by the mere act of the so-called appellant, in the exercise of his option, and the cause transferred for all purposes to the superior court, which thereupon acquires original or quasi-original jurisdiction of the case. * * * The plain meaning of these provisions therefore seems to be that the losing party shall have the option either of appealing from the judgment (in the ordinary sense of the term appeal) on questions of law only, or of vacating the judgment, and transferring the case for trial of all issues, whether of law or fact, to the superior court. * * *" Similarly, it has been said that the effect of an appeal on both law and fact followed by a new trial in the superior court is to vacate the judgment in the justice's court and to provide for a trial in the superior court as though the case were originally brought in that court. See Bullard v. McArdle, 98 Cal. 355, 359, 33 P. 193, 35 Am.St.Rep. 176; Holbrook, Merrill & Stetson v. Superior Court, 106 Cal. 589, 593, 39 P. 936; Stacey Cheese Co. v. Pipkin, 155 N.C. 394, 71 S.E. 442, 37 L.R.A.,N.S., 606, 616–618. In Southern Pac. R. Co. v. Superior Court, supra, is found a clear example of the distinction between the two different types of appeal. In that case the court conceded that the superior court had the ordinary appellate jurisdiction to affirm or reverse a judgment of the justice's court although that court had no jurisdiction over the person of the defendant. Supra, page 474, of 59 Cal. It was pointed out, however, that the superior court had no jurisdiction to conduct a new trial on appeal because it likewise had no jurisdiction over the person of the defendant. Supra, page 475 of 59 Cal.

The distinction which is made between the exercise of true appellate jurisdiction by the superior court and the exercise of its new trial jurisdiction on appeal (that is, a distinction between appellate jurisdiction in its ordinary sense and derivative jurisdiction) serves to complicate the relationship between the justices' courts and the superior courts in many ways. It is, nevertheless, a distinction which cannot be ignored in view of the many cases which have passed upon the point.

[10] The characterization of the superior court's jurisdiction to conduct a new trial on appeal as derivative in nature, however, is not a complete description. Absence of jurisdiction in the justice's court will not bar the new trial on appeal in the superior court if the jurisdictional defect has been corrected in the meantime. Thus, the superior court has jurisdiction to conduct a new trial on appeal although the justice's court originally had no jurisdiction over the person of the defendant in a case where the defendant has submitted himself to the superior court's jurisdiction. American Law Book Co. v. Superior Court, 164 Cal. 327, 128 P. 921; Meads v. Warne, 133 Cal.App. 27, 30, 23 P.2d 773; Armantage v. Superior Court, supra. A further qualification must also be made. The rule that the superior court's jurisdiction to conduct a new trial on appeal is limited to cases in which, under the state of facts presented to the superior court, a justice's court would have jurisdiction over an original action is obscured in certain cases by the fact that the superior court may have original trial jurisdiction even though it has no jurisdiction to conduct a new trial on appeal. Where the justice of the peace has no jurisdiction over the action it is his duty to transfer the case to a court which does have jurisdiction, in most cases the superior court. Code Civ.Proc. § 396, formerly Code Civ.Proc. § 838. If the justice improperly tries the case and thereafter the superior court undertakes to try it anew on appeal, it is clear under the cases above that the superior court is without jurisdiction to conduct the new trial on appeal. City of Santa Barbara v. Eldred, supra, 95 Cal. page 381, 30 P. 562. Since the case is within the original trial jurisdiction of the superior court, however, the proper procedure would have been to transfer the case for trial in the same superior court. Where that is not done but the case is tried in the justice's court and thereafter is tried anew before the superior court, a well established line of cases has held that in the absence of seasonable objection by the parties it will be treated as though the case originally started in the superior court and an appeal may be taken therefrom. In other words, although a lack of jurisdiction to conduct a new trial on appeal still exists, the procedure constitutes a mere irregularity so far as the original trial jurisdiction of the superior court is concerned. City of Santa Barbara v. Eldred, supra; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 P. 196; De Jarnatt v. Marquez, 132 Cal. 700, 64 P. 1090; (distinguishing and limiting Ballerino v. Bigelow, supra, on this precise point only); Nolan v. Hentig, 138 Cal. 281, 71 P. 440; City of Madera v. Black, 181 Cal. 306, 184 P. 397. In the present case, however, there is no contention that the action is within the original jurisdiction of the superior court or that there was any alteration in the cause which would bring

it within the superior court's jurisdiction to conduct a new trial on appeal, assuming that the case was originally outside the jurisdiction of the justice's court. Since a trial de novo on appeal in the superior court is involved, the question whether the superior court had jurisdiction to conduct the new trial on appeal depends, under the principles set forth above, upon whether the filing of a verified claim as required by statute was a jurisdictional prerequisite to plaintiff's cause of action.

[11] Petitioners base their claim that the superior court exceeded its jurisdiction upon the fact that no verified claim was filed within ninety days, as is required by the provisions of section 2.801 of the School Code. Respondents advance two arguments in opposition to this contention. First, it is said, the present action may be maintained under General Laws, Act 5150 (Deering's Gen.Laws, [1937] Act 5150), without the necessity for filing any claim. In support of this argument respondents cite the cases of Jackson v. City of Santa Monica, 13 Cal. App.2d 376, 57 P.2d 226; Kenney v. Antioch Live Oak School Dist., 18 Cal.App. 2d 226, 63 P.2d 1143; and Ogando v. Carquinez Grammar School Dist., 24 Cal. App.2d 567, 75 P.2d 641. These cases, which construed the provisions of Act 5150 prior to its amendment in 1937, held that the requirements of that section (including the requirement for filing a claim within ninety days) because of a defect in the title of the act were constitutionally inoperative where an action to impose liability upon municipalities and political subdivisions, rather than upon the officers of such bodies, was involved. Jackson v. City of Santa Monica, supra, 13 Cal.App. 2d pages 386, 389, 57 P.2d 226. It was also held that the requirements of the act were inoperative so far as liability due to negligence generally was involved, rather than liability due to negligence in connection with defective or dangerous conditions of public streets and grounds. Jackson v. City of Santa Monica, supra; Kenney v. Antioch Live Oak School Dist., supra, 18 Cal.App.2d page 230, 63 P.2d 1143; Ogando v. Carquinez School Dist., supra, 24 Cal.App.2d page 569, 75 P.2d 641. The legislature attempted in 1937 to remedy the defective title of Act 5150 as to the latter point by amending the title to include liability based upon the negligence of officers generally (Stats.1937, p. 585), but respondents contend that this amendment also was inoperative because the title of the act was defective. Cf. Jackman v. Patterson, 42 Cal.App.2d 255, 108 P.2d 682. It is not necessary in the present case, however, to discuss these contentions since the provisions of Act 5150 do not purport to include actions against political subdivisions such as school districts, as distinguished from actions against the officers of such bodies. As the court said in Jackson v. City of Santa Monica, supra, 13 Cal.App.2d page 389, 57 P.2d page 232: "The title of the act, relating solely to the matter of liability of officers and procedure to enforce the same, given the most liberal construction, excludes the subject of procedure for enforcing the liability of cities and other political subdivisions * * *." It follows, therefore, that plaintiffs' action against the school district can be maintained only in accordance with the provisions of the School Code, section 2.801. Since 1937 that section has provided: "Boards of school trustees * * * are liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees; provided, however, that a verified claim for damages shall have been presented in writing and filed with the secretary or clerk of the school district within ninety (90) days after such accident has occurred. * * *." School Code, § 2.801; Stats. 1937, p. 414. The section also prescribes the information to be contained in the claim.

[12] Finally, respondents deny that the failure to file a claim as required by section 2.801 of the School Code is a jurisdictional defect which may be urged upon this petition for a writ of certiorari. Cases have established that the liability of municipalities, counties and school districts for the negligent acts of their officers and employees is derived solely from statutory provisions in this state. Any plaintiff, therefore, must fulfill the mandatory requirement that a verified claim be filed as a prerequisite to maintaining a suit under the statute and failure to file such a claim is fatal to the cause of action. Douglass v. City of Los Angeles, 5 Cal.2d 123, 128, 53 P.2d 353; Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Thompson v. County of Los Angeles, 140

Cal.App. 73, 35 P.2d 185; Farmers, etc., Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795; Wicklund v. Plymouth E. School Dist., 37 Cal.App.2d 252, 99 P.2d 314; Wilkes v. City and County of San Francisco, 44 Cal.App.2d 393, 112 P.2d 759; Kline v. San Francisco U. School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; Myers v. Hopland U. E. School Dist., 6 Cal.App.2d 590, 44 P.2d 654; Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13.

Petitioners rely upon recent decisions which have held that a court having jurisdiction over the subject-matter of an action and over the parties acts in excess of its jurisdiction for the purposes of certiorari or prohibition when it exercises its power in an unauthorized manner. This court has said, "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291, 109 P.2d 942, 948, 132 A.L.R. 715. Thus, where the action of a court is in violation of constitutional restrictions upon its power, it has been held that the court has exceeded its authority. Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691; Langdon v. Superior Court, 65 Cal.App. 41, 223 P. 72. Where statutory limitations or restrictions upon a court's power to act are violated, many cases have held that such unauthorized acts are in excess of the court's jurisdiction for purposes of certiorari or prohibition. See, for example, Modification of court's judgment or the granting of a new trial in violation of statutory limitations on such power: Treat v. Superior Court, 7 Cal.2d 636, 62 P.2d 147; Lankton v. Superior Court, 5 Cal.2d 694, 55 P.2d 1170; Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001; Diamond v. Superior Court, 189 Cal. 732, 210 P. 36; Prothero v. Superior Court, 196 Cal. 439, 238 P. 357; Estate of Paulsen, 179 Cal. 528, 178 P. 143; Lang v. Superior Court, 71 Cal. 491, 12 P. 306, 416; Colthurst v. Justice's Court, 100 Cal.App. 146, 279 P. 812. Failure of a court or tribunal of limited statutory jurisdiction to comply with the express limitations contained in the statute: Olcese v. Superior Court, 210 Cal. 566, 292 P. 964; Texas Co. v. Bank of America, etc., Ass'n, 5 Cal.2d 35, 53 P.2d 127; Spreckels Sugar Co. v. Industrial Accident Comm., 186 Cal. 256, 199 P. 8. Issuance of an injunction against the enforcement of a public statute in violation of a statutory limitation on such power; Reclamation Dist. v. Superior Court, 171 Cal. 672, 154 P. 845; Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107; Loftis v. Superior Court, 25 Cal.App. 2d 346, 77 P.2d 491. Attempted use of bail deposited by a third person in satisfaction of the fine levied against a defendant in violation of statutory restrictions: Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109; Hudson v. Police Court of Oakland, 39 Cal.App. 149, 178 P. 172; Paton v. Superior Court, 37 Cal.App.2d 475, 99 P.2d 698. Similarly, there are certain procedural rules developed by the courts which operate as a limitation on their power and are so fundamental in their nature that any violation thereof constitutes an excess of jurisdiction for the purposes of certiorari or prohibition. (For example, Failure to exhaust the administrative remedies provided by statute before resorting to a court of law to challenge the order of an administrative agency: Abelleira v. District Court of Appeal, supra; United States of America v. Superior Court, 19 Cal.2d 189, 120 P.2d 26; Louis Eckert B. Co. v. Unemployment R. Comm., 47 Cal.App.2d 844, 119 P.2d 227. Failure to join an indispensable party in an action where his rights will inevitably be affected by the court's decree: Bank of California v. Superior Court, 16 Cal.2d 516, 106 P. 2d 879.

[13] The requirements of section 2.801 of the School Code, however, cannot be brought within the doctrine of those cases involving statutes which restrict the power of the courts. Under the provisions of that section, liability on the part of the school district (that is, the waiver of sovereign immunity) is made dependent upon the filing of a claim within ninety days. That requirement, however, is one which goes to the elements of the plaintiff's right to recover rather than to the power of the court. Judgment in favor of the plaintiff in the absence of such a claim is a grievous error of law and a violation of statute. But not every violation of a statute constitutes excess of jurisdiction on the part of a

court. The doctrine relied upon by petitioners applies only where the clear purpose of the statute is to restrict or limit the power of the court to act and where the effective enforcement of such restrictions requires the use of the extraordinary writs of certiorari or prohibition. Where, as here, the statute does not restrict the power of the court but merely sets up a condition precedent to the establishment of the plaintiff's cause of action, we think the violation of the statutory provision constitutes an error of law rather than excess of jurisdiction. Cf. Karry v. Superior Court, 162 Cal. 281, 284, 122 P. 475, 128 P. 760; Estrin v. Superior Court, 14 Cal.2d 670, 674, 96 P.2d 340.

No case which involves the filing of a claim as a prerequisite to establishing liability against a municipality or school district has been called to our attention which characterizes the requirement as jurisdictional. Hill v. Superior Court, 16 Cal.2d 527, 106 P.2d 876, which is especially relied upon by petitioners, merely states the general rule set forth above as to the broad concept of excess of jurisdiction where certiorari or prohibition is involved. The actual holding of the case in no way militates against the conclusions which have been announced herein. The superior court indicated in that action that it would refuse to proceed with an action to recover embezzled funds brought against the former executor of an estate and would discharge an attachment secured against him upon the ground that the action was prematurely brought. The theory upon which the superior court acted was that because the settlement of an executor's account is within the exclusive jurisdiction of a probate court, no suit to recover embezzled funds could be maintained until the probate court determined what amount was chargeable against the executor by settling his accounts. A writ of prohibition was granted to prevent the superior court from denying its jurisdiction over such an action. Cf. Hall v. Superior Court, 71 Cal. 550, 12 P. 672. That case does not require us to hold, however, that the error in the present case constitutes an excess of jurisdiction on the part of the superior court. Since it is our conclusion that no excess of jurisdiction existed, the judgment of the superior court must be, and it hereby is, affirmed.

SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concur.

CARTER, Justice (concurring).

I concur in the conclusion reached in the majority opinion upon the sole ground that the failure to file a claim as required by section 2.801 of the School Code is not a jurisdictional prerequisite to the commencement or maintenance of an action in either the justice's or superior court.

I do not agree with that portion of the majority opinion which holds that certiorari will not lie to annul a void judgment of a justice's court where such void judgment has been affirmed on appeal to the superior court without a trial de novo, and I am of the opinion that a writ of certiorari should issue by this court to annul a void judgment of an inferior court in every case in which there is no remedy by appeal to this court.

The essential issue presented on review by certiorari of a judgment of a justice's court is whether or not that judgment is void; that is, did the court have jurisdiction to render it? If it did not, the judgment may be set aside when the remedy of certiorari is invoked. That is true whether the case is criminal or civil, and whether the appeal is on issues of law alone, or of both law and fact, and whether a new trial or a trial de novo is had in the superior court or the justice's court.

It is stated in the majority opinion that certiorari lies if the court exceeds its jurisdiction. That may be amplified by the broader proposition that a judgment which is void because of a lack or excess of jurisdiction may be directly or collaterally attacked at any time or any place, and there is no sound reason why certiorari should not be available as the proper mode of attack. As stated in 15 Cal.Jur. 49: "Generally speaking, if a judgment is void it is subject to collateral impeachment. It has been said that 'A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right, whatever.'"

It is true that certiorari will not lie if there is a remedy by appeal. But that is a mere procedural limitation. The matter ultimately rests in the sound discretion of the court. If the right of appeal has been exhausted without the judgment having been set aside or the time for appeal has expired, the judgment is nevertheless still as void as it ever was if the court lacked jurisdiction to render it. An affirmance on appeal by the appellate court cannot give it any vitality, even though the appellate court may have had jurisdiction to determine the issue. That follows because where a court lacks jurisdiction of the subject matter of the action, no act of the parties can confer jurisdiction upon it; it is distinguishable from the case in which jurisdiction over the person is conferred by express or implied consent of the parties.

It is the firmly established rule which has been lost sight of in many cases, that a void judgment cannot be given life or validity by a mere affirmance thereof by an appellate court, even though that latter court may have had appellate jurisdiction to determine that issue. This court said in Pioneer Land Co. v. Maddux, 109 Cal. 633, 642, 42 P. 295, 297, 50 Am.St.Rep. 67:

"It has been held that the affirmance by an appellate court of a void judgment imparts to it no validity, and especially if such affirmance is put upon grounds not touching its validity." And again:

"Thus, where a void judgment had been affirmed on appeal by the supreme court of Texas, the court said: 'The judgment of affirmance rendered by this court could not impart to it validity, but would itself be void by reason of the nullity of the judgment appealed from.'" See, also, Ball v. Tolman, 135 Cal. 375, 67 P. 339, 87 Am.St. Rep. 110; Bank of Italy v. Cadenasso, 206 Cal. 436, 274 P. 534. It is said in Pennell v. Superior Court, 87 Cal.App. 375, 378, 262 P. 48, 49:

"The rule is well recognized that judgments void on their face may always be attacked either directly or collaterally. In Estate of Pusey, 180 Cal. 368, 374, 181 P. 648, 650, it is said, quoting from Forbes v. Hyde, 31 Cal. 342, 348: '"A judgment absolutely void may be attacked anywhere, directly or collaterally whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever." See, also, Pioneer Land Co. v. Maddux, 109 Cal. [633], 638, 42 P. 295, 50 Am.St.Rep. 67, and Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L.R.A. 275.' Moreover, the affirmance of a void judgment on appeal does not make it valid. Ball v. Tolman, 135 Cal. 375, 67 P. 339, 87 Am.St.Rep. 110; Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 P. 295, 50 Am.St.Rep. 67."

The cases of Culver v. Superior Court, 185 Cal. 144, 145, 195 P. 1055; Sherer v. Superior Court, 94 Cal. 354, 29 P. 716; Roberts v. Police Court, 185 Cal. 65, 195 P. 1053; and Moyer v. Superior Court, 29 Cal.App.2d 330, 84 P.2d 240, should be disapproved. They rest upon the fallacious basis that certiorari is not available even though the justice's court lacked jurisdiction, because the superior court had appellate jurisdiction. They ignore the principle that an affirmance of a void judgment does not validate it, and that such a judgment is subject to attack at any time. Furthermore, it should be observed that in all of those cases the writ was sought to review the order of the superior court rather than the judgment of the justice's court, and it was held merely that the superior court had appellate jurisdiction to determine whether the justice's court had jurisdiction to render the judgment attacked. But even assuming that to be true, it appears from the authorities cited above that the affirmance by the superior court could not validate a void justice's court judgment. Thus, we are back where we started from with a void judgment which may be directly or collaterally attacked at any time. Therefore, certiorari would lie to annul the void judgment of the justice's court. The more reasonable approach would be to say that the action of both the superior court and the justice's court is void and reachable on certiorari.

With those principles applied, no strange or unusual results are reached such as are indicated by the majority opinion. It is there concluded that if a new trial is had in a superior court after appeal on issues of both law and fact, then certiorari lies if there is an excess of jurisdiction, because the superior court is acting as a substitute for the justice's court. But if the appeal is on issues of law alone, certiorari does not lie because the superior court is exercising its appellate jurisdiction. There is no basis founded upon sound reasoning or considerations of practicability why the result should be different in one case than in the other. The basic inquiry in both instances is whether the judgment is void because the court lacked jurisdiction. If it is void in one instance it is equally void in the other. The affirmance on appeal can no more imbue the void judgment with life when the appeal is on issues of both law and fact than when it is on issues of law alone. While it may be that a lack of jurisdiction in personam in the justice's court could be cured by voluntary submission to the jurisdiction of the superior court in a trial de novo, it is difficult to see how lack of jurisdiction over the subject matter could be so waived. The jurisdiction of a court over the subject matter can never be conferred by the consent of the parties. Thus, if the superior court is substituting for the justice's court in holding a trial de novo on appeal and its jurisdiction over the subject matter is restricted by the same limits applicable to the justice's court, the parties cannot possibly confer jurisdiction on the superior court by their failure to reasonably object to the jurisdiction. The cases of City of Santa Barbara v. Eldred, 95 Cal. 378, 30 P. 562; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 P. 196; De Jarnatt v. Marquez, 132 Cal. 700, 64 P. 1090; Nolan v. Hentig, 138 Cal. 281, 71 P. 440; and City of Madera v. Black, 181 Cal. 306, 184 P. 397, overlook the fundamental issue involved; that is, if the court has no jurisdiction of the subject matter the conduct of the parties cannot cure the defect.

The most glaring illustration of the unsound and unjust results which will flow from the principles announced in the decision of the Chief Justice, occurs in appeals of justice's court judgments in criminal cases. There certiorari will not lie to review the justice's court's judgment of conviction nor the affirmance thereof by the superior court on appeal even where the statute for the violation of which defendant is convicted is unconstitutional. Yet, if imprisonment rather than a fine be the punishment imposed, defendant has relief by way of habeas corpus. Ex parte Bell, 19 Cal.2d 488, 122 P.2d 22. Whether a defendant convicted in a justice's court under an unconstitutional law has any remedy in this court is made wholly dependent upon whether a fine or imprisonment be the penalty. No reason has been advanced for such a manifestly absurd result, and I know of none. The incongruity of the results is further manifested in appeal in criminal cases. If the appeal is from a class A justice's court and a new trial is ordered, the new trial is in the justice's court; but if a class B court is involved then the new trial is in the superior court. Pen.Code, § 1469. Under the theory announced in the majority opinion, the defendant in an appeal from a class B justice's court followed by a trial de novo and conviction could have a review by certiorari, but the defendant in an appeal from a class A justice's court would have no such right upon affirmance of the judgment of conviction by the superior court. Furthermore, under the rule announced in the majority opinion a situation could arise where two defendants convicted in the same justice's court of a violation of an unconstitutional statute and who perfected separate appeals to the superior court, one conviction being affirmed without a trial de novo and the other being granted a trial de novo and convicted and sentenced in the superior court, would not have the same opportunity to have their respective cases reviewed on certiorari. The defendant who succeeded in obtaining a trial de novo in the superior court would be entitled to the issuance of the writ, but the one whose conviction was affirmed by the superior court without being granted a trial de novo would not be entitled to have his case reviewed. This lack of uniformity in the operation of the law is in direct conflict with sec. 11 of article I of the Constitution of California which provides: "All laws of a general nature shall have a uniform operation."

If the stutate under which both of the supposititious defendants above-mentioned were convicted was unconstitutional, the judgment of conviction against both of them would be void, and if both pursued the same remedy to have the judgment of conviction against them declared void, they should be entitled to the same relief. The mere matter of whether the superior judge thought one of them should have a trial de novo in the superior court and the other should not, should not in the least affect the right of the one who was denied a trial de novo in the superior court to have the void judgment against him annulled on certiorari. It was such lack of uniformity, in my opinion, that the above-mentioned constitutional provision was designed to prevent.

20 Cal.2d 897

COATES v. KLETTE, Judge, et al.

S. F. 16629.

Supreme Court of California.

May 1, 1942.

Rehearing Denied May 28, 1942.

1. Criminal law ⚷1011

A writ of certiorari does not lie to review a judgment of justice court where that judgment has been affirmed by the superior court without a trial de novo.

2. Criminal law ⚷260(4)

Where superior court was not engaged in conducting a new trial on appeal from justice court judgment of conviction for violation of Petroleum Products Fraud Prevention Law, the superior court had jurisdiction to affirm the judgment of the justice court, regardless of whether the justice court had jurisdiction. Gen.Laws 1937, Act 2967.

CARTER, J., dissenting.

In Bank.

Certiorari proceeding by Mabel L. Canham Coates against Ernest Klette, as Judge of the Superior Court of Fresno County, etc., and others, to review a judgment of conviction entered in Justice Court which had been affirmed by the Superior Court. On demurrer to the petition.

Demurrer to petition sustained.

See, also, 119 P.2d 397.

Rehearing denied; CARTER, J., dissenting.

Rae B. Carter, of Fresno, for petitioner.

Earl Warren, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and W. C. Tupper, Dist. Atty., and E. A. Thompson, Deputy Dist. Atty., both of Fresno, for respondents.

PER CURIAM.

This petition for a writ of certiorari is sought to review a judgment of conviction entered in the Justice's Court of the Third Township of Fresno County which was affirmed by the Superior Court of Fresno County and which adjudged petitioner guilty of violating the Petroleum Products Fraud Prevention Law of 1931. Stats.1931, p. 1313; Deering's Gen. Laws, 1937, Act 2967. A demurrer to the writ, which is directed to the justice's court and the superior court and the judges thereof, was overruled as to the superior court by the District Court of Appeal, Third District, 119 P.2d 397, and thereafter a hearing was granted in this court.

[1, 2] The issues presented by this petition are determined by our decisions in Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490 (this day decided), and Portnoy v. Superior Court, 20 Cal.2d 375, 125 P.2d 487, this day decided. Under the principles laid down there we hold that the writ of certiorari does not lie to review the judgment of a justice's court, where, as in this case, that judgment has been affirmed by the superior court. Since the superior court in this case was not engaged in conducting a new trial on appeal, it had jurisdiction to affirm the judgment of the court below, whether or not the justice's court had jurisdiction. Redlands High School Dist. v. Superior Court, supra. The demurrer to the petition is sustained as to all respondents.

EDMONDS, J., did not participate in the consideration or decision of this case.

CARTER, Justice (dissenting).

I dissent. In my opinion, the judgment sought to be annulled by this proceeding is void for the reason that both the justice's court and the superior court exceeded their jurisdiction in rendering same, and for the reasons stated in my concurring opinion in the case of Redlands High School District v. Superior Court, 20 Cal.2d 348, 125 P.2d 490, this day filed, petitioner is entitled to a writ of certiorari annulling said judgment.

52 Cal.App.2d 1

KERSTEN v. YOUNG et al.

Civ. 13101.

District Court of Appeal, Second District, Division 1, California.

May 8, 1942.

Hearing Denied July 6, 1942.

1. **Appeal and error** 🔑927(3)

On appeal from judgment of nonsuit, reviewing court was required to state the evidence in the light most favorable to the plaintiff and without regard to conflicts in the evidence.

2. **Livery stable keepers** 🔑11

In absence of notice to contrary, contract for renting of riding horses contains "implied warranty" that renter knew or exercised reasonable care to ascertain horse's habits, and that horse was safe and suitable for renter's purposes.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Warranty".

3. **Livery stable keepers** 🔑11

A stablekeeper must inform himself of habits and disposition of horses kept for hire, and if he knows or in exercise of reasonable care should know that horses are unsuitable or dangerous, he is liable to customers hiring horses for injuries from vicious propensities of horses.

4. **Negligence** 🔑4

The test in determining whether conduct is negligent is not what others would have done, but what a reasonably prudent person would have done under similar circumstances.

5. **Livery stable keepers** 🔑11

The test in determining whether customer, suing stablekeeper for injuries sustained when customer was thrown from hired riding horse, was contributorily negligent in attempting to ride the particular horse was whether ordinarily prudent person in customer's position, knowing what customer knew and seeing what customer saw, would have used greater caution and refrained from riding such horse.

6. **Appeal and error** 🔑997(2)

A judgment of nonsuit will be affirmed only when, from a review of the evidence, it appears that, disregarding conflicts and giving full credit only to plaintiff's or defendant's evidence supporting plaintiff's allegations, and indulging in every legitimate inference to be drawn therefrom, there is insufficient evidence to support verdict for plaintiff.

7. **Trial** 🔑142

Where different conclusions can reasonably be drawn by different minds from the same evidence, decision must be left to triers of fact.

8. **Negligence** 🔑136(26)

Contributory negligence is always "question of fact" for jury, except in cases in which, judged in light of common knowledge and experience, there is standard of prudence to which all persons similarly situated must conform, in which event failure to conform to such standard is "contributory negligence" as a matter of law.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence" and "Question of Fact".

9. **Livery stable keepers** 🔑11

In determining whether stablekeeper sued for injuries sustained when customer was thrown from rented riding horse was negligent in renting particular horse to customer, evidence whether at the time and place in question the horse was unsafe or unsuitable for purpose for which hired, and whether stablekeeper had or should have had knowledge thereof, and notified customer of type and character of horse, presented questions for jury.

10. **Livery stable keepers** 🔑11

In determining whether customer suing stablekeeper for injuries sustained when customer was thrown from rented riding horse was contributorily negligent in riding such horse, evidence whether situation in which customer found himself was such as to impress on his mind the danger incident to driving the horse was a question for jury.

11. **Livery stable keepers** 🔑11

In customer's action against stablekeeper for injuries sustained when customer was thrown from rented riding horse, evidence relating to proximate cause was question for jury.

12. **Appeal and error** 🔑994(2), 997(3)
Trial 🔑165

In determining motion for nonsuit, or on appeal from judgment of nonsuit, neither trial nor reviewing court can weigh evidence or judge credibility of witnesses.

13. Appeal and error ⚷1011(1)

Before reviewing court can say that party has assumed risk from which injury occurred, evidence must be without substantial conflict in reference to matter of knowledge or means of knowledge of the existing danger, or that such danger was obvious.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Hugo M. Kersten against Robert Young, Bollan, Inc., and others, to recover damages for personal injuries allegedly sustained by the plaintiff as the result of being thrown from a horse hired from Bollan, Inc. From the judgment, the plaintiff appeals, Bollan, Inc., being the respondent.

Reversed and remanded for new trial.

Roland Rich Woolley, of Los Angeles, for appellant.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff instituted this action to recover damages for personal injuries sustained by him as the result of being thrown from a horse hired from defendant, which owned and operated a riding academy and stables. The complaint contained two causes of action, the first of which alleged negligent hiring of the horse by defendant to plaintiff, while the second charged a breach of warranty of suitability of the horse hired by plaintiff from defendant.

By his complaint plaintiff alleged that he was an unskilled rider, incapable of riding any horse other than a gentle and dependable one. In the first cause of action he set forth that notwithstanding the defendant was aware of this fact, it nevertheless negligently and knowingly rented the plaintiff a horse that was addicted to plunging, rearing, jumping, and bolting, and which horse was unsafe for an unskilled rider such as the plaintiff; that defendant knew or should have known of the alleged characteristics of the horse, and that at the time of said hiring plaintiff was ignorant of and unaware of said characteristics. It was further alleged that while plaintiff was riding the horse, it suddenly, without warning or provocation, reared, jumped, bolted and became unmanageable, throwing plaintiff against a tree and to the ground, as a result of which he received serious injuries. The second cause of action, after incorporating the allegations of the first, in addition thereto set forth the contract of hire, and further that defendant warranted the horse so let was a gentle, dependable horse, safe for the plaintiff to ride, and charged a breach of that warranty.

By its answer defendant denied upon information and belief the lack of skill of the plaintiff; denied that it knowingly rented to plaintiff a horse unfit for him to ride, or that it knew that the horse was unfit, or that it should have known that the horse was unfit for the plaintiff to ride. The answer further challenged plaintiff's allegation that he was ignorant of the unfitness of the horse or that the fall was due to the unfitness of the horse or the actions of the animal. The answer also denied the warranty of suitability and the breach thereof, and alleged that the accident was due to the negligence of the plaintiff, in that plaintiff, in attempting to race said horse over the bridlepath in the vicinity of defendant's stables, so negligently handled and managed the horse as to lose his balance on a bend of the path, as a result of which he was thrown as set forth in his complaint. It is conceded that the accident occurred while plaintiff was riding said saddle horse upon a bridlepath in the vicinity of the riding academy maintained by the defendant.

The case was tried before the court sitting with a jury upon the theory of a breach of contract upon an implied warranty of suitability. Upon the completion of plaintiff's case defendant moved for a nonsuit, which motion was granted. From the judgment of dismissal thereupon entered plaintiff prosecutes this appeal.

[1] Stating the evidence in the light most favorable to the plaintiff and without regard to conflicts in the evidence, as we are required to do upon an appeal from a judgment of nonsuit, we find in the record testimony that defendant at the time of the accident operated a riding academy commonly known as the Bel-Air Stables, where it let saddle horses to the public. On February 19, 1939, defendant hired and rented a horse to the plaintiff for the latter to ride. Plaintiff, a physician and surgeon, accompanied by his wife and 16-year-old daughter, on the last-mentioned date arrived at the Bel-Air Stables about 8 o'clock in the morning for the purpose of taking a horseback ride. His

daughter had called for the horses in advance. Upon the arrival of plaintiff and his family, three horses were brought into the ring, and the horse "Buck Benny" was assigned to plaintiff. His daughter wanted to ride that horse, but Mr. Gordon Smith, the riding master in charge of the stables, refused to permit her to do so, saying, "No, you can't have that horse, you can't ride that horse on that trail * * * no, no, too much horse for you." Thereupon plaintiff said, "No, I will ride this horse. I will follow Mr. Smith's suggestion." Plaintiff further testified that Mr. Smith stated, "He is a high-spirited horse, but he will give you a good ride." It also appears from plaintiff's testimony that he was advised by Mr. Smith that the horse was a privately owned one and that the academy was not in the habit of "letting him out." Plaintiff testified that he first started riding horses some seven years prior to the accident; that he took about six lessons. It further appears that Mr. Smith, who was in charge of the academy stables, accompanied the plaintiff on three or four rides.

After mounting the horse and proceeding out on to the bridlepath, plaintiff testified, "I was on a trot, and Alice came along, the daughter, by the side of me on her horse at a canter, and she was to my right and suddenly she turned with her horse at right angles on to a path going up toward the hill, and my horse, who was following about—oh, I would say, 4 to 6 feet, turned at the same time, or turned following her horse, and— * * * he just got into this turn and suddenly swerved back to the left, reared and swayed over to the left, and in so doing he apparently stepped on his foot or lost control of his equilibrium in some way because we landed into a tree, and I landed up against a branch and the trunk of the tree and I stayed there, I fell, and the horse went on."

Plaintiff also introduced three witnesses who prior to the day of the accident had ridden the horse "Buck Benny." One of these witnesses testified with reference to the horse in question, "He would jump from side to side all over the bridlepath, because he was such a very well reined horse and had a very touchy disposition, and whenever he would be touched either by the hand or by the heel, he would swerve from one side to the other." This witness testified he had considerable experience in riding horses and was a riding master and trainer at the stables where the horse here in question was kept prior to its acquisition by the defendant. Another witness testified that he had been riding horses since 1922; that he had ridden the horse "Buck Benny" after the defendant had acquired possession of the animal. He further testified that the horse was nervous and "seemed to be afraid of the rail," and that he "had a hard time getting him in to the point where the road comes down into the trail again. He refused to go down, and I had quite a hard job with him then, and he was nervous all the way down to the stables." This witness further testified that upon his return to the barn he "told the groom who took the horse that it had been a very bad ride, and I told somebody in the office—I don't know who it was —that I thought the horse was dangerous on the trail and should never be allowed to go out." Still another witness testified that he had ridden the horse a few months prior to the accident here in question. This witness stated with reference to his ride on the horse, "In fact, a few minutes before that he was stubborn, and I could not seem to hold the horse back, and we went under the underpass very rapidly, and crossed out up over the incline or hill, and then I was able by pressing my feet in the stirrups and pulling back with all my strength, I was able to hold the horse, turn him around and go on the way to the corral."

In support of the judgment as rendered, respondent asserts that the evidence established that no warranty was made to plaintiff, but that on the contrary such warranty was actually disaffirmed by the defendant; that the latter notified plaintiff of the type and character of the riding horse and of his disposition; that the actions of the horse before plaintiff's ride commenced and during the early stages thereof clearly indicated the nature of the horse; that plaintiff, cognizant of his own inexperience and inabilities as a rider, assumed the risk of continuing to ride the animal; that the accident was the result of the action of plaintiff's daughter and himself and of circumstances which are ordinarily and necessarily incident to the sport of horseback riding, and were not the result of any unusual or abnormal dangerous habit or propensity of the horse of which plaintiff had no notice.

[2, 3] At the outset it should be noted that in a contract of hiring with one who rents horses for riding purposes, in the absence of any notice to the contrary there is contained an implied warranty to the rider that the renter of the animal knew or had exercised reasonable care to ascertain the

habits of the horse and that the animal was safe and suitable for the purpose for which the keeper hired the horse to the renter thereof. To inform himself of the habits and disposition of horses which he keeps at his stable for hire is the duty of a stablekeeper, and if he knows or in the exercise of reasonable care should ascertain the fact that his animals are dangerous or unsuitable, he is liable for injuries to his customers resulting from the vicious propensities of animals so hired to his customers. Dam v. Lake Aliso Riding School, 6 Cal.2d 395, 399, 57 P.2d 1315.

[4, 5] Whether plaintiff was notified by defendant of the type and character of the riding horse with which we are here concerned, and whether plaintiff's conduct in attempting to ride such horse was negligence, were questions of fact upon which the evidence in this case was in conflict. The character of every act depends upon the circumstances in which it is done, and in determining the presence or absence of negligence, the test is not what others would have done in that regard, but rather what would a reasonably prudent person do under similar circumstances. Wolfsen v. Wheeler, 130 Cal.App. 475, 483, 19 P.2d 1004. The question presented, therefore, is would a person situated in appellant's position, possessing ordinary prudence, knowing what he knew and seeing what he saw, have used greater caution than he used and refrained from mounting or riding the particular horse in question? There is in the record testimony that defendant had actual knowledge of the propensities and characteristics of the horse. True, defendant refused in the presence of plaintiff to permit the latter's 16-year-old daughter to ride the horse, but according to plaintiff's testimony, defendant through an agent who had ridden with plaintiff assured the latter that the horse would give him "a good ride."

[6-11] We may affirm a judgment of nonsuit only when, from a review of the evidence, we can say that, disregarding the fact that there may be a conflict therein, and giving full credit only to that portion of the evidence, whether produced by plaintiff or defendant, which tends to support the allegations contained in plaintiff's complaint, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff if such verdict were given. Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579; Estate of Lances, 216 Cal. 397, 14 P.2d 768. The decision must be left to the triers of fact where different conclusions may reasonably be drawn by different minds from the same evidence. In the instant case it is clear to us that whether the situation in which he found himself was such as to impress upon the mind of appellant the danger incident to his mounting or riding the horse proffered by defendant, was for the jury to decide as a controverted issue of fact. Except in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform, the question of contributory negligence is always one of fact for the jury to decide under proper instructions. It is only in these last mentioned cases that failure to adhere to that common standard is as a matter of law contributory negligence. We are not unmindful of respondent's contention that before appellant commenced his ride and before the horse had left the riding room, it shied, threw its head around, and endeavored to wrest control from the plaintiff; that during the early portion of the ride the horse displayed more or less similar characteristics, and that the accident was the result of plaintiff's daughter's attempt to pass and ride in advance of her father at a canter after she had been warned not to do so; and also respondent's claim that plaintiff's injury occurred by reason of the horse's endeavor to return to the customary riding trail after it had followed the other horse into a side trail where plaintiff's horse lost its equilibrium, stepped on its foot, reared, and brushed plaintiff against a nearby tree. If in the face of this factual situation, the jury had found for respondent, such an argument might prevail on appeal, but that is not the case, and we are asked to hold that appellant, in acting as he did, was negligent as a matter of law. This we cannot do, because we feel that reasonable minds might well differ on the question whether a man situated as plaintiff was, seeing what he was able to see, and knowing what he knew, would or would not have accepted the horse rented to him by the defendant. Whether at the time and place in question the horse was unsafe or unsuitable for the purpose for which it was hired was also a question of fact for the jury to determine. Therefore, under the conflicting facts and circumstances here present, the negligence of the defendants, the contributory negligence of the plaintiff, as

well as the important issue of proximate cause, were all pure questions of fact for the jury to determine in the light of the particular facts and circumstances surrounding the conduct and behavior of the parties litigant, as disclosed by the evidence.

[12, 13] Assuming, as contended by respondent, that a rider under the circumstances here present assumes the risk of the habits and propensities of the horse which are known to him and of which he has been informed, and which are apparent at the time he mounts the animal, when he is afforded an opportunity to request a change of mount, nevertheless in the instant case there is some evidence that respondent had knowledge of the characteristics and propensities of the horse, while at most the evidence concerning plaintiff's knowledge thereof was in conflict. Under well known and established rules, we must disregard the fact that there is a conflict and give full credit only to that portion of the evidence which tends to support the allegations contained in plaintiff's amended complaint, when the appeal is taken from a judgment grounded upon a nonsuit. We are not authorized, and neither was the trial court, in determining a motion for a nonsuit, to weigh the evidence or judge of the credibility of witnesses. Under the facts as disclosed by the evidence in the case at bar, it was for the jury to determine whether plaintiff had knowledge of existing conditions and should have appreciated, under all the surrounding circumstances, the possibility of the danger involved and of the hazardous position assumed by him in riding the horse. As was said in Wilmot v. Golden Gate Inv. Co., 41 Cal.App.2d 664, 107 P.2d 263, 265: "The doctrine of assumption of risk is surrounded by the equally stringent boundaries that, before the appellate court can say that a party assumed the risk from which the injury occurred, the evidence must be without substantial conflict in reference to the matter of knowledge or means of knowledge of the existing danger or that such danger was obvious. It is a matter of common knowledge that all construction activities are surrounded by some element of risk of injury, but it is a question of fact in each case whether the conduct of the injured party was in accord with the custom and habits of reasonable men under similar circumstances. The evidence here does not show that there was any unusual risk which the respondent assumed or that his conduct was any different from what other reasonable men under the same circumstances would have followed. These questions all depend upon the facts and circumstances which the jury was required to decide."

It should be understood that throughout this opinion we have taken the evidence most strongly in plaintiff's favor, as we are bound to do where an appeal is taken after the granting of a nonsuit. We wish it understood that we are expressing no opinion as to the weight of the evidence or its truth or falsity.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concurred.

51 Cal.App.2d 576

DELL v. HJORTH.

Civ. 12823.

District Court of Appeal, Second District, Division 3, California.

April 29, 1942.

Rehearing Denied May 29, 1942.

Hearing Denied June 25, 1942.

1. Appeal and error ⚷989

Appellate court's function is to consider not relative weight of conflicting evidence, but only legal sufficiency to support challenged finding.

2. Appeal and error ⚷931(1)

On appeal, evidence is viewed from the standpoint most favorable to sustaining the judgment.

3. Automobiles ⚷208

In an action for injuries sustained in an automobile collision at an intersection, where evidence supported findings that defendant, who was approaching from the right, entered the intersection either before or at the same time as plaintiff, defendant had the right of way and, in failing to yield to such right of way, plaintiff was contributorily negligent. Vehicle Code, § 550, St. 1937, p. 619.

4. Trial ⇐404(5)

Oral statements of the trial judge can have no effect on the findings of fact which were signed and filed.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Elizabeth Dell against Rolf Hjorth for personal injuries sustained in a collision of automobiles at an intersection. From a judgment for defendant, plaintiff appeals.

Affirmed.

Irving Cohen, of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

In an action for damages for personal injuries sustained by plaintiff in a collision between her automobile and that of defendant, at a street intersection, the trial court found that both plaintiff and defendant were negligent and that the negligence of each contributed proximately to plaintiff's injury. This appeal attacks only the sufficiency of the evidence to sustain the finding that plaintiff was contributively negligent. Viewing all the evidence, such finding in not untenable.

[1] While a reading of the record discloses evidence which on the printed pages before us seems to tend strongly to prove shockingly gross negligence on the part of defendant with relatively little to support an inference that plaintiff neglected any duty and thereby proximately contributed to the accident, we are bound to recognize that the trial court had the benefit of personal observation of the witnesses and that the appellate function is to consider not relative weight of conflicting evidence, but only legal sufficiency to support the challenged finding. (Lutz v. Merchants Nat. Bank, (1918), 179 Cal. 401, 406, 177 P. 158; Smith v. Royer, (1919), 181 Cal. 165. 172, 183 P. 660; Estate of Filippi, (1935), 9 Cal.App.2d 407, 409, 49 P.2d 892.)

[2, 3] In this case the evidence, viewed from the standpoint most favorable to sustaining the judgment (Feckenscher v. Gamble, (1938), 12 Cal.2d 482, 492, 85 P.2d 885; Chronister v. Brennan, (1938), 27 Cal.App.2d 509, 510, 81 P.2d 479; Bigelow v. City of Ontario, (1940), 37 Cal.App. 2d 198, 205, 99 P.2d 298), legally warrants the conclusions of fact that defendant, traveling north on Kenmore Avenue, entered its intersection with Fifth Street at least as soon as plaintiff, who was driving east on Fifth, reached such intersection; that plaintiff's car was proceeding fully as fast as defendant's and that the front of plaintiff's machine struck near the center on the left side of defendant's vehicle.

Defendant testified that he had stopped completely at the corner of Sixth and Kenmore; that he turned and proceeded north on Kenmore at not more than thirty-five miles per hour; that when fifty to seventy feet back of the intersection of Fifth Street he looked to his left, could see approximately seventy feet west on Fifth and saw no moving vehicle; that he then looked to the right and ahead and did not see plaintiff's car until it struck his. Plaintiff testified that, when thirty feet back from the intersection and again when entering it, she saw the defendant's car approaching at high speed but that she shifted down to second gear and proceeded slowly, assuming that defendant would yield her the right of way.

The foregoing epitome of evidence favorable to defendant, when considered with the inferences which may be drawn therefrom, is legally sufficient to support the challenged finding. Neither the relative positions of the vehicles after the impact nor the testimony of other witnesses deprives such evidence of its substantiality. Defendant, if he entered the intersection either first or at the same time as plaintiff, had the right of way (§ 550, Vehicle Code, St. 1937, p. 619) and it was negligent of plaintiff not to accord him the privilege of clear passage.

[4] Since we are bound by the aforementioned considerations to sustain the questioned finding, it is unnecessary for us to determine the legal effect of plaintiff's conduct on the hypothesis that she entered the intersection first. The oral statement of the trial judge, referred to by appellant, can have no effect on the findings of fact which were signed and filed. (Fisk v. Casey, (1898), 119 Cal. 643, 645, 51 P. 1077; Phillips v. Hooper, (1941), 43 Cal. App.2d 467, 470, 111 P.2d 22; see, also, Rickards v. Noonan, (1940), 40 Cal.App. 2d 266, 273, 104 P.2d 839.)

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concurred.

51 Cal.App.2d 690

WAIDLEY v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 6799.

District Court of Appeal, Third District, California.

May 4, 1942.

1. Courts ⚷207(5)

The District Court of Appeal as matter of policy would not issue writ prohibiting Superior Court from taking further proceeding in an estate pending appeal to Supreme Court from order of Superior Court appointing a general administrator of the estate, on ground that proceeding was equitable in nature of which Supreme Court has original appellate jurisdiction.

2. Courts ⚷207(5)

The District Court of Appeal would not issue writ prohibiting Superior Court from taking further proceeding in an estate where appeal was pending in Supreme Court from order of Superior Court appointing a general administrator of the estate.

3. Courts ⚷207(1)

An appellate court will not issue a writ affecting a proceeding pending on appeal in another court or which is originally appealable to such other appellate court.

Proceeding by Raymond J. Waidley for a writ of prohibition to prohibit the Superior Court of Los Angeles County from taking further proceedings in the matter of the estate of Virginia Dodds, deceased, pending an appeal to the Supreme Court from an order of the respondent court appointing a general administrator of such estate.

Application for writ of prohibition denied and proceeding dismissed.

Busick & Busick, of Sacramento, for petitioner.

N. E. Youngblood, of Los Angeles, for respondent.

STEEL, Justice pro tem.

This is an application for a writ of prohibition, the object of which is to prohibit the Superior Court of Los Angeles County from taking further proceeding in the matter of the estate of Virginia Dodds, deceased, also known as Virginia Dodds Waidley, pending an appeal to the Supreme Court from an order of the respondent court appointing a general administrator of said estate.

From the record it appears that petitioner herein, Raymond J. Waidley, is a resident of Sacramento County, and is alleged to be the surviving husband of the above-named decedent who, it is alleged, was at the date of her death a resident of Sacramento County and left estate therein; that in September, 1941, petitioner was appointed special administrator of the estate of said decedent by order of the Superior Court of Sacramento County, and ever since has been and still is acting as such; that thereafter Orba L. Dodds (also claiming to be the surviving husband of said decedent) filed a petition for general letters of administration in the Superior Court of Los Angeles County which came on for hearing on the sixth day of January, 1942, at which time it appears the court determined that a Nevada divorce decree granted to decedent from said Orba L. Dodds was invalid and thereupon made its order, over the opposition of the petitioner herein, appointing said Orba L. Dodds as general administrator of said estate; that on the tenth day of January, 1942, petitioner herein filed his notice of appeal to the Supreme Court from the order so made; that letters of administration were issued on the 20th day of January, 1942, and thereafter upon application of Orba L. Dodds a citation was issued out of said court directing petitioner herein to show cause why he should not deliver all the assets of said estate over to the general administrator and forthwith file his report and account as special administrator. Upon the return date petitioner herein appeared by his counsel and objected to respondent court proceeding with the hearing of said citation or making any order directing petitioner to deliver said assets or to file his report and account as special administrator; that respondent court thereupon ordered a bench warrant to issue for the arrest of petitioner for contempt of court in failing to appear personally before said court, the service of which was ordered withheld, pursuant to stipulation, until March 4, 1942, to which time the hearing on the order to show cause was continued. In the meantime the instant proceeding was instituted and an alternative writ was issued. Upon the return the respondent court and Orba L.

Dodds, as the real party in interest, appeared separately and specially by demurrer and also by answer.

Several points are raised and argued in the briefs, among them that this court is without jurisdiction to issue the writ asked for by reason of the fact that the respondent superior court is situate outside this district; that the appeal taken from the order appointing the general administrator was premature in that the findings and judgment were not signed until January 19, 1942, and were entered January 22, 1942, while the notice of appeal was filed January 10, 1942; and also that respondent Orba L. Dodds, the real party in interest, was not served with a copy of the application for the writ herein, as provided in section 1107 of the Code of Civil Procedure.

[1-3] Without passing upon any of the questions so presented we are of the opinion that as a matter of policy and not of jurisdiction, this court should not entertain this petition for the reason that it arose out of a proceeding in the trial court, equitable in nature, and of which the Supreme Court has original appellate jurisdiction. Moreover it appears that an appeal is now pending in the latter court from the order complained of, and it has long been the established policy and practice of the appellate courts of this state not to issue a writ affecting a proceeding which is pending on appeal in another court or which is originally appealable to such other appellate tribunal. Foster v. Superior Court, 4 Cal.App.2d 466, 41 P.2d 187; In re Estate of Turner, 9 Cal.App. 556, 177 P. 854; Collins v. Superior Court, 147 Cal. 264, 81 P. 509.

In Gunder v. Superior Court, 100 Cal. App. 334, 279 P. 822, 823, which is somewhat similar to the instant proceeding, and in which a hearing was denied in the Supreme Court, it is stated in denying the writ as follows: "That the proceeding in the superior court was of an equitable nature is not doubted. It lay within the exclusive appellate jurisdiction of the Supreme Court. Const.Cal., art. 6, § 4. Unquestionably this court has jurisdiction, but as a matter of practice and policy, where cases were in the superior court, both the Supreme and District Courts have refused to take jurisdiction when the case involved was one originally appealable to the other court. Favorite v. Superior Court, 181 Cal. [261], 263, 184 P. 15, 8 A.L.R. 290; Collins v. Superior Court, 147 Cal. 264, 81 P. 509; [In re] Estate of Turner, 39 Cal. App. 56, 177 P. 854. If policy indicated this course, where no appeal had yet been taken, it seems clear that the reasons therefor apply even more strongly where, as in this instance, an appeal has been taken to the court having original appellate jurisdiction. Should this petition be granted, questions involved in the appeal to the Supreme Court now pending would necessarily be determined by this court."

The application for a peremptory writ of prohibition is denied and the proceeding is dismissed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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51 Cal.App.2d 714

In re KENNEDY'S ESTATE.

ROGERS et al. v. KENNEDY.

Civ. 13503.

District Court of Appeal, Second District.
Division 2, California.

May 5, 1942.

Hearing Denied July 2, 1942.

Executors and administrators 🔑194(5)

Evidence warranted allowance to widow for whom no provision was made in will, on ground that widow had not been divorced, and that property settlement had not been made, waiving allowance, and that widow was without means of supporting herself. Probate Code, § 680.

Appeal from Superior Court, Los Angeles County; Florence Bischoff, Judge pro tem.

Proceeding in the matter of the estate of John E. Kennedy, deceased. From an order of the probate court directing that Celia Kennedy be given a widow's allowance in the sum of $100 a month, for not to exceed 12 months, A. B. Rogers and others, beneficiaries named in the will of the deceased, appeal.

Order affirmed.

John P. Tobin, of Los Angeles, for appellants.

Wyckoff Westover, of Los Angeles, for respondent.

W. J. WOOD, Justice.

This is an appeal by beneficiaries named in the will of John E. Kennedy, deceased, from an order of the probate court directing that petitioner be given a widow's allowance in the sum of $100 a month, not to exceed twelve months. John E. Kennedy died on October 23, 1940, leaving an estate appraised at $4,940.75. His will, in which no provision is made for petitioner, was admitted to probate on December 3, 1940. In this appeal it is contended by appellants that the evidence is insufficient to justify an allowance for petitioner.

Petitioner and decedent were married on September 18, 1918. Petitioner testified that for a short time after their marriage she and decedent lived together on Grand Avenue in Los Angeles until she became ill, when she was sent home by decedent "because he had no one to care for me." Subsequently they again resided together at 49th Street and Western Avenue in Los Angeles until decedent again sent her home, telling her that he was going to Arizona. Thereafter, although they did not reside in the same house, they had sexual relations at various times at a hotel. These relations continued until petitioner became paralyzed, eight or ten years before the court hearing. Petitioner also testified that she was without means, that she had worked for the telephone company from 1918 to 1924 and that she had been supported by her brother since 1925.

Petitioner relies upon section 680 of the Probate Code which provides that during the progress of the settlement of the estate the "widow and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances * * *." There was no evidence before the court that a divorce decree had been entered or that a property settlement had been made waiving a widow's allowance. Petitioner was unquestionably the widow of decedent and was penniless and without means of supporting herself. The order is supported by the evidence.

The order is affirmed, respondent to recover her costs on appeal from appellants.

MOORE, P. J., and McCOMB, J., concurred.

ROSEMOND T. DE HART et al., Respondents, v. Joe ALLEN, Defendant; Anna Allen, Third Party Claimant and Appellant.

Civ. 11473.

District Court of Appeal, First District, Division 2, California.

May 6, 1942.

Motion to recall remittitur.

Prior order on motion annulled and remittitur issued forthwith.

See, also, 43 Cal.App. 479, 111 P.2d 342.

Ernest Spagnoli, of San Francisco (Walter F. Lynch, of San Francisco, of counsel), for appellant.

Abraham Setzer and Carl E. Day, both of San Francisco, for respondents.

PER CURIAM.

An order having been made November 1, 1941, in the above entitled cause granting respondents' motion to recall the remittitur upon the grounds that this court was without jurisdiction to entertain the proceedings, and the Supreme Court having determined the question of jurisdiction in Gore v. Bingaman, 20 Cal.2d 118, 124 P.2d 17, and re-transferred the cause to this court by its order dated April 23, 1942; and it now appearing that the order recalling said remittitur was inadvertently made: It is hereby ordered that said order be and the same is vacated and annulled, and that a new remittitur issue forthwith.

51 Cal.App.2d 705

LANE et al. v. PACIFIC GREYHOUND LINES et al.

Civ.12075.

District Court of Appeal, First District, Division 2, California.

May 5, 1942.

1. Appeal and error ⚷14(1)

Where second notice of appeal and request for transcript were filed within time and were in full compliance with statute, motion to dismiss purported appeal under first notice of appeal and request for transcript was granted, where plaintiffs were not in financial circumstances to spend funds litigating technical contentions regarding binding effect of first notice. Code Civ. Proc. § 953b.

2. Appeal and error ⚷14(1)

Where first notice of appeal and request for transcript is defective, appellants may file a new notice and request within statutory period. Code Civ.Proc. § 953b.

3. Appeal and error ⚷14(1)

The question of propriety of terminating proceeding on first notice of appeal and request for transcript was matter for decision of trial court in first instance, but where if motion should be granted the case would again come to appellate court to determine whether second appeal was proper, appellate court granted motion to dismiss appeal under notice of first appeal without prejudice to perfection of appeal based on second notice. Code Civ.Proc. § 953b.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Death action by Naomi Gae Lane and others against the Pacific Greyhound Lines and others. From an adverse judgment, plaintiffs appeal. On motion of appellants to dismiss a purported appeal under a notice of appeal and request for transcript.

Motion granted.

F. H. Dam, of San Francisco, for appellants.

Cooley, Crowley & Supple, of San Francisco, and T. H. DeLap, of Richmond, for respondents.

NOURSE, Presiding Justice.

The plaintiffs and appellants have moved to dismiss a purported appeal under a notice of appeal and request for transcript dated November 4, 1941, without prejudice to their appeal, notice of which was given November 29, 1941, followed by a request for transcript dated December 11, 1941. The grounds of the motion are that the notices filed November 4th were unauthorized, defective in form and substance, and detrimental to the interests of plaintiffs and appellants.

The action is one to recover damages for the death of the husband and father of the plaintiffs. They employed two attorneys to represent them upon a contingent fee basis. Following an adverse verdict and denial of their motion for a new trial, one of said attorneys notified the other that he would not go any further in the litigation. He then filed the first notice of appeal and the request for clerk's and reporter's transcripts, but did not secure payment of costs as required by section 953b of the Code of Civil Procedure. The plaintiffs in the action repudiated these acts and requested his associate alone to represent them. Within due time such associate filed a proper notice of appeal and a request for the transcripts. Pursuant to the above Code section he paid the reporter $400 for the transcripts, which was in excess of the sum required. The defendants thereafter moved to terminate proceedings under the first notice of appeal, and action on that motion has been stayed by these proceedings.

[1-3] We do not need to consider the controversial subject of the authority of counsel to take the first appeal under the circumstances above stated. The second notice and request were filed within time and were in full compliance with the statute. If there were defects in the former notice, inconsequential though they may be, we know of no rule which would prevent the appellants from filing a new notice and request within the statutory period. Though the question of the propriety of terminating the proceedings on the first notice is a matter for decision of the trial court in the first instance, it is apparent that if the motion should be granted the case would again come to us to determine whether the second appeal is proper. It appears that the plaintiffs are not in financial circumstances to spend their funds upon frivolous litigation, and they should not be denied their right of a speedy appeal because of the apparent neglect of their former counsel, or because of the highly technical contentions as to the binding ef-

fect of the course of action which he pursued.

The motion is granted and the appeal dated November 4, 1941, is dismissed without prejudice to the perfection of the appeal based upon the notice of November 29, 1941.

STURTEVANT and SPENCE, JJ., concurred.

51 Cal.App.2d 735

In re PRYOR'S ESTATE.

PRYOR et al. v. OSBORN, BURUM & SHORTRIDGE.

Civ. 3032.

District Court of Appeal, Fourth District, California.

May 5, 1942.

1. Executors and administrators 🔑111(3)

Whether a will contest is one wherein it is necessary or proper for an executor to resist opposition to probate of alleged will is for probate court's determination.

2. Executors and administrators 🔑111(3)

The mere fact that a statute authorizes an executor to resist opposition to probate of an alleged will does not give executor the right to be reimbursed from estate for his expenses in the way of attorney's fees.

3. Executors and administrators 🔑439

An executor may, at his option, become a party to a will contest by denying or answering opposition to probate of alleged will.

4. Executors and administrators 🔑111(3)

Where executrix, who was also a devisee under will, successfully defended a will contest, and some devisees besides executrix benefited by sustaining of will but others did not, fees of executrix' attorneys for extraordinary services in resisting contest could not be paid from estate.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Proceedings in the matter of the estate of Walter B. Pryor, deceased, between Everett W. Pryor and others and Osborn, Burum & Shortridge, a law partnership. From an order allowing, as payable from the estate, certain fees for extraordinary legal services in resisting a contest before probate of the will of deceased, Everett W. Pryor and others appeal.

Reversed.

Waldo R. Bergman, of Bakersfield, for appellants.

R. Y. Burum and John Shortridge, both of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order allowing, as payable from the estate, certain fees for extraordinary legal services in resisting a contest before probate of the will of the deceased.

Under the terms of his will the deceased devised certain real property to his housekeeper, Ann Stevenson, and named her as executrix. The will also devised certain other real property to Raymond Pryor, a grandson of the testator, and left all of the residue of the estate, share and share alike, to Everett W. Pryor, a son of the deceased, and Alta U. Pryor, Everett's wife. The property devised to Ann Stevenson was appraised at $1,900, that to the grandson at $400, and that given to the son and his wife at $3,027.14.

When the will was presented for probate Everett W. Pryor filed a contest to which Ann Stevenson filed an answer. After a hearing, the will was admitted to probate and Ann Stevenson was appointed executrix and qualified as such. Subsequently, the attorneys who had represented Ann Stevenson in the contest proceeding filed a petition for the allowance of fees for extraordinary services in defending that contest. Everett W. Pryor, Alta U. Pryor and Raymond Pryor filed answers opposing the granting of the petition in which they alleged, among other things, that Everett W. Pryor had filed and prosecuted the contest to the will with the approval of Alta U. Pryor and Raymond Pryor and while also acting as their agent; that Alta U. Pryor and Raymond Pryor had never authorized Ann Stevenson to defend the contest in their behalf; and that Ann Stevenson had at all times acted for herself and in her own interest in her efforts to sustain the will. The court found that the efforts of the executrix to sustain the will by and through these attorneys had "benefited all the heirs and devisees of said estate, other than Contestant, Everett W. Pryor" and entered an order allowing these attorneys $400 payable out of the estate for extraordinary services rendered in this will contest. This appeal followed and the question presented is whether under such circumstances an order for the payment of such fees out of the assets of the estate may be sustained.

In Re Riviere's Estate, 8 Cal.App. 773, 98 P. 46, an order allowing attorney's fees for similar services was affirmed but it does not appear that the executor there had any interest in the estate other than as executor, and there is nothing in the opinion to indicate that all of the devisees and legatees under the will were not equally interested in opposing the contest and upholding the will. That case was referred to in Re Higgins' Estate, 158 Cal. 355, 111 P. 8, 9, and approved insofar as it held that attorney's fees, in successfully resisting a contest before probate, may be allowed under some circumstances, the same being *"such as to make such an allowance entirely equitable* as to all persons interested in the estate." (Italics ours.)

[1-3] In Re Hite's Estate, 155 Cal. 448, 101 P. 448, 450, after stating that it was the duty of the trial court to deny such an application for fees "if the services for which compensation was sought were not such as should be paid for from funds of the estate," the court said:

"We have no statute in this state which in terms authorizes an executor named in a will to recover from the estate fees paid by him to attorneys in resisting a contest of the will before probate. * * * If allowable at all, they are allowable under * * * the provision of section 1619, Code Civ.Proc. * * * for such extraordinary service, as the conducting of such litigation 'as may be necessary for the executor or administrator to prosecute or defend.' * * * Assuming the power to exist, it was clearly for the probate court to determine whether the case was one wherein it was necessary or proper for the executor to resist the opposition to the probate. The mere fact that the statute authorizes him to resist the opposition does not give him the right to be reimbursed from the estate for his expenses in the way of attorney fees. * * * The statute nowhere requires the executor named in the will, who has petitioned for its probate, to resist the claim of one filing written grounds of opposition thereto. He may or may not, at his option, become a party to the contest by demurring or answering the opposition. See section 1312, Code Civ.Proc. It is obvious that there are many cases in which the executor named in the will would not be warranted in engaging in litigation, at the expense of the estate, for the purpose of establishing the paper offered by him for probate, even though he believed that it should be admitted, and that a trial of the contest would so establish. Mr. Woerner says: 'Whether the executor is entitled to credit for the expenses incurred in the litigation to establish a will depends on circumstances in several directions. In so far as he simply performs a duty, the expenses fairly incurred by him in a contest with the heirs at law are payable out of the estate, whatever be the consequences to the successful contestants; but, if he voluntarily assume the burden of a contest which properly belongs to the legatees or devisees, he must look to them, and not to the estate, for reimbursement. It is held to be the duty, or at least the privilege, of the person named as executor in a paper purporting to be a last will, to propound the same for probate in the proper court; but the executor is not bound to become a party to an issue of devisavit vel non, unless he be secured for the expenses by the persons interested in the will. * * * If, therefore, an administrator or executor incur expense at the request, or in the interest, of a legatee or devisee, in the fruitless attempt to establish a will, the parties are liable therefor, but not the estate. If the will is established, however, the costs and counsel fees, *being chargeable against those who are benefited by the litigation,* may be charged against the estate, *if it go to the parties so benefited;* otherwise, the executor's remedy is by action for contribution.' 2 Woerner on Administration (2d Ed.) § 517. (The italics are ours.)

"We think this states a most equitable rule, and one that is in full accord with the established doctrine in this state that an executor or administrator as such has no part to play in contests between heirs, devisees, or legatees, disputing regarding the distribution of the estate. As in the case of a contest on distribution, a contest of a will is generally nothing more than a contest between heirs and devisees and legatees for the property of the deceased."

In Re Higgins' Estate, supra, an order allowing such attorney's fees payable from the estate was reversed on the ground that it there appeared that the executor was the only person beneficially interested in maintaining the will. The court there said: "In view of the principles declared in the Hite case, there was nothing in the facts of this case to furnish any support for a conclusion that the executor was warranted in defending this will at the expense of the estate. To hold otherwise would simply be to enable him by reason of his position as executor to subject the whole estate to such expenses as were incurred by him in litigation defended by him for his own sole benefit as a devisee and legatee under the assailed will. It cannot properly be held that it was necessary for him *as executor* to defend such litigation. While he undoubtedly had the legal right under our statute to defend the will in his capacity as executor (Code Civ. Proc., §§ 1299, 1312; In re Hite's Estate, supra [155 Cal. 448, 101 P. 448]), if such defense was solely for his own benefit as a devisee and legatee and could not operate beneficially as to any other person interested in the estate, he must bear the costs and charges of maintaining it."

[4] In the instant case, the executrix is not, technically speaking, the only person benefited by sustaining the will since Alta U. Pryor and Raymond Pryor would take nothing directly if the will were not sustained. As a practical matter, however, they seem to have preferred, as a family matter, to have all of the property go to Everett W. Pryor, the contestant. Whether or not they were benefited by not having their wishes carried out, and viewing the matter from a legal standpoint, this case differs from the Higgins case in that the executrix was not the sole person benefited by sustaining the will and in that two of the other devisees were also benefited. However, the executrix greatly benefited in that she received approximately one-third of the estate under the will while she would have received nothing had the contest been upheld, and one of the devisees, Everett W. Pryor, was clearly and substantially placed in a worse position by the upholding of the will. The result is that all of the estate will not go to parties who were benefited by sustaining the will and it cannot be said that to allow the payment of these fees from the assets of the estate will be "entirely equitable as to all persons interested in the estate." Under these circumstances, we think it logically follows, under the principles laid down in the cases we have mentioned, that "the services for which compensation was sought were not such as should be paid for from the funds of the estate." The executrix being substantially benefited and only a part of the devisees being benefited, it was practically a contest between individuals and was not such a contest as under the statutes the executrix was entitled to defend at the cost of the estate.

The order appealed from is reversed.

MARKS and GRIFFIN, JJ., concurred.

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52 Cal.App.2d 31

PEOPLE v. NICHOLS.

Cr. 3551.

District Court of Appeal, Second District, Division 1, California.

May 8, 1942.

Hearing Denied June 3, 1942.

1. Criminal law 🔑1159(3)

An appellate tribunal may not disturb conclusion and inferences arrived at by trier of facts upon conflicting evidence.

2. Criminal law 🔑260(11), 1159(2)

Where evidence, viewed in one light, creates hypothesis inconsistent with guilt, and, when viewed in another light, is reasonably consistent with guilt, and where jury or trial judge rejects hypothesis pointing to innocence, and there is evidence to support implied finding of guilt as the more reasonable of the two hypotheses, appellate court is bound by finding of trial court or jury.

3. Criminal law 🔑1159(2)

An appellate court may set aside finding of trial court when there is no substantial or credible evidence in record to support it, or where evidence relied upon by prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against verdict or decision as to convince appellate court that its rendition was result of passion or prejudice.

4. Criminal law ⚷552(4), 561(1)

The law makes no distinction between direct and circumstantial evidence in degree of proof required for conviction, but only requires that proof of guilt be established beyond reasonable doubt by direct or circumstantial evidence or both.

5. Insurance ⚷31

Evidence as to whether accused actually lost, in robbery of his restaurant, personalty which he listed in claim presented to insurer did not support conviction of presenting false claim for insurance. St.1935, p. 511, § 556(a).

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

George Nichols was convicted of presenting a false claim for insurance, and he appeals.

Reversed and remanded.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County defendant was charged in two counts thereof with the crime of presenting false claims for the payment of losses under two contracts of insurance. Ins.Code, § 556, subd. a, St. 1935, p. 511. It will not be necessary to discuss or consider count 1, because while the defendant was convicted thereunder, a new trial was granted and the charge dismissed. This appeal is prosecuted from the judgment of conviction and the order denying a new trial as to count 2.

Epitomized, the facts in connection therewith are that the defendant was the owner of a drive-in restaurant, known as Dixie Drive-In, located in the town of El Monte, in Los Angeles County. He came to California from the state of Georgia in October, 1940, being accompanied by his brother and the latter's wife. He commenced operation of the above-mentioned business in December, 1940, or January, 1941. On February 17, 1941, the Canadian Indemnity Company issued its contract of insurance in favor of defendant covering loss by burglary at the aforesaid premises. The policy limit was $250. On the morning of March 4, 1941, at approximately 2:30 o'clock, W. B. Ambrose, the cook employed by appellant, closed the restaurant, and in accordance with his custom placed the money from the cash register in the oven. He did not count the money, but estimated the amount thereof to be between fifty-five and sixty dollars. Shortly after 4 o'clock on the same morning defendant reported to the sheriff that his place of business had been burglarized. The investigating officer found that a pane of glass in the back door had been broken, but the glass was resting against the door in such a way that it was necessary to remove the glass in order to open the door. The telephone cash box had been torn from the wall and the receipts taken. The cigarette machine and the coin boxes connected with the automatic phonograph had been broken open and the cash removed therefrom. Defendant informed the officer that the sum of $59.25 in cash had been taken from the oven; that three malt mixers valued at $90 were missing, and that a set of Toledo scales valued at $15 had been taken, as had been three boxes of cigars valued at $6. About 10 o'clock on the same morning defendant informed a second investigating officer that approximately $60 had been taken from the refrigerator in addition to the money taken from the oven. However, defendant stated to this officer that no other articles were missing. A short time thereafter defendant presented to the insurance company a claim under his burglary policy. In the claim defendant listed the following articles as stolen: 3 boxes of cigars, value $6; 3 malt mixers, value $84; 1 Toledo scales, value $20; 1 ceiling fan, value $25; 1 eight-slice toaster, value $30; 1 coffee maker, value $24; 1 neon sign clock, value $54; 1 leg of pork, value $3.50; 1 ham, value $3.50; $153 in cash.

The policy did not cover cash kept in refrigerators or ovens, and nothing was paid on account of such loss. A dispute arose as to the value of the items reported stolen, and finally an agreement was reached upon a value of $225, which amount was paid to defendant by the insurance company on or about May 3, 1941.

We find in the record testimony given by Mr. Ambrose the cook, that neither the ham nor the pork reported to be stolen was actually taken. This witness also testified that the remaining articles reported as stolen had never been seen by him on the premises. The testimony of the cook was corroborated in part by the testimony of two witnesses employed by defendant, who likewise testified that they had never seen the articles on the premises.

Taking the witness stand in his own behalf, defendant testified that on the morning of the burglary he left the home of friends in Hollywood around 3:15 o'clock; that enroute home he picked up an army corporal as a passenger; that the latter told him that he would like to stop and telephone his camp that he was going to be late. It was this request on the part of his passenger that prompted defendant to stop at his place of business so that the corporal might use the telephone. Defendant testified that when he went in to his drive-in restaurant he noticed that the place had been robbed. He thereupon went to a garage in the back of his place some few hundred feet, awakened his brother, and repaired to the corner, where he telephoned the sheriff's office. The defendant testified that when the officers arrived, his brother as well as the army corporal was at the premises; that the soldier told one of the officers to take his name in case he needed him as a witness, but the soldier was not called to testify at the trial. The defendant testified positively that all of the articles for which he made claim to the insurance company were actually upon the premises of his place of business, although some of them were not installed, but were kept in a box, and others under the sink and on some shelves which were closed and padlocked; but that the lock was broken the morning of the burglary. Defendant testified that he bought all of these articles in Atlanta, Georgia, in October, 1940, from his brother. At the trial he produced two bills of sale, one of which was acknowledged before and bore the certificate of a notary public in the state of Georgia, in proof of his claimed purchase. Defendant denied that he told the officer that the sum of $59.25 was taken, stating that this was the amount he informed the officer had been taken in as receipts on the night in question, but that there was more than that amount in cash on the premises. In fact, defendant testified that there was $63 in the oven and $100 in the large icebox, making a total of $163. This is the information he claimed he gave to the sheriff.

Defendant produced another witness, who testified that she saw him at a bowling alley conducted by her in Hollywood around 3 o'clock on the morning in question. She further testified that she had been in the kitchen of defendant's premises and had seen boxes underneath the sink and had in fact seen the electric toaster and three malt mixers. An electrician testified that he had been at appellant's place of business three or four times; that on one occasion he had a discussion with defendant in reference to the installation of an electric fan, and that he had seen the fan in a back room. Another witness for the defense testified that he had aided defendant in moving articles into his place at the time the latter opened the business; that there was a lot of equipment moved in; that he had a recollection of seeing a large toaster, and that while he had seen various boxes around the restaurant he had never had occasion to look into them or to note their contents. Defendant's brother testified that he had formerly been in the restaurant business in Georgia; that he sold this business, and in connection with such sale he sold to his brother the items hereinbefore referred to. He identified a bill of sale and testified that he had aided defendant in bringing the accessories to California and also assisted in placing them in the drive-in restaurant. The wife of defendant's brother also testified in corroboration of the testimony given by her husband and defendant.

[1-3] The sole ground relied upon by appellant for reversal of the judgment and order is that the evidence is insufficient to support the trial court's judgment. The principal issue raised against the defendant by the information and the evidence was the truth or falsity of the claim filed with the insurer. The attorney general asserts that the trial court was not required to accept the testimony of appellant and witnesses who corroborated him as to the verity of his filed claim. We are cognizant of the oft-quoted rule which forecloses an appellate tribunal from disturbing the conclusion and inferences arrived at by the trier of facts upon conflicting evidence. Neither are we unmindful of the rule that where the evidence, viewed in one light, creates a hypothesis inconsistent with guilt, and when viewed in another light such evidence is reasonably consistent with guilt, and where the jury, or as in this case the trial judge, rejects the hypothesis pointing to innocence, and there is evidence to support the implied finding of guilt as the more reasonable of the two hypotheses, this court is bound by the finding of the trial court or jury. But it is axiomatic as well

that an appellate court may set aside the findings of the trial court when there is no substantial or credible evidence in the record to support it, or where the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible, or where it so clearly and unquestionably preponderates against the verdict or decision as to convince this court that its rendition was the result of passion or prejudice upon the part of the trier of facts. When a case presents any of these features this court deals with it as a matter of law.

[4, 5] Conceding that such a situation can only be presented on appeal in extreme cases, we are convinced that the case at bar does not present the usual and ordinary situation where the evidence was in conflict as to the main or only issue, but on the contrary tenders to us a case where the evidence not only preponderates in favor of appellant's innocence, but where the evidence relied upon by the prosecution to establish guilt falls short of that quantum of reasonableness and substantiality required to satisfy the reason and judgment of those bound to act conscientiously upon it as to the existence of guilt beyond a reasonable doubt and to a moral certainty. In the case now before us the prosecution introduced no positive, direct or affirmative evidence on any material issue. The most that can be said of such evidence is that it was highly circumstantial and negative in character, consisting in the main of testimony by witnesses to the effect that they had never seen the allegedly stolen personal property upon the premises of appellant's place of business. It cannot be questioned that evidence of a negative character is ordinarily never as satisfactory as that of a positive character. While it is true that the law makes no distinction between direct and circumstantial evidence in the degree of proof required for conviction, but only requires that proof of guilt be established beyond a reasonable doubt by evidence of the one character or the other, or both, nevertheless in the instant case the unsubstantial and negative evidence of the prosecution, when viewed in the light of the unimpeached oral and documentary evidence presented by the defendant, does not bear that degree of reasonableness and substantiality required to give to it the probative force necessary to sustain the finding of guilt by the trial judge. It must therefore be regarded as amounting to no evidence at all, as a matter of law, sufficient to overcome the presumption of innocence and to meet the burden resting upon the prosecution to establish guilt beyond a reasonable doubt. Without contradiction the evidence shows that the cook employed by appellant closed the restaurant about 2:30 a.m.; that appellant was then in Hollywood and was en route home between 3 and 4 o'clock; that when he arrived at his restaurant appellant was accompanied by an army corporal, the latter of whom was seen by one of the deputy sheriffs shortly after 4 o'clock. When appellant arrived at his restaurant and discovered the burglary, he immediately telephoned the sheriff's office, and without delay went to the home of his cook, awakened him, and informed him of what had happened at the restaurant. Upon the arrival of the deputy sheriffs appellant reported his loss, and at all times insisted that the articles claimed to have been stolen were in his place of business. Disinterested witnesses testified that they had seen some of the articles upon the premises prior to the morning in question, while a bill of sale dated September 28, 1940, certified by a notary public in the state of Georgia, gave mute but convincing proof that appellant had in fact purchased a considerable portion of the allegedly stolen property from his brother in the last-named state. Another bill of sale, which was delivered to the insurance company, and the contents of which were uncontradicted, showed the purchase of other portions of the personal property. Evidence of two witnesses that they had accompanied appellant when he transported the personal property purchased in Georgia from that state to California and lodged it in his restaurant, was uncontradicted and unimpeached, as was the testimony of other witnesses that they had assisted appellant in placing the articles in the restaurant. It is also significant that during the investigation made by the insurance company following the filing by appellant of his proof of loss, none of his employees, who gave testimony only of a negative character at the trial, ever stated to the insurer or to the deputy sheriffs that they had never seen the questioned articles upon the restaurant premises. Further, the insurance company never questioned the presence of the articles upon the premises; the dispute was as to the value thereof, and finally the claim was paid. As we review the evidence in this case, it impresses us with the belief that it is inherently improbable and not reasonably possible that appellant did not own and have upon the

premises of his restaurant the property for the loss of which he filed his claim upon his policy of insurance. His conviction must therefore be set aside as unsupported by any evidence of that substantial character required to establish guilt beyond a reasonable doubt of the charge lodged against him.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is, reversed, and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concurred.

51 Cal.App.2d 702

RIVERA v. RON et al.

Civ. 11977.

District Court of Appeal, First District, Division 2, California.

May 5, 1942.

Hearing Denied July 2, 1942.

1. Deeds 🔑210, 211(3)

In suit to quiet title, evidence did not support findings that although plaintiff executed deed to third party who subsequently conveyed to defendants, plaintiff did not intend to convey title but was deceived as to character of paper she was signing, that no consideration was given for either conveyance, and that plaintiff was induced to execute deed by fraudulent conspiracy between third party and defendants.

2. Deeds 🔑194(2)

The delivery of a deed was presumed from its possession by grantee. Civ.Code, § 1055; Code Civ.Proc. § 1948.

3. Estoppel 🔑74(2)

A grantor was "estopped" from denying due execution and delivery of deed, where, for two years after its execution, grantor permitted grantee to assume ownership and obtain loan on basis of ownership, voluntarily handed deed, after it was recorded, to third parties to enable them to have papers prepared to transfer title to them from grantee, had full knowledge of such purchase from grantee for good consideration, and permitted purchasers to pay taxes. Civ.Code, § 3543.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

4. Appeal and error 🔑1178(1)

Where trial court quieted title to realty in plaintiff, plaintiff held possession pending appeal, and reviewing court decided that defendants had valid title, defendants were entitled to accounting for rents collected pending appeal, and case would be remanded for purpose of accounting.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Suit to quiet title by Ana Rivera against Jesus V. Ron and others, wherein a cross-complaint was filed. From a judgment for plaintiff, defendants appeal.

Reversed and remanded with directions.

Hearing denied; CARTER, J., dissenting.

Single, Bryant, Cook and Hays, Carroll Single, and Clarke Weigand, all of San Francisco, for appellants.

Harry Gottesfeld and Joseph A. Brown, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendants appeal from an adverse judgment quieting title in plaintiff to real property.

The cause was tried upon an amended and supplemental complaint framed in four counts, the gist of which was that plaintiff's deed to an intermediary holder of the title was not signed, acknowledged, or delivered by her, was procured by fraud and that her signature thereon was forged. The essential facts are that plaintiff purchased the property in 1934 by payment of $400 in cash and the assumption of a mortgage of $4,000. She moved into the place which she conducted as a rooming house, and soon after acquired one Alvarez whom she expected to marry later on. In 1938 she executed a deed conveying the property to Alvarez. This was acknowledged in the presence of a notary, certified, and duly recorded on March 15, 1938. The parties continued to live in the premises, some payments were made upon the principal and interest, and the tax bills showing Alvarez to be the titled owner were paid for the years 1938 and 1939. During this period the plaintiff permitted Alvarez to place a mortgage on the property as titled owner to secure a loan from a local bank. In 1939 Alvarez employed defendant Jesus Ron to work for him as a carpenter. An indebtedness of $376 was unpaid. In 1940 plaintiff requested him to come to her home and see Alvarez who was ill. In her presence this defendant agreed to take Alvarez to a hospital and pay all hospital and other expenses of his illness. Thereafter he promised to pay the funeral expenses, and Alvarez executed and delivered his deed conveying the property to the defendants. Alvarez died on April 15, 1940. Defendants paid, in addition to the indebtedness of $376, hospital and funeral expenses of $397, accrued taxes amounting to $74, and assumed the mortgage of approximately $3,400. All these payments were made with the knowledge and consent of the plaintiff, with her knowledge that they were consideration for the deed, and upon her statement to the defendants that neither she nor Alvarez had been able to pay the mortgage and "I wish you can pay it."

[1] Upon this evidence the trial court made its findings of fact which we are unable to reconcile with the record. It was found that the plaintiff did sign the deed to Alvarez but did not intend to do so; that she was deceived as to the character of the paper she was signing, but in what respect it does not appear; that no consideration was given for her deed, though all the evidence is to the contrary; that no consideration was given to Alvarez for the transfer to defendants, though all the evidence is to the contrary; that this transfer was a part of a fraudulent conspiracy between Alvarez and defendants, though there is not a particle of evidence of either fraud or conspiracy. No finding was made upon the one issue that stands out all through the record—the obvious estoppel of the plaintiff. If the trial court had found upon that issue in accordance with the true facts disclosed, judgment must have gone for the defendants. The findings as a whole appear to have been signed inadvertently and without careful examination. Respondent makes but a feeble attempt to defend them upon the ground that an appellate court should not set aside findings on a "controverted issue of fact." There is no quarrel with that rule, but these findings are not based upon controverted facts.

[2] The judgment must be reversed for these reasons—there was a complete and valid transfer of title from respondent to Alvarez, and she is now estopped to deny it. Respondent insists there was no proof of delivery of the deed. Section 1055 of the Civil Code and section 1948 of the Code of Civil Procedure supply the proof, and delivery is presumed from the possession of the deed by the grantee. Stewart v. Silva, 192 Cal. 405, 409, 221 P. 191; Merritt v. Rey, 104 Cal.App. 700, 705, 286 P. 510; Ware v. Julian, 122 Cal.App. 354, 9 P.2d 906.

[3] Respondent is estopped from denying due execution and delivery of her deed. For two years after its execution she permitted Alvarez to assume ownership, and permitted a local bank to make him a loan on the basis of that ownership. She voluntarily handed the recorded deed to appellants to enable them to have papers prepared to transfer title to them from Alvarez. She had full knowledge that appellants purchased the property from Alvarez for a good consideration and permitted appellants to pay the taxes. There is no word of evidence showing fraud on the part of appellants in the execution of either deed. If injury has resulted to any one from the transaction it is because of respondent's negligence. The principle of equity that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer" (§ 3543, Civ.Code), demands a judgment for the appellants.

[4] There is no conflict as to the amount collected by respondent in rents of the premises prior to the trial, but appellants are entitled to an accounting of subsequent rents since it is conceded the respondent has held possession pending the appeal.

The judgment is reversed, and it is remanded for the purpose of such accounting only, with directions to enter judgment for appellants as prayed in their cross-complaint.

STURTEVANT and SPENCE, JJ., concurred.

51 Cal.App.2d 555

WILLARD v. NATIONAL SUPPLY CO. et al.

Civ. 13343.

District Court of Appeal, Second District, Division 2, California.

April 29, 1942.

Hearing Denied June 25, 1942.

1. Sales 🔑313

A seller having prior lien on merchandise sold may make deliveries of the merchandise after notice of a subsequent lien without losing right to enforce the prior lien when at time he receives notice of subsequent lien he is under a compulsory obligation to furnish merchandise to buyer.

2. Mortgages 🔑116

Where mortgagee has obligated himself to make advances, such advances tack and the mortgage lien when recorded is a lien for all advances actually made although made after notice of a subsequent encumbrance of the property.

3. Assignments 🔑85

Where oil company assigned to seller money which might become due to company under third party's agreement to pay company $8,000 on drilling of oil well and seller agreed to extend credit to extent of $8,000 for materials used in drilling well, and company thereafter assigned to plaintiff the company's remaining interest in the commitment, which was guaranteed to constitute at least $4,000, and after seller had delivered materials of value of $3,500 company placed order for material valued at $4,500 which was delivered by seller with notice of assignment to plaintiff, seller's lien for material was superior to plaintiff's assignment since seller was under compulsory obligation to deliver the merchandise.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Action by Charles F. Willard against the National Supply Company and others, which involved question of priority of liens created by assignments. From an adverse judgment, plaintiff appeals.

Affirmed.

Landon Morris, of Los Angeles, for appellant.

Flint & MacKay, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover the sum of $4,424.61, plaintiff appeals. Plaintiff urges error here only insofar as the judgment was in favor of defendant National Supply Company.

The essential facts are:

January 16, 1940, El Rey Oil Company entered into a written agreement with defendant Gilmore Oil Company by the terms of which said defendant agreed to pay El Rey Oil Company $8,000 when, as, and if said El Rey Oil Company drilled a certain oil well located in the county of Los Angeles to a depth of 8,500 feet. January 22, 1940, El Rey Oil Company assigned to defendant National Supply Company money which might be due it under the aforesaid agreement with the Gilmore Oil Company by an agreement, the material part of which is as follows:

"Los Angeles, California,
"January 22, 1940.

"The National Supply Company,
147 North Los Angeles Street,
Los Angeles, California.
Gentlemen:

"We understand that The National Supply Company (hereinafter called 'National') is willing to extend to the undersigned credit to the extent of $8,000.00 in connection with the sale to the undersigned of materials and supplies to be delivered to the undersigned and used by the undersigned in, on, or about a certain well to be drilled, the location of which is set forth in a certain agreement between the undersigned and Gilmore Oil Company dated January 16, 1940.

"In consideration of said extension of credit and of your agreement to sell, as aforesaid, the undersigned does hereby sell, assign, transfer, and set over unto National all moneys due or to become due to the undersigned under and by virtue of a contract between the undersigned and Gilmore Oil Company dated January 16, 1940."

The first paragraph of the foregoing agreement was on February 9, 1940, by mutual consent of the parties amended to read thus:

"We understand that The National Supply Company (hereinafter called 'National') is willing to extend to the undersigned credit to the amount of $8,000.00 in connection with the sale to the undersigned of materials and supplies which you handle and/or manufacture."

On January 27, 1940, El Rey Oil Company assigned to plaintiff all of its remaining right, title, and interest in and to the agreement dated January 16, 1940, with defendant Gilmore Oil Company by assignment reading as follows:

"January 27th, 1940.

"For and in consideration of the sum of Ten ($10.00) Dollars, cash in hand paid, receipt of which is hereby acknowledged, the undersigned, El Rey Oil Company, a California Corporation, hereby sells, assigns, transfers and conveys unto Charles F. Willard, 2650 East Washington Blvd., Los Angeles, Calif. all of its remaining right, title and interest in and to that certain $8,000 commitment of the Gilmore Oil Company, dated January 16th, 1940, and payable to the undersigned, which said commitment is now held as security by The National Supply Company, 147 North Los Angeles St., Los Angeles, California, for the payment of the account of the undersigned, which the undersigned guarantees does not exceed the total sum of $4000 leaving a net equity owned by the undersigned El Rey Oil Company, and assigned by these presents of an amount not less than Four Thousand ($4,000.00) Dollars.

"To have and to hold unto the said Charles F. Willard, his heirs, successors and assigns forever.

"El Rey Oil Company
"(Seal) By J. Warren Miller, Pres.
By J. F. Martgan Secy."

On February 12, 1940, El Rey Oil Company placed with National Supply Company an order, which the latter accepted, for merchandise of the value of $4,500 to be delivered to the R. R. Bush Oil Company. On February 12, 1940, subsequent to the placing and acceptance of the foregoing order, defendant National Supply Company received notice of the assignment by El Rey Oil Company to plaintiff set forth supra. Subsequent to February 12, 1940, defendant National Supply Company delivered, pursuant to the order of February 12, 1940, to R. R. Bush Oil Company merchandise of the value of $4,500.

This is the sole question necessary for us to determine:

Was the assignment of January 27, 1940, by El Rey Oil Company to plaintiff superior to the order placed with said defendant by El Rey Oil Company on February 12, 1940?

[1, 2] This question must be answered in the negative. We believe the correct rule to be that a seller may make deliveries of merchandise after notice of a latter lien or encumbrance without losing his right to enforce a prior lien when at the time he receives notice of the latter lien he is under a compulsory obligation to furnish the merchandise to his vendee. (See 25 Cal.Jur.(1926) 27, § 17; Citizens' Savings Bank of San Diego v. Mack, 180 Cal. 246, 251, 180 P. 618.) We have neither found nor has there been directed to our attention any case directly in point which involves a situation where the security given to the vendor consisted of an assignment of a chose in action; however, we find nothing which distinguishes the case from the rule applicable where money is lent pursuant to the terms of a mortgage or trust deed. In the case of mortgages the rule is established that where a mortgagee has obligated himself to make advances, such advances tack and the mortgage lien when recorded is a lien for all advances actually made although they may have been made after notice of a subsequent mortgage or encumbrance of the property. (W. P. Fuller & Co. v. McClure, 48 Cal.App. 185, 191, 191 P. 1027; Valley Lumber Co. v. Wright, 2 Cal.App. 288, 84 P. 58; Atkinson v. Foote, 44 Cal.App. 149, 159, 186 P. 831; Lumber & Builders Supply Co. v. Ritz, 134 Cal.App. 607, 610, 25 P.2d 1002; 22 Cal.Law Rev. 705; 17 Cal.Jur. § 183, p. 899.)

The same rule has been applied in the case of trust deeds. (Machado v. Bank of Italy, 67 Cal.App. 769, 774, 228 P. 369; Valley Lumber Co. v. Wright, supra.) Likewise the rule has been applied in the case of pledges. (Citizens' Savings Bank of San Diego v. Mack, supra, 180 Cal. 251, 180 P. 618, and Bank of Napa v. Ferguson Burns Estate, Inc., 48 Cal.App. 319, 324, 326, 192 P. 66.)

[3] Applying the foregoing rule to the instant case, it is apparent that on February 12, 1940, when defendant National Supply Company received notice of the assignment which plaintiff held, it was under a compulsory obligation to deliver to R. R. Bush Oil Company merchandise of the

value of $4,500, and, since prior to that time said defendant had delivered to El Rey Oil Company merchandise of the value of $3,500, there was no overplus due said defendant from the Gilmore Oil Company and therefore no sum due plaintiff by the El Rey Oil Company's assignment to plaintiff.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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51 Cal.App.2d 753

ELLIS v. DEPARTMENT OF MOTOR VEHICLES et al.

Civ. 13034.

District Court of Appeal, Second District, Division 3, California.

May 6, 1942.

1. Automobiles 🔑144

The duty of municipal court clerk to forward to Department of Motor Vehicles an abstract of motorist's conviction of violating section of Vehicle Code requiring motorist, involved in accident resulting only in damage to property, to perform certain acts, was a continuing duty, though Vehicle Code required certification to be made within ten days after conviction, and hence certification more than one year after conviction was effective. Vehicle Code, §§ 481, 744, St.1935, pp. 170, 241.

2. Automobiles 🔑138

Where motorist was convicted under section 502 of Vehicle Code and under section 481, and motorist's license was suspended under section 304(c) for failure to give proof of ability to respond in damages after conviction under section 502, and thereafter section 304(c) was eliminated from Vehicle Code, and section 307, subd. 6, was added providing that any person whose license has been suspended pending proof of ability to respond in damages under section 304(c) may receive probationary license on showing of only one conviction, and thereafter clerk forwarded abstract of motorist's conviction under section 481 to Department of Motor Vehicles, motorist was not entitled to probationary license without proof of ability to respond in damages. Vehicle Code, §§ 304, 307, subd. 6, St.1937, pp. 337, 338; Vehicle Code, §§ 304(c), 308, 414, 481, 502, 744, St. 1935, pp. 137, 138, 158, 170, 174, 241.

3. Automobiles 🔑138

Where court, on application for probation by motorist convicted under Vehicle Code, § 502, of driving while intoxicated, and of violating section 481, entered order that probation was denied, and that sentence for driving while intoxicated was suspended on payment of fine, and that sentence upon other conviction was suspended, there was no "probation", and convictions precluded issuance of probationary license to motorist without proof of ability to respond in damages. Vehicle Code, §§ 304(c), 308, 414, 481, 502, 744, St.1935, pp. 137, 138, 158, 170, 174, 241.

See Words and Phrases, Permanent Edition, for all other definitions of "Probation".

4. Criminal law 🔑1001

A court not acting under the probation law has no power to suspend execution of any part of sentence imposed under the Vehicle Code, and order purporting to do so is void.

5. Evidence 🔑83(6)

Where there was no allegation in regard to certification to Department of Motor Vehicles of conviction of motorist under Vehicle Code for driving while under influence of intoxicating liquors, District Court of Appeal was required to presume that, in regular performance of official duty, such certification was properly made by clerk of court at required time. Code Civ.Proc. § 1963 subd. 15; Vehicle Code, § 502, St.1935, p. 174.

6. Constitutional law 🔑197

An "ex post facto" law is one which, operating retrospectively and on penal or criminal matters only, renders a previously innocent act criminal, aggravates or increases the punishment for a crime, alters the rules of evidence, penalizes an innocent act while assuming to regulate civil rights and remedies, deprives an accused of some protection or defense previously available, or alters his situation to his disadvantage.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Post Facto".

7. Automobiles ⟹132
Constitutional law ⟹203

Vehicle Code, § 309, providing that termination of probation and dismissal of charges shall not effect any revocation or suspension of any license of the probationer, and that the probationer's prior conviction shall be considered a conviction for the purpose of revoking or suspending any license issued to him, on ground of two or more convictions, was not invalid as an "ex post facto" law as applied to motorist who, before that section was enacted, was twice convicted of violating section 502, by driving while intoxicated, and whom the court ineffectually attempted to place on probation. Vehicle Code, § 309, St.1939, p. 2319; § 502, St.1935, p. 174.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding for a writ of mandate by Glenn H. Ellis against the Department of Motor Vehicles of the State of California and others to obtain a license to drive motor vehicles. A demurrer to petitioner's amended petition was sustained without leave to amend, and, from the resulting judgment against him, he appeals.

Judgment affirmed.

Fred W. Chase, of Glendale, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondents.

SHAW, Justice pro tem.

By this proceeding for a writ of mandate against the Department of Motor Vehicles (hereinafter referred to as the department), the director of that department, and the chief of the drivers' license division thereof, petitioner seeks to obtain a license to drive motor vehicles, which has been denied him by the department. A demurrer to his amended petition was sustained without leave to amend, and he appeals from the resulting judgment against him. The facts hereinafter stated appear in the amended petition.

Petitioner had a driver's license which was issued March 26, 1937. On April 26, 1937, he was charged in the Municipal Court of the City of Los Angeles with two offenses and after trial was, on April 28, 1937, convicted of both. One of these offenses was a violation of section 502 of the Vehicle Code, St.1935, p. 174, which prohibited the driving of a vehicle by any person while under the influence of intoxicating liquor; the other was a violation of section 481 of the Vehicle Code, which required the driver of a vehicle involved in an accident resulting only in damage to property to perform certain acts. Acting under section 744 of the Vehicle Code, the clerk of the municipal court on May 26, 1937, certified to the department an abstract of the record of petitioner's conviction of violating section 502 of the Vehicle Code and on June 2, 1937, the department notified petitioner that his license was suspended and his driving privilege was revoked until he should file proof of his ability to respond in damages.

Section 414 of the Vehicle Code provided what such proof should consist of and required insurance policies, a bond, or a cash deposit, to cover damages to persons or property resulting from the operation of motor vehicles owned by the person required to make such proof. Petitioner has never filed such proof. Section 304, subdivision (c) of the Vehicle Code, as it stood at the various dates above stated, provided that the department, upon receipt of an abstract of the record of a conviction of violating section 502, should suspend all licenses of the convicted person "until the person gives proof of ability to respond in damages as provided in this code." Section 308 of the Vehicle Code, at the times above mentioned, provided and still provides that the department "may" suspend a license upon conviction of the licensee of violating section 481, and in case of such suspension the department "is authorized to require" proof of ability to respond in damages "before reinstating said license." But at the time of the suspension of petitioner's license, his conviction under section 481 had not been certified to the department, so that, the reason for the suspension of his license not being alleged, we must infer that it was made by reason of the conviction under section 502 rather than that under section 481.

In 1937 section 304 of the Vehicle Code, St.1937, p. 337, was amended by eliminating therefrom subdivision (c) above mentioned. Section 307 of this code was also then amended by adding to it several provisions, one of which was subdivision (6), reading as follows: "Any person whose privilege of operating a motor vehicle upon the highway has heretofore been suspended pending the giving of proof of ability to respond in damages under the provisions of section 304(c) or 308 of this code or section 73½ of the California Vehicle Act, may request, and the department, upon a showing by its records that such person has been convicted of one violation only of an offense which would be ground for such suspension, shall withdraw the requirement that proof be filed and shall issue a probationary license to such person subject to the provisions of this section." (Stats.1937, ch. 98, p. 338.) This provision is still a part of this section.

[1] Acting, as we must infer, although it is not so alleged, under this provision, the department on March 9, 1938, issued to petitioner a probationary license, without the giving of proof of ability to respond in damages. On July 11, 1938, the clerk of the Los Angeles Municipal Court at last forwarded to the department an abstract of petitioner's conviction on the charge of violating section 481 of the Vehicle Code. Although section 744 required this certification to be made within ten days after the conviction, the duty of the clerk to make it was a continuing one, and it was as effective when made as if it had been made on time. On September 23, 1938, a notice of suspension of driving privileges until proof of ability to respond in damages, was served upon the petitioner. While he does not allege the source of this notice, we must presume against him that it came from the department since it was authorized to send such a notice.

[2] In the situation disclosed by the foregoing statement, the defendants are justified in refusing to issue to petitioner a driver's license without proof of ability to respond in damages, which he has not made. By the terms of subdivision (6) of section 307 he is entitled to a license without such proof *only* if the department's records show that he has been convicted of but one violation of an offense justifying suspension pending the giving of proof of ability to respond in damages. The foregoing recital shows, it is true, but one offense for which such suspension could be made if the conviction were *now* had, that is, the violation of section 481. But in view of the reference in subdivision (6) of section 307 to suspensions made under subdivision (c) of section 304, which is no longer in the code, but when in force required a suspension until the giving of proof of ability to respond in damages, it must be concluded that convictions on which subdivision (c) of section 304 directed such suspensions are within the terms of subdivision (6) of section 307 and are to be counted in determining whether an applicant is now entitled to receive a probationary license without making such proof. So viewing petitioner's record it shows two convictions and he is not entitled to a license.

[3, 4] He contends, however, that the whole effect of these two convictions is wiped out by proceedings which, he claims, constituted a granting to him of probation and a subsequent dismissal of the charges under the probation law. The allegations of the petition in regard to the supposed granting of probation are: "that an application for probation was filed; that upon the hearing had thereon the Court entered its order in effect as follows: Probation denied. Sentence on the 502 V. C. charge is 30 days in the City Jail and a fine of $100.00, 20 days of said sentence suspended upon the payment of the $100.00 fine; Sentence on the 481 V. C. charge is 1 day in the City Jail, suspended * * *." If the words "probation denied" had been excluded from the order of the court here, leaving only the suspension of a part of the sentence imposed, its action would have been regarded as an informal order granting probation and given effect as such. (In re Herron, 1933, 217 Cal. 400, 404, 19 P.2d 4; Ex Parte Slattery, 1912, 163 Cal. 176, 124 P. 856; People v. Wallach, 1935, 8 Cal.App.2d 129, 132, 47 P.2d 1071.) But here we have an application for probation, a hearing upon it and an express denial of probation. Upon such a record there is no room for an implication or construction of the immediately following orders suspending part of one sentence and all of the other as an informal granting of probation. (In re Taylor, 1934, 140 Cal.App. 102, 34 P.2d 1036; In re Eyre, 1934, 1 Cal. App.2d 451, 36 P.2d 842.) Where the court does not act under the probation law it has no power to suspend execution of any part of the sentence, and an order purporting to do so is void. (In re Taylor, supra; In re Eyre, supra; In re Howard, 1925, 72 Cal.App. 374, 237 P. 406; In re Clark, 1925, 70 Cal.App. 643, 646, 234 P. 109.) Since there was no probation in these cases the

attempt to dismiss them under the probation law is void, and the convictions still stand as a bar to the issuance of the license petitioner seeks.

[5] If, however, we should concede that the orders just considered could be regarded as probationary orders, petitioner's path to the relief he demands would be blocked by section 309, which was added to the Vehicle Code in 1939, St.1939, p. 2319. It reads as follows: "A termination of probation and dismissal of charges pursuant to section 1203.4 of the Penal Code shall not affect any revocation or suspension of any license of the probationer under the provisions of this chapter. The probationer's prior conviction shall be considered a conviction for the purpose of revoking or suspending any license issued to him on the ground of two or more convictions." In applying this section we consider the further facts, alleged in the petition, that on September 1, 1938, petitioner pleaded guilty in the Glendale Police Court to a charge of violating section 502 of the Vehicle Code and his probationary license was taken up by the court and sent to the department; that petitioner was granted probation on this offense, by an order which, while informal, was sufficient for that purpose, under the authorities already cited, and later, in November, 1939, an order dismissing the charge was made under the probation law. There are thus altogether two convictions of violating section 502 which petitioner has suffered, and if section 309 is applicable to this and also the other convictions mentioned, his case comes within subdivisions (2) and (5) of section 307, which prevent the issuance of a license in case of two such convictions without proof of ability to respond in damages. There is no allegation in regard to certification of the conviction in the Glendale court to the department; so we must presume, if the fact be important, that in the regular performance of official duty such certification was properly made at the required time. (Subd. 15, § 1963, Code of Civ.Proc.)

[6, 7] Petitioner contends, however, that section 309, if applied to his case, where all the offenses, as well as the convictions, occurred before this section took effect, would be an ex post facto law and void, and hence it cannot be so applied. An ex post facto law is thus defined: "An ex post facto law is one which, operating retrospectively and on penal or criminal matters only, renders a previously innocent act criminal, aggravates, or increases the punishment for, a crime, alters the rules of evidence, penalizes an innocent act while assuming to regulate civil rights and remedies, deprives an accused of some protection or defense previously available, or alters his situation to his disadvantage." (16 C.J.S., Constitutional Law, § 435, p. 886.) But "A statute intended to protect the public is not ex post facto even though disqualifying a person, for past acts or omissions, from continuing his profession or business or continuing to own concealable firearms." (16 C.J.S., Constitutional Law, § 448, p. 900.) The doctrine last stated has been applied to uphold an ordinance denying a liquor license by reason of improper conduct occurring before its adoption (Foster v. Police Com'rs, 1894, 102 Cal. 483, 490, 37 P. 763, 41 Am.St.Rep. 194); a statute forbidding one previously convicted of a felony to possess firearms (People v. Camperlingo, 1924, 69 Cal.App. 466, 471, 231 P. 601); and a statute forbidding the issuance of a license to transact the bail bond business to one whose conduct before the law was passed was such that he is not to be regarded as of good moral character (McDonough v. Goodcell, 1939, 13 Cal.2d 741, 750, 91 P.2d 1035, 123 A.L.R. 1205). A statute which removed the privilege attached to a successful probation granted before the law took effect and directed that the conviction be counted for the purposes of a law imposing heavier punishment for second offenders was held not to be ex post facto in People v. Hainline, 1933, 219 Cal. 532, 536, 28 P.2d 16. The rule of the foregoing cases must be applied here. Section 309 of the Vehicle Code does not impose any punishment for past offenses. It merely directs that the applicant's past conduct, of a sort obviously germane to the question in hand, be taken into consideration in passing on his application for a driver's license and that the application be denied when his conduct has been such that a denial would reasonably be in the public interest.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

PUTNAM v. PUTNAM et al.

Civ. 11833.

District Court of Appeal, First District, Division 2, California.

May 5, 1942.

Rehearing Denied June 4, 1942.

Hearing Denied July 2, 1942.

1. Action 🔑6

In action for declaration of plaintiff's rights and duties under separation agreement with his former wife, plaintiff was entitled to interpretation of contract under statute, even if such interpretation took on nature of reformation of contract. Code Civ.Proc. §§ 1060, 1062.

2. Parent and child 🔑3(1)

A separation agreement, obligating husband to pay stated sum monthly for wife's support and parties' minor child's care, maintenance and support, did not contemplate continuance of such payments after child reached majority.

3. Action 🔑6

One suing for declaration of his rights and duties under separation agreement with his former wife seeks interpretation of such contract, not modification thereof, so that question of court's power to modify terms of agreement in wife's divorce proceeding need not be considered. Code Civ.Proc. §§ 1060, 1062.

4. Action 🔑6

A declaration of rights and obligations under contract, which results in reformation thereof, is merely a determination of parties' intention and legal effect of contract, not a modification of its terms. Code Civ. Proc. §§ 1060, 1062.

5. Appeal and error 🔑909(5)

On appeal from judgment denying declaration of appellant's rights and duties under separation agreement with his former wife for support of herself and parties' minor child, District Court of Appeal cannot assume that equity court is unable to reform contract to meet contingencies not provided for therein, as by adding provisions as to portion of agreed amount payable to wife alone after child reached majority or to child alone if wife died during child's minority. Code Civ.Proc. §§ 1060, 1062.

6. Appeal and error 🔑1212(1)

In action for declaration of plaintiff's rights and duties under separation agreement with his former wife for payment of stated sum monthly to her for support of herself and parties' minor son, who had reached majority, where plaintiff's offer to prove son's and former wife's monthly earnings was rejected and no evidence was permitted to show what proportion of contract amount was reasonable to be awarded wife, only question which trial court need determine, on retrial after reversal of judgment denying relief prayed by plaintiff, is what parties intended by contract to be reasonable sum for plaintiff to pay for wife's support after son reached majority. Code Civ. Proc. §§ 1060, 1062.

7. Judgment 🔑585(5)

In action for declaration of plaintiff's rights and duties under separation agreement with his former wife for support of herself and their minor son, a municipal court judgment, awarding monthly payments to wife on basis of such agreement in her action to recover difference between amount thereof and reduced amount fixed by superior court decree modifying divorce decree incorporating such agreement, was not "res judicata" of issue as to plaintiff's rights and duties after child reached majority. Code Civ.Proc. §§ 1060, 1062.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

◆

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Action by William Mason Putnam against Pansy Putnam and another for a declaration of plaintiff's rights and duties under a separation agreement with named defendant. Judgment for defendants, and plaintiff appeals.

Reversed.

Hearing denied; CARTER, J., dissenting.

Phil F. Garvey and Julia M. Easley, both of San Francisco, for appellant.

Elmer P. Delaney and George A. Helmer, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued in declaratory relief seeking a declaration of his rights and duties under a separation agreement. The defendant Pansy Putnam is the former wife of plaintiff, and the defendant William Mason Putnam, Jr., is the adult son of these parties. Judgment was given for both defendants denying plaintiff any relief.

[1] The appeal presents the simple question whether the Code sections providing for this form of relief are to be given a reasonable and sensible interpretation to afford the relief which the equities demand or whether they are to be nullified by the strict rules of legal procedure. The clear purpose of section 1060 of the Code of Civil Procedure is to permit the court in such proceedings to "make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. * * *" and, under section 1062, these remedies are cumulative "and shall not be construed as restricting any remedy, provisional or otherwise * * *." We mention this at the outset because our conclusion from the entire record is that the plaintiff was entitled to an interpretation of the contract determining his rights and duties under it, and that if such interpretation took on the nature of a reformation of the contract it was nevertheless within the contemplation of the Code section.

Plaintiff and Pansy Putnam entered into a separation agreement in June, 1923, under which the custody of the minor child was given the mother and provisions made for his support. The agreement was approved and incorporated in a subsequent decree of divorce. This child reached the age of majority on September 2, 1939. In 1927 and again in 1928 the superior court modified the final decree by reducing the amount of alimony payable. In 1936 the wife commenced an action in the municipal court to recover the difference and judgment was entered holding that these modifications were void. The plaintiff paid, either voluntarily or by reason of this judgment, all sums called for by the written contract until the son reached his majority.

[2] The portion of the separation agreement which is the subject of the controversy reads: "Said first party hereby agrees that, beginning with the date hereof, he will on the same date of each and every month, pay to said second party the sum of $75 in lawful money of the United States of America, for her care, maintenance and support, and the care, maintenance and support of said minor child, provided that if said second party shall divorce first party, and remarry, said allowance of $75 per month shall cease and terminate upon such remarriage, and thereafter first party shall pay to second party such monthly allowance for the care, maintenance and support of said minor child, as the parties hereto may mutually agree upon, and if they are unable to agree upon any such sum, then first party agrees to pay to second party for such care, maintenance and support of said minor child, such sum as may be fixed by the Superior Court of the City and County of San Francisco, State of California, as a reasonable sum for such purposes. First party hereby further agrees that second party shall be, and she is hereby given the care, custody and control of said minor child, subject, however, to the right of first party to be with and visit said minor child at all reasonable times and places, and daily, if he so desires."

Here is the question at issue—when the appellant agreed to pay $75 a month for the support of the wife and "the care, maintenance and support of said minor child" did the parties contemplate that these payments should continue after the child had reached his majority? Manifestly they did not so contemplate, any more than they intended that these payments should continue after the death of either the wife or the son.

[3-5] It would serve no purpose to discuss the question of the power of the court in the divorce proceeding to modify the terms of the separation agreement. That issue does not determine anything here. In suing for declaratory relief the appellant seeks an interpretation of the contract—not a modification of it. A declaration of the rights and obligations under a contract which results in a reformation is but a determination of the intention of the parties and of the legal effect of the contract, not a modification of its terms. By its express terms the alimony payments were to be made jointly for the benefit of the wife and the minor son. When the latter reached his majority all payments for his benefit automatically ceased to be due. What portion of that amount is to be paid to the wife alone is something upon which the contract is silent. It is also silent as to the contingency that the wife might die while the son was still a minor. We cannot assume that a court of equity is unable to reform the contract to meet these con-

tingencies which the contracting parties overlooked.

[6] The appellant made competent proof that since his majority the son was gainfully employed and had an income of $175 a month. An offer of proof was made to show that the respondent wife was in receipt of a monthly income of $200 from her business as a notary public. This offer was rejected, and no evidence was permitted to show what proportion of the contract figures was reasonable to be awarded the wife. The only question which the trial court need determine on a retrial is what did the parties intend by their contract was a reasonable sum for the husband to pay for the support of the wife after the minor son had reached his majority.

[7] The respondents lay great stress upon the judgment of the municipal court awarding payments upon the basis of the original agreement. They argue that this is res judicata of the issues here. The former judgment has no bearing upon the issue of the rights and duties of the appellant after the son has reached his majority. That case was commenced and tried in 1936. The date of majority was September 2, 1939. The trial court correctly held that the former judgment was not res judicata of this issue.

The judgment is reversed.

STURTEVANT, and SPENCE, JJ., concurred.

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51 Cal.App.2d 634

In re ESKRIDGE'S ESTATE.

FUQUA v. HOLT.

Civ. 13466.

District Court of Appeal, Second District, Division 2, California.

May 1, 1942.

1. Wills 🔑282

A legatee seeking revocation of the probate of a will was bound to allege in her petition for revocation facts showing that legatee's legal rights were adversely affected by will, and such fact was not sufficiently shown by an allegation that legatee was testatrix' niece and that by will legatee was bequeathed one dollar. Probate Code, § 222.

2. Descent and distribution 🔑34
Wills 🔑229

If decedent's will was invalid and decedent died intestate, decedent's niece was an "heir at law" under statute only if niece was more closely related than, or equally related with, such other relatives as survived decedent, and niece could not contest probate of alleged will if decedent had issue surviving her, since they would succeed to estate on intestacy to exclusion of niece. Probate Code, § 222.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir at Law".

3. Wills 🔑229

Where, in absence of any other will providing more adequately for decedent's niece than will which had been admitted to probate, niece stood to receive less by a contest of probate, niece did not have an interest of sufficient substantiality to permit her to contest probate of will. Probate Code, § 222.

4. Wills 🔑286

In proceedings by decedent's niece for revocation of probate of decedent's will, niece was not entitled to submit evidence of her interest to trial court for decision without alleging specifically facts which if true would permit niece to contest will. Probate Code, § 222.

5. Wills 🔑326, 327

In proceedings for revocation of probate of will of petitioner's aunt, petitioner's case would not be proved by merely presenting evidence that petitioner was a niece, and, without more, a motion for nonsuit or directed verdict would be in order. Probate Code, § 222.

6. Wills 🔑286

In proceedings for revocation of probate of the will of petitioner's aunt, petitioner would not be entitled, under a mere allegation that she was a niece, to introduce evidence that there were no other relatives more closely related to decedent than petitioner, and proof could be adduced only of ultimate facts which petitioner had alleged. Probate Code, § 222.

7. Pleading ⚿48

Every ultimate fact required to be proved to sustain a cause of action must be alleged.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Proceedings in the matter of the estate of Etta Keith Eskridge, deceased, by Mary Allen Fuqua against Reed E. Holt, as executor, etc., wherein Mary Allen Fuqua filed a petition for revocation of the probate of deceased's will. From an adverse judgment, Mary Allen Fuqua appeals.

Affirmed.

J. M. Danziger, of Los Angeles, for appellant.

Martineau & Stratton and Richard C. Heaton, all of Los Angeles, for respondent.

HANSON, Justice pro tem.

[1] The sole question is whether a legatee in a will seeking a revocation of its probate is required to allege in her petition the facts showing her legal rights are adversely affected by the will, or whether this is sufficiently shown by an allegation that she is a niece of the testatrix. The trial court held that she had to allege the ultimate facts in her petition, and for failure to do so sustained the demurrer of the executor. Appellant elected to stand on her petition and so refused to amend. We think the ruling of the trial court was correct.

[2, 3] In her written petition for revocation of the probate of the will appellant averred she was a niece of the testatrix and that by the will in question she was bequeathed the sum of one dollar. If the will was invalid and the decedent died intestate, appellant was an heir at law made under our statute only if she was more closely related than, or equally related with, such other relatives as survived the decedent. In short, she had no standing to contest the probate of the alleged will if the testatrix, as claimed, had issue surviving her, as they would succeed to the estate on intestacy to the exclusion of decedent's niece. Prob.Code, § 222. Hence, in the absence of any other will providing more adequately for her than the will in question, appellant stood to receive less, not more, by a contest. This is not an interest of sufficient substantiality to permit of a contest—taking the time of the courts for no purpose at all. Estate of Land, 166 Cal. 538, 137 P. 246.

[4-7] While appellant apparently recognizes that this is so, she nevertheless argues that she is entitled to submit evidence of her interest to the trial court for its decision, without alleging specifically facts which if proved would permit her to contest the will. She cites no authority that sustains her contention and we know of none. In this state authority is to the contrary (State v. Superior Court, 148 Cal. 55, 82 P. 672, 2 L.R.A.,N.S., 643), and apparently this is true everywhere. 117 A.L.R. 1455. The case of In re Morrow's Will, 41 N.M. 723, 73 P.2d 1360, cited by appellant does not rule to the contrary. Appellant seems to be of the opinion—an altogether too common error—that if she were permitted to present her evidence showing she was a niece she could then rest her case, and if it was not controverted her right to contest the will would be established. On the contrary, her case would not be proved, and a motion for nonsuit or a directed verdict would be in order. Cf. O'Day v. Superior Court, 18 Cal.2d 540, 116 P.2d 621. Moreover, she would not be entitled, under a mere allegation that she was a niece, to introduce evidence that there were no relatives more closely related to decedent than she. Proof could be adduced only of the ultimate facts which she had alleged. Contrary to appellant's contention, by alleging that the decedent left no one more closely related to her than appellant she would not be negativing a defense but merely averring what is requisite to sustain her own cause of action. Every ultimate fact required to be proved to sustain a cause of action must be alleged.

The cases, of which Estate of Land, supra, is typical, holding that where a question is raised as to the right of one to contest the trial court should take evidence on the point in advance of the will contest are not in point. They do not say, nor do they purport to say, that a contestant is entitled to be heard where the allegations are insufficient to sustain her own cause, i.e., her right to contest.

The trial court rightly ruled and its judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

51 Cal.App.2d 716

PEOPLE v. PRICE.

Cr. 3552.

District Court of Appeal, Second District, Division 2, California.

May 5, 1942.

Hearing Denied June 1, 1942.

1. Criminal law ⇨274

A motion to withdraw a plea of guilty and to substitute a plea of not guilty is directed to the discretion of the trial court.

2. Criminal law ⇨1149

An order denying a motion to withdraw a plea of guilty and to substitute a plea of not guilty will not be disturbed on appeal except upon a strong and convincing showing that the party presenting the motion has been deprived of his legal rights.

3. Criminal law ⇨274

In prosecution for violating and conspiring to violate statute regarding pool selling or bookmaking, denial of motion to withdraw plea of guilty and to substitute plea of not guilty was not shown to be an abuse of discretion, although motion was based on theory that plea of guilty was entered because of impression given by district attorney that recommendation for probation would be made. Pen.Code, § 337a.

4. Criminal law ⇨1023(3)

An order denying a motion to set aside pleas of guilty was not an "appealable order" where order was made before judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Henry Farmer Price was convicted of violating and of conspiring to violate Penal Code, § 337a, and he appeals.

Affirmed.

Joseph L. Fainer and Russell E. Parsons, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., for respondent.

W. J. WOOD, Justice.

In count I of an indictment defendant was charged with conspiracy to violate section 337a of the Penal Code. In each of six other counts he was charged with the violation of subdivisions of this code section. He entered a plea of not guilty to each count on April 16, 1941, but the trial was continued by stipulation to October 8, 1941. Defendant withdrew his pleas of not guilty to counts I and II on October 6, 1941, and entered pleas of guilty to these two counts. He thereupon filed an application for probation, which came on for hearing on December 10, 1941. At this time defendant requested the court to set aside the pleas of guilty for the purpose of permitting him to enter pleas of not guilty but his motion was denied. Thereupon defendant was sentenced to a term in the county jail and the remaining counts were dismissed on motion of the prosecutor. Defendant has appealed from the order denying his motion to change his pleas and from the judgment.

When defendant was arraigned for judgment on December 10, the court, after relating briefly the proceedings which had taken place, asked defendant if he had any legal cause to show why judgment should not be pronounced. Thereupon counsel for defendant said: "If your Honor please, at this time I am hesitant as to just what I should do. We have had considerable discussion among ourselves here. I have talked to Mr. McCormick, and in view of some of these matters set forth by the defendant in his statement to the probation officer, and in view of some conflict as to just what his discussion may have been privately and otherwise with representatives of the district attorney's office, we have rather felt that, notwithstanding the long time this case has been here, we have felt that in justice to all of us concerned in this matter that we should perhaps at this time move to set aside the pleas of guilty to the two counts, for the purpose of permitting the defendant Price to proceed to trial. We have no intention of making such a motion as to any of the other defendants involved here, but I think your Honor will see from the statements made by the defendant Price in the report just exactly why I have considered this motion as to him. I have done this after careful consideration and study of the matter." The statements made by defendant to the probation officer which were relied upon by defendant when he moved to set aside the pleas of guilty were as follows: "After my arrest and the Grand Jury investigation, I talked to the attorney general's office and the district attorney, and I was given the impression by the District Attorney that if I continued on and fought this case and lost it, the entire expense of the case would be on my shoulders to pay off. As I had spent nearly everything I had, I didn't feel as though I wanted to go ahead with it. They told me if I would plead guilty they would make a recommendation to the judge for probation, but also I was to give them information regarding pay-offs and other things that they believed I knew. I gave them what information I could. * * *"

[1-3] A motion to withdraw a plea of guilty and to substitute a plea of not guilty is directed to the discretion of the trial court and an order denying the motion will not be disturbed on appeal except upon a strong and convincing showing that the party presenting the motion has been deprived of his legal rights. People v. Northcutt, 38 Cal.App.2d 258, 100 P.2d 1094. No affidavit was filed in support of defendant's motion to change his pleas. Defendant did not offer to take the witness stand at the time of the hearing of his application for probation to testify concerning the facts of his relations with the prosecutor's office. No claim was then made that evidence could be produced to show that defendant had been unduly or improperly influenced in entering his pleas of guilty. The report of the probation officer merely contained an unsworn statement by defendant made to that official. Although counsel for defendant told the court that there was "some conflict" as to what was defendant's discussion with the prosecutor's representatives, the manner in which he presented the motion did not afford the prosecutor an opportunity to refute the statements on which the motion was based. We find no abuse of discretion on the part of the trial court.

If defendant was taken by surprise when the prosecutor failed to present to the court a recommendation favoring probation he could have requested a continuance so that any claims of unfair treatment could be properly and effectively presented to the court. The way was also open to him even after judgment had been pronounced to file a motion for change of pleas supported by sufficient affidavits, a course followed in People v. Fuller, 133 Cal.App. 772, 24 P.2d 870. However, defendant chose to stand upon his unsworn statement made to the probation officer.

[4] The appeal from the order denying the motion to set aside the pleas of guilty must be and is dismissed, since such an order made before judgment is not appealable. People v. Brickert, 3 Cal.App.2d 474, 39 P.2d 450.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

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51 Cal.App.2d 739

J. W. DONNELLY, Respondent, v. UNDERWRITING MEMBERS OF LLOYD'S (an Unincorporated Association), Appellant.

Civ. 11581.

District Court of Appeal, First District, Division 2, California.

May 6, 1942.

Rehearing Denied June 5, 1942.

Hearing Denied July 2, 1942.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Prior opinion, 117 P.2d 419.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

Livingston & Livingston, of San Francisco, for respondent.

PER CURIAM.

It appearing that following the judgment and decision in the above-entitled cause on October 1, 1941, a petition for rehearing questioning the jurisdiction of this court was granted, and that the cause was for that reason transferred to the Supreme Court, and it appearing that by its order dated April 23, 1942, the cause was re-transferred to this court by the Supreme Court, and no other reasons appearing why the disposition of the cause should be delayed,

It is hereby ordered that the judgment appealed from is reversed and judgment is ordered entered in favor of the defendant for the reasons stated in our former opinion filed herein October 1, 1941, which is hereby adopted as the opinion of the court.

WHITTEMORE v. LOCKHEED AIRCRAFT CORPORATION.

Civ. 12826.

District Court of Appeal, Second District, Division 3, California.

April 30, 1942.

Rehearing Denied May 29, 1942.

Hearing Denied June 25, 1942.

1. Statutes ⚷225

In construing word "guest", as used in California Air Navigation Act relieving pilot and owner of aircraft from liability for death or injury of a guest, unless death results from intoxication or wilful misconduct of pilot, resort should be had to definitions and discussions of the guest status as found in automobile cases. Gen.Laws 1937, Act 151, § 11½.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest".

2. Negligence ⚷121(1)

Where plaintiff admitted that airplane owner received no compensation for taking plaintiff's decedent on trip but sought to establish that business advantage thereby accruing to owner would be deemed compensation, so as to render deceased a "passenger" rather than a "guest", within California Air Navigation Act, burden was upon plaintiff of producing tangible evidence of each fact essential to establish liability. Gen.Laws 1937, Act 151, § 11½.

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger".

3. Negligence ⚷136(18)

Evidence was sufficient to present question for jury as to whether decedent who was killed in airplane crash was a "passenger" or a "guest", within California Air Navigation Act relieving pilot and owner of aircraft from liability for death or injury of a guest, unless death results from intoxication or wilful misconduct of pilot, notwithstanding that deceased paid no compensation, where plane owner was an airplane manufacturer and decedent was vice president of airline company which had purchased a plane from owner, and decedent at time of accident was being flown to place where he was to accept delivery of the plane. Gen.Laws 1937, Act 151, § 11½.

On Petition for Rehearing.

4. Negligence ⚷22½

In determining whether there was a tangible benefit accruing to airplane manufacturer in transporting a representative of one of its customers without compensation to place where representative was to accept delivery of a plane purchased from manufacturer, so as to render representative a "passenger" rather than a "guest", within California Air Navigation Act, the possible desire of manufacturer to maintain goodwill of an established customer could properly be considered by jury. Gen.Laws 1937, Act 151, § 11½.

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger" and "Guest".

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Margaret C. Whittemore against Lockheed Aircraft Corporation to recover for death of plaintiff's husband who was killed in an airplane crash. From a judgment of nonsuit, the plaintiff appeals.

Reversed.

Mott & Grant, of Los Angeles, Howard A. Grant, of Longmont, Colo., and Kenneth E. Grant, of Los Angeles, for appellant.

Joe Crider, Jr., and Jennings & Belcher, all of Los Angeles, for respondent.

PER CURIAM.

This is an action for damages brought by the wife of Fred W. Whittemore, deceased, who came to his death in the crash of an airplane. Plaintiff appeals from a judgment of nonsuit. The sole question on the appeal depends on the character in which deceased traveled, whether as a guest (meaning a "nonpaying" guest), or as a passenger (meaning one who is not a nonpaying guest and who is not engaged in a joint enterprise).

The controlling law relating to liability is that declared in section 11½ of the California Air Navigation Act, which reads as follows: "No guest riding in or upon any aircraft without giving compensation for such ride or riding in or upon any aircraft while engaged in a joint enterprise with the airman flying the same shall have, nor shall any other person have, any right of action for civil damages against the airman flying such aircraft or against any other person legally liable for the conduct of such airman on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said airman." Stats.1929, p. 1874, as amended by Stats. 1933, p. 1135, Deering's Gen. Laws, 1937, Act 151.

It is not questioned that plaintiff made out a case sufficient to go to the jury had negligence alone been the test of defendant's liability. There was no allegation of intoxication or wilful misconduct, and consequently no contention is made that the judgment of nonsuit was improper, unless the evidence was sufficient to have supported a finding that decedent was a passenger and not a guest.

The complaint alleged and the answer denied that decedent was invited by defendant to ride in the plane. Neither pleading specifically alleged whether he rode as a passenger or as a guest, and there was a minimum of evidence on this point. No reference was made to the "guest" statute until the motion for nonsuit, when it was cited by defense counsel, but the delay appears not to have been due to lack of their familiarity with it.

Our duty is to inquire whether the evidence and the inferences to be drawn therefrom under a construction most favorable to plaintiff would have justified a finding that decedent rode as a passenger. The facts before us are the following: the plane in question had been constructed by defendant at Burbank, California, for Northwest Airlines, Inc., with offices at Saint Paul, and was to be used as a passenger transport on the air lines of the latter company, which was engaged in business as a commercial carrier. Under the agreement of sale the plane was to be delivered at Las Vegas, Nevada. Decedent, Fred W. Whittemore, was vice president of Northwest Airlines, Inc. In connection with the sale, it had been arranged that Mr. Whittemore, who was a pilot, was to accept delivery of the plane for his company at Las Vegas, where papers were to be delivered showing transfer of title, and was to fly the plane from there to Saint Paul. He came to Burbank instead, and entered the plane at the airport with a pilot employed and designated by defendant to fly the plane to Las Vegas. The pilot reported his flight plan to the authorities, the plane left the airport, and shortly thereafter crashed in a mountainous area which was enveloped by a heavy overcast of fog or clouds.

The witness Louis W. Wulfekuehler, assistant secretary of defendant, testified that he knew that Mr. Whittemore was vice president of Northwest Airlines, Inc. He was asked and answered questions as follows:

"Q. And on Saturday preceding the Monday on which the plane left Burbank you told Mr. Downes, did you not, that Mr. Wulfekuehler (sic: Whittemore) was to arrive in this city to go out with the plane and take delivery of possession and title at Las Vegas? A. If I recall correctly, I passed on to Pilot Downes the information that I understood that from Mr. Salisbury, that Mr. Whittemore would be here to accompany the plane at departure.

"Q. It was understood between Lockheed and the Northwest Airlines that Mr. Whittemore would be available at Las Vegas to take delivery; is that correct? A. That is my understanding, yes.

"Q. That was a part of the business arrangement between the two companies involved in this sale and purchase of the airplane; is that correct? A. Yes, sir."

(Cross-examination): "Q. Mr. Wulfekuehler, did Mr. Whittemore pay any compensation to Lockheed Aircraft Corporation for the ride from Burbank? * * * A. None whatsoever."

The president of defendant company testified that the company owned the plane on the day of the accident, May 16, 1938, that it had been fully completed and was deliverable and that it was to be delivered to Northwest Airlines, Inc., at Las Vegas; that a pilot had been detailed and authorized to make the flight. He further testified:

"A. I did not actually know that this particular flight was going to be made at this particular time. Mr. Whittemore had taken delivery of all planes that we had previously delivered, and I knew that he was in town to take delivery of this plane. I did not know definitely that he got on the plane, or was on the plane, until after the unfortunate accident. * * *

"Q. Who would be in charge of fixing the time of the departure of this particular plane? A. I feel that the time [for departure of the plane] would have been settled by mutual agreement between the desires in this case of the customer, when he wished to get away, coupled with the policy of our flight department with respect to releasing the plane when it was proper for flight and when conditions were proper for it to depart."

[1,2] The courts have not had occasion to construe the quoted provision of the California Air Navigation Act in its use of the word "guest" as designating one who pays no consideration for the privilege of riding. It is assumed by counsel, quite properly we think, that resort should be had to the definitions and discussions of the guest status as found in the automobile cases. These are numerous and involve a multitude of different factual situations. Speaking generally, the basic question is, of course, whether the operator of the vehicle has been given compensation by another for the privilege of riding. This compensation may consist of any benefit of a tangible nature received by the former as a consideration for the ride. Obviously if the rider parts with nothing but goes along solely for his own pleasure or in pursuit of his own business and not in aid of the business of the operator or the common business of the two, he is a mere guest. Where the claimed compensation consists only of some business advantage or benefit which will accrue to the operator, in order to take one out of the guest class, it must be of a practical and tangible nature identified definitely with the business purposes of the operator of the vehicle. Sharing the expenses of an automobile trip taken for pleasure has been held not to be such compensation (McCann v. Hoffman, 1937, 9 Cal.2d 279, 70 P.2d 909), although the contrary is true where there is a sharing of the expense of travel and the transportation is incidental to the business in which the parties are mutually interested. Peccolo v. City of Los Angeles, 1937, 8 Cal.2d 532, 536, 537, 66 P.2d 651. In the McCann case it was said, 9 Cal.2d at page 286, 70 P.2d at page 913, "Therefore, where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given. But it is not given where the main purpose of the trip is the joint pleasure of the participants." Following this line of analysis, it would seem to be proper in the present case to inquire first what was the "motivating influence" for allowing Mr. Whittemore to ride in the plane from Burbank to Las Vegas. Immediately we encounter difficulties on account of the meagerness of the facts which can be gleaned from the record. It is admitted that decedent did not pay anything for the ride, but defendant must be deemed to have received compensation if he was taken along because it was considered by defendant to be to its business advantage that he be taken to Las Vegas in the plane. The reasoning in Piercy v. Zeiss, 1935, 8 Cal. App.2d 595, 47 P.2d 818, would support this view. It was incumbent upon plaintiff to produce tangible evidence of each fact essential to establish liability and if there was no evidence which would have justified a reasonable inference that the arrangement to take decedent to Las Vegas in the plane was intended to forward the business interests of defendant or the mutual business interests of both, the judgment of nonsuit must be upheld. We think there was such evidence.

[3] The controlling facts are the following: the contract of sale was not in evidence but it appears that all of the details of the sale had been arranged, delivery and transfer of title to take place at Las Vegas, where the plane was to be accepted by Mr. Whittemore. While there was no evidence that decedent went to Burbank to inspect the plane or that he did inspect it, and no evidence that it was any part of the agreement of sale that he was to accompany the plane to Las Vegas, it does clearly appear that he was attending to the business of concluding the purchase and acceptance of the plane. It does not appear why he went to Burbank instead of directly to Las Vegas, that he was requested by defendant to do so, or what he did after his arrival at Burbank before he boarded the plane. It was a part of the business arrangement that Mr. Whittemore should be in Las Vegas to accept delivery of the plane. Of course if he had not gone there at all some other arrangement would have been necessary in order to make delivery. Obviously it was to the advantage of defendant, since Mr. Whittemore was in Burbank, that he be flown to Las Vegas in order to facilitate the closing of the business involved in the sale. But it appears that the arrangement that he would go to Burbank and accompany the plane to Las Vegas had been made at least as early as Saturday preceding the Monday when the flight started. It was on Saturday that Mr. Wulfekuehler advised the pilot who was supposed to take the trip that he had been informed by Mr. Salisbury, another employee of Northwest Airlines, that Mr.

Whittemore would be in Burbank to accompany the plane at departure, and this arrangement was evidently satisfactory to the defendant. What was the advantage or benefit to defendant in Mr. Whittemore's going to Burbank to fly in the plane to Las Vegas instead of going directly to Las Vegas? It was not shown that he had to go to Burbank as a part of the transaction of the business either of his own company or that of the defendant. We may assume for the purpose of this opinion that Mr. Whittemore's plan, in choosing to go to Burbank, was in furtherance of his own wishes or those of his company exclusively and that if instead of going to Burbank he had gone to Las Vegas, the business purposes of defendant would have been served equally well. We may even assume that Mr. Whittemore requested permission to accompany the plane from Burbank to Las Vegas. What, then, was the motivating influence which controlled the events which followed? Defendant was in the business of manufacturing and selling airplanes; Northwest Airlines, Inc., was its customer; Mr. Whittemore was the latter's vice president and pilot and was engaged in concluding a purchase for his company as he had done before. One or more of several inferences was allowable under the circumstances and each furnished a reason why the arrangement as made was to the business advantage of defendant. In the first place it was necessary that the purchaser should be satisfied that the plane was in condition for acceptance and it was, of course, desirable that this determination should be made before the plane had been removed to a great distance from defendant's factory. It might have been inferred that the arrangement as made was as much to the advantage of defendant as it was to the representative of its customer. Again, it was possible for the jury to infer from the testimony that regardless of Mr. Whittemore's purpose in coming to Burbank the defendant was transporting him to Las Vegas in order to facilitate his going there and insure his presence there to take delivery of the plane without delay on its arrival, thus ending defendant's responsibility for the plane, and that this was done, not as a matter of pure personal accommodation to him, but in furtherance of the business arrangement between defendant and the buyer. In another view of the relations of the parties it might be said that something more was involved between plaintiff and Northwest Airlines, Inc., than the mere sale of a single plane and that there was also the element of continued patronage to be considered. This was not the first plane defendant had sold to the same customer nor is there any reason for assuming that it was considered to be the last one that would be sold. There were established business relationships between the two companies and if in the course of that business Mr. Whittemore expressed a desire to fly in the particular plane in question from Burbank to Las Vegas, or at any other time or place prior to its delivery at the latter point, it is difficult to see how his proposal or defendant's acceptance thereof could be disassociated from the business between the two companies. There is nothing whatever to suggest a social relationship or that Mr. Whittemore or defendant looked upon the former's trip in the plane as one to be taken merely for pleasure. Why should not a manufacturer of airplanes welcome an opportunity to exhibit and display his product to a customer? If it had been the demonstration of an automobile there would have been a consideration paid by the customer in accepting the demonstration or ride, which would take him out of the guest status. Crawford v. Foster, 1930, 110 Cal.App. 81, 87, 293 P. 841. What difference can it make that the case was one of an uncompleted sale and transfer of title of an airplane? And how can it be said that it was any less important to the defendant to maintain the good will of and to continue business with an established customer than it would have been to give a demonstration of a plane to a prospective new customer? In its essential features the transaction was one in which defendant was promoting its own business interests. Certainly if it be assumed that the request to take the ride came from Mr. Whittemore it is logical to assume that a refusal of that request by defendant might have been detrimental to a continuance of its business relationship with Northwest Airlines, Inc., and inconsistent with the promotion of defendant's business as a manufacturer of planes. It appears to us that more was involved in the arrangement than the mere transportation of Mr. Whittemore to Las Vegas to accept delivery of the particular plane, since, as we have pointed out, there are several tenable reasons why the jury could have discerned from the evidence a business rather than a social purpose as the motivating influence of the trip. The case of Duclos v. Tashjian, 1939, 32 Cal.App.2d 444, 450, 90 P.2d 140, 143, which is later than the McCann case, is also persuasive to this conclusion. There it appeared that Duclos, who was a mechanic, was riding with Tashjian to look at a pump owned by the latter, for the purpose of determining whether he could repair it, and it was held that Duclos was not a mere guest, the court saying, "The journey was not undertaken by Tashjian as an act of hospitality nor as a favor, but as a real and vital part of his own business with an eye to his own benefit. It was participated in by Duclos, not as a means of obtaining free transportation, but as an integral part of a business transaction. It may be considered as a distinct benefit to Tashjian as a step towards getting his pump repaired and put in operation." All of this, in effect, could be said of the present case. We think the court erred in granting the nonsuit.

The judgment is reversed.

SCHAUER, P. J., SHINN, J., and SHAW, J., pro tem., concur.

On Petition for Rehearing.

PER CURIAM.

Respondent's petition for rehearing is denied. In making the order we wish to make our view clear, if it is not clear from the opinion, that the possible desire of defendant to maintain the goodwill of an established customer would have been a proper matter for the jury to consider in determining whether there was tangible benefit accruing to defendant in transporting the representative of its customer in connection with business in hand at the time.

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51 Cal.App.2d 602

KOSHABA v. KOSHABA et al.

Civ. 11881.

District Court of Appeal, First District, Division 1, California.

April 30, 1942.

1. Appeal and error 🔑339(5)

An appeal from order terminating proceeding for a transcript on appeal which was not taken until more than three months after entry of the order was barred by statute requiring appeal to be taken within 60 days. Code Civ.Proc. § 939.

2. Appeal and error 🔑117

An order refusing to set aside an earlier order terminating proceedings for a transcript on appeal was not "appealable" even though entered as the result of what purported to be a motion for relief under provisions of Code of Civil Procedure in the matter of settling transcript upon appeal but which was actually merely an attempt to secure a second hearing on the same facts and a reversal in the trial court of the first order terminating proceedings. Code Civ. Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

3. Appeal and error 🔑117

An order terminating proceedings for a transcript on appeal was an "appealable order".

4. Appeal and error 🔑113(2)

Where the grounds upon which a party seeks to have a judgment vacated existed before the entry of the judgment and would have been available on appeal from such judgment, an order refusing to vacate the judgment is not "appealable".

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by David Koshaba against George Koshaba and others wherein plaintiff recovered judgment against defendants who filed notice of appeal and requested a transcript. From an order terminating proceedings in trial court for a transcript on account of delay in filing transcript and from an order refusing to set aside such order terminating proceeding, defendants appeal. Plaintiff moves to dismiss the appeal.

Motion to dismiss granted.

D. W. Brobst and Frederick Dubovsky, both of Oakland, for appellants.

McKee, Tasheira & Wahrhaftig, of Oakland, and Ingemar E. Hoberg, of San Francisco, for respondent.

GOODELL, Justice pro tem.

The respondent has moved for a dismissal of this appeal. The appeal to which the motion is addressed is from an order refusing to set aside an earlier order which terminated proceedings for a transcript on appeal in the main case. In the main case judgment was entered in favor of respondent and against appellants on October 17, 1938. A motion for new trial was denied and on December 28, 1938, a notice of appeal from the judgment was filed and a request made for a transcript. There was delay in its preparation, and on April 24, 1939, respondent served upon appellants a notice of motion to terminate the proceedings in the trial court, upon the ground that the transcript had not been filed and that no extensions of time for its preparation had been given either by the court or by stipulation, which motion was granted on May 2, 1939.

On June 21, 1939, appellants served upon respondent a "Notice of motion for relief under the provisions of section 473 * * * in the matter of settling transcript upon appeal" which stated that the appellants would move the court for an order setting aside the order theretofore made, "upon the ground that the failure to procure a transcript and having said transcript settled occurred through the mistake, inadvertence and excusable neglect of counsel for defendants and of the shorthand reporter in the above entitled cause." The notice was accompanied by an affidavit of appellants' counsel, and a counter-affidavit was filed by respondent's counsel. The motion was presented on June 29, 1939, and denied on August 17, 1939.

On August 24, 1939, appellants filed a notice of appeal from the order of August 17, 1939, "and from the order terminating proceedings for a transcript on appeal made and entered on the 2d day of May, 1939."

[1] No appeal from the first order—that of May 2, 1939—was attempted to be taken until August 24, 1939, when the said appeal therefrom was coupled with an appeal from the second order. The appeal was, of course, ineffective with respect to the order of May 2, 1939, because not taken within sixty days. (Code Civ.Proc. § 939.)

[2-4] We are satisfied that the pending appeal is also ineffective with respect to the second order—that of August 17, 1939—because appellants' motion to set aside the order of May 2, 1939, although ostensibly made under section 473 of the Code of Civil Procedure, was nothing more or less than an attempt by the appellants to secure a second hearing of the motion which had gone against them, and a "reversal," if possible, in the trial court of the first order, terminating the proceedings, which was itself appealable. Howland v. Howland, 11 Cal.2d 20, 77 P.2d 475. There are numerous cases holding that under such circumstances the second order is not appealable. The rule is stated in 2 Cal.Jur. 164, section 30, as follows: "Even where there is a right of appeal from a judgment or order, a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of, under such circumstances that the motion merely calls upon the court to repeat or overrule the former ruling on the same facts. If the grounds upon which the party sought to have a judgment vacated existed before the entry of the judgment and would have been available on an appeal from the judgment, an appeal will not lie from an order refusing the motion. The party aggrieved by a judgment or order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside."

We are satisfied that the instant case is squarely within the case of Taft v. Security-First National Bank, 139 Cal.App. 228, 33 P.2d 683.

There is no substantial difference between the showing made on behalf of appellants at the first hearing and that made by them at the second, except that by June 6, 1939, and before the second hearing, the transcript had been completed and was tendered for certification. The trial judge having, a month before, made the order terminating proceedings, declined to sign or certify it. The appellants contend that this fact distinguishes this case from the Taft case and brings it within the holding in Wood v. Peterson Farms Co., 214 Cal. 94, 98, 3 P.2d 922. In the Wood case, there was a motion to dismiss an appeal from the judgment itself, and another motion to dismiss an appeal from an order terminating proceedings in the trial court for a reporter's transcript. Both were denied, for in each case a clerk's transcript had been filed within time which the Supreme Court held sufficient, and the court held the appeals could be heard (as they ultimately were) on such clerk's transcripts without reporter's transcripts. The court did not on that appeal pass upon the propriety of the trial court's action in terminating proceedings. It is interesting to note that in the Wood case the reporter's transcript was tendered to the trial judge for authentication—which he refused—upon the same day that proceedings were terminated. It is of still further interest to note that on appeal the order terminating proceedings was affirmed. Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468. The instant case therefore is not at all similar to the Wood case.

We repeat, this case is not distinguishable from the Taft case, supra. The order of May 2, 1939, was an appealable order and no appeal was taken from it within the time prescribed by law. If, after the termination of proceedings, an appellant could rush the completion of a transcript and then, by tendering it, reopen the entire matter, litigation could never be brought to a conclusion.

Finally it is urged that this court should now direct the trial court to certify the transcript, as was done in Keck v. Keck, 217 Cal. 280, 18 P.2d 338, but in that case it appeared from the record "that appellant seasonably pursued the steps essential to the production of a proper record on appeal." In other words, in the Keck case there was no delay or other fault chargeable to the appellant.

The motion to dismiss is granted.

PETERS, P. J., and WARD, J., concurred.

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51 Cal.App.2d 552

BORROR et al. v. BERRY.

Civ. 12986.

District Court of Appeal, Second District,
Division 2, California.
April 29, 1942.

1. Automobiles 🔑244(45)

In action for damages when defendant's automobile ran into rear of parked truck in which two plaintiffs had been riding, causing it to strike parked automobile of other plaintiff, evidence sustained finding that plaintiffs' automobile and truck were not parked on highway at time of accident, and section of Vehicle Code forbidding parking on main traveled portion of highway when practicable not to park on such portion of highway was not applicable. Vehicle Code, § 582, St.1935, p. 190.

2. Automobiles 🔑245(83)

In action for damages when defendant's automobile ran into rear of parked truck in which two plaintiffs had been riding, causing it to strike parked automobile of other plaintiff, it was a fact question for trial court to determine whether plaintiffs were contributorily negligent.

3. Appeal and error 🔑1011(1)

Where trial court's determination of issue was based on conflicting evidence, determination was binding on appeal.

4. Damages 🔑131(3)

An award of $360 to truckman for shoulder injury was not excessive, where there was evidence that truckman was disabled for a week or two, that his earning capacity was $2.50 or $3 a day, and that he suffered pain in his shoulder bone for about a month.

5. Costs 🔑32(5)

The statute allowing costs to a successful plaintiff in an action for recovery of money or damages as a matter of course, unless he falls within an exception noted in the statute, was not applicable in determining whether plaintiffs, who were successful on defendant's cross-complaint, were entitled to costs on defendant's cross-complaint, since the statute applies to costs allowed to plaintiffs as plaintiffs. Code Civ. Proc. § 1032(a).

6. Costs 🔑32(5)

Plaintiffs who were successful as cross-defendants on defendant's cross-complaint were entitled to recover costs under statute providing that, except as otherwise expressly provided, costs are allowed to the defendant on a judgment in his favor in certain actions, or as to whom the action is dismissed. Code Civ.Proc. § 1032(b).

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Floyd Borror and others against Milton H. Berry, Jr., to recover for personal injuries and damage to truck which was struck by defendant's automobile, wherein the defendant filed a cross-complaint against plaintiffs seeking damages for injuries received in the accident. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Henry L. Walleck, of Van Nuys, and David Silverton, of Los Angeles, for appellant.

Fred E. Subith, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs (cross-defendants) after trial before the court without a jury in an action to recover damages received in an automobile accident, defendant (cross-complainant) appeals.

The evidence being viewed in the light most favorable to plaintiffs, the essential facts are:

March 30, 1939, plaintiff Cecil Borror, while traveling south on Sepulveda Boulevard, noted that one of his cylinders was "missing." He therefore pulled his car off the highway and parked six or eight inches west of the westerly pavement line of the boulevard. His co-plaintiffs were riding in a truck just behind him. They likewise stopped and parked off the highway. A few minutes later defendant, while driving his automobile at a speed of from 35 to 40 miles per hour in a southerly direction on the same boulevard struck the parked truck in which plaintiffs Floyd Borror and Edward Miller had been riding, causing the truck to strike plaintiff Cecil Borror's parked automobile, as a result of which the plaintiffs received personal injuries and the truck was damaged.

Defendant filed a cross-complaint against plaintiffs seeking damages as a result of the injuries which he received in the accident.

It is necessary for us to determine three questions, which will be stated and answered hereunder seriatim.

First: Is there substantial evidence to sustain the trial court's findings that:

(a) Plaintiffs' automobiles were not parked upon the highway at the time of the accident, and

(b) Plaintiffs were not contributorily negligent.

This question must be answered in the affirmative.

[1] (a) The defendant concedes that each of the plaintiffs testified that their cars were parked "clear off the pavement." This testimony was substantial evidence to sustain the trial court's finding that plaintiffs' automobiles were not parked upon the highway at the time of the accident in question.

[2, 3] (b) Since the evidence discloses that there was substantial evidence to sustain the trial court's finding that plaintiffs' automobiles were not parked upon the highway when the accident occurred, section 582 of the Vehicle Code, St.1935, p. 190, was not applicable to the facts of the instant case and it was, therefore, a question of fact for the trial court to determine from all of the evidence whether plaintiffs were contributorily negligent. The evidence being conflicting, the trial court's determination of this issue is binding upon this court. For the applicable rules of law in such a situation see In re Estate of Winzeler, 42 Cal. App.2d 246, 248, 108 P.2d 720.

Second: Did the trial court err in awarding plaintiff Cecil Borror damages in the sum of $360?

[4] This question must be answered in the negative. Plaintiff Cecil Borror testified that he was disabled for a week or two, that his earning capacity as truckman was $2.50 or $3.00 a day, and that he suffered pain in his "shoulder bone" for about a month. The amount of damages awarded to said plaintiff rested within the sound discretion of the trial judge based on the foregoing evidence, and we are of the opinion that the award was reasonable.

Third: In view of the fact that all plaintiffs recovered in the aggregate only the sum of $1,037 damages on their complaint, did the trial court err in allowing them to recover the amount of their costs on defendant's cross-complaint, upon which judgment was entered in their favor?

[5] This question must be answered in the negative. Section 1032, subsection (a) of the Code of Civil Procedure, is not applicable to the instant question. This section applies to costs allowed to *plaintiffs.* The pertinent section in the present case is section 1032, subsection (b) of the Code of Civil Procedure, which is applicable to *defendants* and reads in part thus:

> "In the superior court, except as otherwise expressly provided, costs are allowed of course: * * * (b) To the defendant upon a judgment in his favor * * * in the actions mentioned in subdivision (a) of this section, or as to whom the action is dismissed."

[6] Subdivision (a) of section 1032 of the Code of Civil Procedure allows costs to a successful plaintiff in an action for the recovery of money or damages as a matter of course, unless he falls within an exception noted in the section, which exception does not apply to this case. The present action is an action for the recovery of damages and, since the judgment was in favor of *cross-defendants,* the trial judge properly entered a judgment providing "that the cross-defendants have and recover their costs herein taxed in the sum of $28."

For the foregoing reasons, the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

51 Cal.App.2d 684

WILLIAMS et al. v. GILMORE.

Civ. 6691.

District Court of Appeal, Third District, California.

May 4, 1942.

Hearing Denied July 2, 1942.

1. Interpleader 🔑37

Where judgment debtors deposited face amount of judgments in court and sought to require judgment creditor's assignee and garnishor holding judgment to litigate their respective rights to the fund alleging willingness to pay but ignorance as to who was entitled to the money and inability to determine such fact, and answers admitted that conflicting claims were made, judgment debtor's action was an "interpleader" suit. Civ. Code Proc. § 386.

See Words and Phrases, Permanent Edition, for all other definitions of "Interpleader".

2. Interpleader 🔑40

In judgment debtors' action to require judgment creditor's assignee and garnishor holding judgment to litigate their respective rights to the fund, plaintiffs were not required to show which of the claims was valid, but only to show that the parties called in made claims for the same thing, that the respective claims were adverse to each other, and that plaintiffs could not safely determine which claim was lawful. Code Civ. Proc. § 386.

3. Interpleader 🔑37

Where determination of the amount of interest due from judgment debtors required nothing more than computation, judgment debtors were not precluded from maintaining action to require judgment creditor's assignee and garnishor holding judgment to litigate their respective rights to the fund, on the ground that to subject the judgment to a suit of such nature would deprive the judgment creditor of a legal right. Code Civ. Proc. § 386.

4. Interpleader 🔑37

The plaintiff in statutory action in the nature of "interpleader" seeking to compel conflicting claimants to litigate their several claims upon plaintiff among themselves must be a disinterested stakeholder, and the amount to be deposited in court cannot be litigated, but uncertainty about the amount of interest on an obligation would be fatal to the action. Code Civ.Proc. § 386.

5. Interpleader 🔑43

Where judgment debtors seeking to require judgment creditor's assignee and garnishor holding judgment to litigate their respective rights to the fund deposited the face of judgments against them in court, the deposit of the money in court relieved judgment debtors from their obligation to pay the principal sums and any interest thereafter to accrue. Code Civ.Proc. § 386.

6. Interpleader 🔑37

The conditions under which the remedy of "interpleader" may be invoked are prescribed by statute authorizing person against whom conflicting claims are made for personal property or performance of an obligation to bring an action to compel the conflicting claimants to interplead and litigate their several claims among themselves, and the scope of the common-law remedy has been broadened. Code Civ.Proc. § 386.

7. Interpleader 🔑1

Interpleader is an "equitable proceeding" in which the rights of the parties as between themselves are governed by principles of equity. Code Civ.Proc. § 386.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Proceeding".

8. Interpleader 🔑37

Where judgment debtors had contested judgments based on tort and reported to the sheriff when served with writs that judgment debtors had no money owing judgment creditor, judgment debtors were not precluded by equitable principles from maintaining action to require judgment creditor's assignee and garnishor holding judgment to litigate their respective rights to the fund. Code Civ.Proc. § 386.

9. Interpleader 🔑40

In judgment debtors' action to require judgment creditor's assignee and garnishor holding judgment to litigate their respective rights to the fund, where allegations of complaint coupled with admissions of answer showed that judgment debtors were entitled to relief, and question of validity of garnishments or assignments could not be determined in a preliminary proceeding so as to preclude vexation from the garnishor, judgment creditor's assignee was not entitled to a trial on the issue whether interpleader lay. Code Civ.Proc. § 386.

10. Interpleader ⚿37

Where judgment debtors deposited face amount of judgments in court and sought to require judgment creditor's assignee and garnishor holding judgment to litigate their respective rights to the fund, judgment debtors were not precluded from relief on ground that one of the judgments was not only for money, but also for restitution. Code Civ. Proc. § 386.

11. Execution ⚿16

Where judgment debtors deposited face amount of judgments in court and sought to require judgment creditor's assignee and garnishor holding judgment to litigate their respective rights to the fund, judgment creditor's assignee was not entitled to levy on other property of judgment debtor, since assignee would recover in the interpleader proceeding all that he was entitled to. Code Civ.Proc. § 386.

◆

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by Leanor Williams, as executrix, etc., and others against Charles L. Gilmore and others, to require defendants to litigate their respective rights to a fund deposited in court, and for a decree discharging plaintiffs from all liability to either of the defendants. From a judgment for plaintiffs, named defendant appeals.

Affirmed.

Chas. L. Gilmore in pro. per., of Sacramento, for appellant.

W. E. Davies, of Marysville, for respondents.

DIERUP, Justice pro tem.

The defendant Chas. L. Gilmore has appealed from an interlocutory decree permitting the plaintiffs to deposit certain moneys in court and requiring the defendants to litigate their respective rights to the fund and discharging the plaintiffs from all liability to either of the defendants. The action was brought pursuant to the provisions of section 386 of the Code of Civil Procedure and is the kind of action that is known as an interpleader suit. The part of the section which is applicable reads as follows: "And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another."

The sum that was deposited pursuant to the order was $4,143.32. This sum was the aggregate amount of the principal and interest of three judgments. One of the judgments was a judgment for costs amounting to $276.17, entered December 20, 1937, upon the reversal of a judgment in favor of the defendants in an action for forcible entry and detainer which had been brought by the Templar Mining Company against T. J. Williams and Leanor Williams, his wife. (Leanor Williams as executrix has been substituted for said T. J. Williams.) This judgment was assigned by the Templar Mining Company to appellant, Chas. L. Gilmore, on October 5, 1938. Upon a retrial of the action judgment for $1 damages and $60.50 costs was entered in favor of the Templar Mining Company on September 30, 1938. This judgment also was assigned to appellant on October 5, 1938. A third judgment was entered November 16, 1938, in favor of the Templar Mining Company and against all of the respondents in an action for conversion of mining machinery and equipment. This judgment was for the sum of $3,530.41 damages and $27 costs of suit, and was assigned to the appellant on November 18, 1938.

On November 6, 1936, the Yuba-Sutter Oil & Burner Company, a copartnership, recovered a judgment against the Templar Mining Company in the sum of $2,626.29, including costs. Writs of attachment and execution were issued in that action and served upon the respondents. Alleging that they were ready, able and willing to pay the three judgments in full but that they did not know whether the appellant assignee or the defendant garnishor was entitled to the money and could not safely ascertain for themselves which claim is right and lawful, the appellants brought this interpleader suit against both of the claimants.

[1,2] This action appears on its face to be the kind of action that is referred to in section 386 of the Code of Civil Procedure. The appellant (assignee) and the defendant (garnishor) make conflicting claims against the respondents relating to the performance of an obligation—the payment of the three judgments. It is admitted in the answers that the conflicting claims are made. It was not incumbent upon the plaintiffs to show which of the claims is valid, for the code requires nothing more of a plaintiff "in this respect than to show that the parties to be called in make claims on him for the same thing, that the respective claims are adverse to each other, and that he cannot safely determine for himself which claim is right and lawful." Fidelity Sav., etc., Ass'n v. Rodgers, 180 Cal. 683, 182 P. 426, 427.

[3-5] It is contended by appellant, however, that interpleader did not lie under the facts of this case for several reasons which we shall discuss in some detail. One of them is that the judgments bear interest, and that to subject them to a suit of this nature would deprive the judgment creditor of a legal right. In support of this argument he cites Conner v. Bank of Bakersfield, 183 Cal. 199, 190 P. 801, 803, in which it is said: "Had the check itself been interest-bearing, plaintiff's claim to interest would have had the effect of putting in issue the extent of the obligation of the bank on the check and, therefore, the action could not have been maintained. Appeal of Bridesburg Mfg. Co., 106 Pa. 275. In such a case, if a defendant failed to question the extent of the obligation of the plaintiff, he would be estopped from later attempting to claim a greater obligation than that admitted and consented to in the interpleader. But in the instant case the check was not interest-bearing, and there is no question but that the amount deposited by the bank in the interpleader suit was all that was due on the bank's original obligation."

It is clear from the quotation that the Supreme Court did not decide that interpleader will not lie in any case where the obligation is interest bearing, for the court had under consideration an instrument which was in legal effect a bill of exchange and did not bear interest. What the court decided was that interpleader would lie, but that the person who prevailed in the suit could bring action for interest as damages from the time of his demand for the payment of the money up to the time the money was paid into court. The plaintiff must be a disinterested stakeholder and the amount to be deposited in court cannot be litigated. Uncertainty about the amount of the interest on an obligation would be fatal to the action. But in the case at bar the determination of the amount of interest required nothing more than computation. The principal and interest together are as definite a sum as the principal alone, and the deposit of the money in court relieved the respondents from their obligation to pay the principal sums and any interest thereafter to accrue. Allen v. Vanderbeck, 132 Cal.App. 242, 22 P.2d 561.

Appellant contends also that a judgment cannot be the subject of interpleader and asserts that other remedies are available to the judgment debtor for his protection. Collins v. Angell, 72 Cal. 513, 14 P 135, and Troy v. Troy, 127 Cal.App. 489, 16 P. 2d 290; do not support his position. In American Surety Co. of New York v. Grays Harbor County, 187 Wash. 164, 60 P.2d 10, and in Jax Ice & Cold Storage Co. v. South Florida Farms Co., 91 Fla. 593, 109 So. 212, 218, 48 A.L.R. 957, it was held that if one permitted one of the contesting claimants to take judgment against him he could not thereafter interplead them. But in the first of these cases there was a double liability, not a double vexation for a single liability; and in the second (Jax Ice & Cold Storage case) the actual ground for the decision was the nature of the interpleader action as it has been developed by courts of equity, the court saying: "As said by this court in the case of Fogg v. Goode, [78 Fla. 138, 82 So. 614], supra, the stakeholder's right to interpleader is subject to the highly technical requirement that the opposing claimants' titles must be in privity with each other; one derived from the other, or both derived from a common source. Their claims must be by different or separate interests, but, where their rights are asserted under adverse titles, and are of different natures, the bill cannot be maintained."

[6] In view of such technical rules as prevail in other jurisdictions (30 Am. Jur. 218) the weight of authority is not persuasive, for "the conditions under which the remedy may be invoked in this state are prescribed by statute and scope of the remedy has been broadened and enlarged." Mutual Life Ins. Co. v. Henes, 8 Cal.App.

2d 306, 47 P.2d 513, 515; Fidelity Sav., etc., Ass'n v. Rodgers, supra; 14 Cal.Jur. 702. In Lackmann v. Klauenberg, 3 Cal. App. 183, 84 P. 776, 777, it is said (obiter): "It is undoubtedly the general rule that where either one of the conflicting claimants has secured a final judgment against a stakeholder who had knowledge of the conflicting claims before judgment, such stakeholder cannot maintain an action of interpleader."

But, as we have said, we have a statute which has supplanted the general rule. It states expressly that any person who owes an obligation may, in good faith, bring into court all persons who make conflicting claims to the performance of the obligation and compel them to litigate their claims.

[7, 8] It is true that interpleader is an equitable proceeding in which the rights of the parties, as between themselves, are governed by principles of equity. Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034. Appellant takes the position that the nature of the case and the conduct of the respondents preclude them from having the benefit of the statute. That the judgments are based on torts is immaterial. Nor was there a moral wrong on the part of the respondents in contesting the actions or in reporting to the sheriff when they were served with writs that they did not have moneys owing to the Templar Mining Company. Appellant has pointed out no manner by which they could have brought the garnishor into court in these proceedings and secured a determination of the respective rights of the garnishor and the appellant. Perhaps such a proceeding may be available to a judgment debtor where such conflicting claims as we have under consideration are made. But an interpleader action is a much better mode for reaching the end desired.

[9] Appellant insists that there should have been a trial of the issue whether interpleader lies in this case. As we have shown, the allegations of the complaint, coupled with the admissions in the answer, show that the respondents were entitled to the relief asked. He suggests that he could have shown upon a trial that the relief should not have been granted, in view of authorities already referred to and also Pacific Gas & Elec. Co. v. Nakano, 12 Cal. 2d 711, 87 P.2d 700, 121 A.L.R. 417. But the question of the validity of the garnishments or the assignments could not be determined in the preliminary proceeding in such a manner as to preclude vexation from the garnishor.

[10, 11] It is immaterial that one of the judgments was not only for money but for restitution, for the right to recover property is severable from the judgment for the money and is in no way affected by this proceeding. Nor can the appellant fairly claim a right to levy on other property of the respondents, for he will recover in this proceeding all that he is entitled to receive.

There is no prejudicial error in the rulings of the trial court.

The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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51 Cal.App.2d 638

In re DICKINSON'S ESTATE.

NICHOLS et al. v. HAYWARD et al.

Civ. 13579.

District Court of Appeal, Second District, Division 2, California.

May 1, 1942.

Hearing Denied June 29, 1942.

Descent and distribution 🔑50

The provisions of the Penal Code which suspended civil rights of a person sentenced to a state prison for any term less than life did not deprive such person of the right to inherit under the laws of descent. Pen.Code, §§ 673, 677.

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of Laura L. Dickinson, deceased. From a judgment of the superior court decreeing a distribution of a share in the estate to Jean Louise Hayward, Evalyn M. Nichols and others appeal.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellants.

Paul Angelillo, of Los Angeles, for respondents.

HANSON, Justice pro tem.

This appeal presents primarily the question whether a person who has been sentenced to serve less than life in a penitentiary of this state is capable of inheriting real estate where execution of the sentence stands suspended by order of the judge who sentenced her. The trial court ruled that such a person is capable of inheriting under our laws of descent. We think the ruling was correct.

Respondent Hayward pleaded guilty to a felony punishable by imprisonment in the penitentiary for less than life. On January 26, 1940, the court pronounced judgment and sentenced her to the penitentiary for a term less than life, but at the same time suspended execution of the sentence and placed her on probation for fourteen years upon conditions named. Subsequently, on September 18, 1940, the grandmother of respondent Hayward died intestate, leaving as her next of kin a daughter and respondent Hayward, a granddaughter.

Appellants contend (1) that where a person, as here, was sentenced to the penitentiary prior to the repeal in 1941 of Penal Code section 673, even though execution of the sentence is suspended and the offender placed on probation, she is without civil rights; and (2) that a person without civil rights is incapable of inheriting. As in our view a person who has lost his civil rights under the statute is capable of inheriting, we need not pass on the first contention made by appellants.

Penal Code sections 673 and 677 (now repealed and superseded by sections 2600, 2604, 3054 and 3055) so far as here material respectively read:

"A sentence of imprisonment in a State prison for any term less than life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during such imprisonment."

"No conviction of any person for a crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law; and all forfeitures to the people of the State, in the nature of a deodand, or where any person shall flee from justice, are abolished."

Counsel on both sides seem to have overlooked the fact that the Supreme Court as early as 1868 construed the identical language found in Penal Code section 673, at that time section 145 of the "Act concerning crimes and punishments." In Matter of Estate of Nerac, 1868, 35 Cal. 392, 95 Am.Dec. 111, a judgment creditor of one Sagiel, who was the sole beneficiary of the estate, sought to reach Sagiel's interest by presenting his judgment to the court for payment at the time the executor's petition for an order of distribution was being heard. Sagiel at the time was serving a term in the penitentiary, and it was while he was thus imprisoned that Ellen Nerac died, naming Sagiel by her will as the sole beneficiary of her estate. The trial court denied the creditor relief founded in part on the provisions of the statute with reference to civil death. In dealing with that contention the court said: "By this provision of the statute the civil rights of Sagiel were suspended during the term of his imprisonment, except as hereinafter stated; but the civil rights of Knox and Clark were not suspended. The former had a right to sue, and the latter has a right to subject the property of Sagiel to the satisfaction of his judgment, for the sentence worked no forfeiture of Sagiel's estate. The forfeitures and disabilities imposed by the common law upon persons attainted of felony are unknown to the laws of this State. No consequences follow, except such as are declared in the section to which he have referred. If the convict be sentenced for life, he becomes civiliter mortuus, or dead in law, in respect to his estate, as if he was dead in fact. If, however, he be sentenced for a term less than life, his civil rights are only suspended during the term, and he forfeits only all public offices and private trusts, authority and power." However, the court held that the mode adopted by the creditor was erroneous, as "the only ground upon which that court could take possession of Sagiel's money and apply it to the payment of Clark's judgment would be that Sagiel is dead in law or in fact." Accordingly it affirmed the trial court, but in doing so stated that the interest of Sagiel could be reached by attachment.

Since the decision of the Supreme Court in the cited case it has never been doubted that one imprisoned in the penitentiary for a term less than life is capable of inheriting. Moreover, by Penal Code section 677 the inheritance may not be forfeited. See, also, Emmanuel v. Sichofsky, 198 Cal. 713, 247 P. 205, 48 A.L.R. 580, citing the Nerac case. The principle announced in Re Estate of Nerac, supra, was reflected in Brown v. Mann, 68 Cal. 517, 9 P. 549, where it was held that a notice of appeal served by a plaintiff on defendant, an administrator, while he was serving a term in a penitentiary for less than life was effective. The holding was based on the fact that defendant had been removed as administrator and that the civil right involved was not suspended by Code section 673.

Order affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

51 Cal.App.2d 559

TEMPLE v. DE MIRJIAN et al.

Civ. 13351.

District Court of Appeal, Second District,
Division 2, California.

April 29, 1942.

Hearing Denied June 25, 1942.

1. Automobiles 🔑242(1)

Action of truck driver in driving on left or wrong side of highway at time of collision was presumptively negligent.

2. Automobiles 🔑244(10, 35)

In action for death of plaintiff's son as result of a truck collision, with defense that the collision was the result of an inevitable accident because of unforeseeable mechanical failure of the steering gear of defendant's truck, evidence supported verdict for plaintiff on issue of negligence in defendant's driving on the wrong side of the highway and failing to apply his brakes in time to prevent the collision.

3. Trial 🔑139(1), 140(1)

It was the jury's duty to weigh the evidence and determine the credibility of witnesses.

4. Automobiles 🔑244(40)

In action for death of plaintiff's son resulting from truck collision, jury was not required to accept defendant truck driver's version that the accident was due to an unforeseeable mechanical failure of the steering gear as true.

5. Automobiles 🔑242(1), 245(13, 66)

In action for death of plaintiff's son as result of truck collision, the presumption of negligence of defendant from driving on left side of highway was "evidence" which, considered with other evidence inconsistent with defendant's version that accident was due to an unforeseeable mechanical failure of steering gear of defendant's truck, created a conflict for jury to resolve.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

6. Automobiles 🔑242(1)

In action for death of plaintiff's son as result of a truck collision, where plaintiff introduced no evidence wholly irreconcilable with presumption of defendant's negligence for driving on left side of highway, the presumption remained as "evidence".

7. Evidence 🔑150, 557

Generally, admission of testimony regarding experiments is within the discretion of the trial judge.

8. Appeal and error 🔑970(2)

District Court of Appeal was not authorized to disturb trial court's judgment excluding defendant's testimony concerning an experiment unless an abuse of trial court's discretion be shown.

9. Evidence 🔑557

Where an expert testified concerning various circumstances possibly causing failure of steering gear of defendant's truck in support of defense of unforeseeable mechanical failure, and no pieces of cement, rock, or metal were found at scene of accident, trial court did not abuse its discretion in excluding defendant's offered testimony concerning the results of an experiment in which such objects were placed in the steering mechanism of a similar truck resulting in dislocation of the steering gear.

10. Trial 🔑260(3, 8)

In action for death of plaintiff's son in a truck collision, where trial court instructed that burden of proof by the preponderance of the evidence was upon plaintiff, and cautioned jury not to speculate as to cause of accident, trial court did not err in refusing defendant's requested instruction on burden of proof and an instruction pointing out that defendants contended that their truck was properly greased and inspected, and they knew of no mechanical defect therein.

11. Trial 🔑260(8)

Where trial court submitted defense that truck collision was the result of an inevitable accident because of an unforeseeable mechanical failure of the steering gear of defendant's truck, trial court did not err in refusing to give requested instructions on the subject of unavoidable accident.

12. Trial 🔑260(8)

Where trial court fully instructed jury on contributory negligence, trial court did not err in refusing to give defendant's requested instruction on that subject.

13. Trial 🔑267(1)

The trial court is not required to instruct the jury in the particular language requested by a party if the subject matter of the requested instruction is fully and fairly covered in other instructions given to the jury.

14. Death 🔑104(6)

Instruction that plaintiff was entitled to just compensation for pecuniary loss suffered by reason of son's death as determined by age of deceased and plaintiff, deceased's physical condition and that of plaintiff at time of death and prior thereto, and their relative expectancies and earning capacity, was not improper as failing to instruct that recovery was to be limited to the pecuniary value of deceased's life to plaintiff for the probable duration of plaintiff's life or the joint lives of plaintiff and deceased.

15. Death 🔑104(6)

In action for death of plaintiff's son, jury was properly instructed that it was not bound by the precise estimates of life expectancy as shown by the mortality tables nor required to accept estimates as to past earning capacity of deceased.

16. Evidence 🔑12

It is a matter of common knowledge that many persons live beyond the period of life allotted to them by the mortality tables.

◆

Appeal from Superior Court, Los Angeles County; Sheldon, Judge.

Action by Charlotte A. Temple against Edward De Mirjian and another for wrongful death of plaintiff's son resulting from a collision of two trucks. From a judgment for plaintiff, defendants appeal.

Affirmed.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, for appellants.

Albert E. Wheatcroft, of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages for the wrongful death of her son resulting from a collision of two trucks. A jury returned a verdict in plaintiff's favor in the sum of $9,500. From the ensuing judgment defendants have appealed.

The collision occurred on March 5, 1940, between 4 and 5 o'clock a. m. on Garvey road, a paved, four lane highway in the county of Los Angeles. Plaintiff's son was driving a truck owned by Armour & Company in an easterly direction on the south side of the highway and defendant Busick was driving a truck owned by defendant DeMirjian in a westerly direction. The collision took place at a point which was south of the center line of the highway, near the most southerly traffic lane. As a result of the head-on collision both trucks were severely damaged by the force of the impact, as well as by the ensuing fire which enveloped them. Plaintiff's son was pinned in the cab of the truck and was burned to death.

[1] At the time of the collision defendant Busick was driving on the left, the wrong side of the highway, and therefore was presumptively negligent. Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51. In an effort to rebut the presumption of negligence, defendant Busick testified that shortly before the accident, while he was driving on the right side of the highway, the truck began to "wander" toward the middle of the road; that when he attempted to control its direction he discovered that the steering apparatus was not functioning and therefore he was unable to control the direction which the truck traveled. Although aware of the approach of the truck driven by the deceased, defendant Busick did not immediately apply his brakes upon discovering that his truck was out of control because he was afraid that the front wheels would "jackknife" and thus

catapult the truck. He did, however, apply his brakes prior to the accident but was unable to stop before he struck the other truck. Examination of defendant's truck following the accident disclosed that the steering mechanism was broken, the draglink being disconnected from the pitman-arm; the front wheels were cramped to the left as far as possible and the steering wheel was turned as far to the right as it would go. The break in the steering mechanism was at a point near the left front wheel. Defendants introduced evidence to the effect that the draglink could have been forced from the pitman-arm prior to the accident by a rock or other hard substance becoming lodged between the frame and the steering apparatus. However, no rock or other hard substance was found at the scene of the accident. Relying upon such evidence defendants contend that the jury could lawfully have come to but one conclusion, namely, that the collision was the result of an unavoidable accident caused by the breaking of the steering gear prior to the accident.

[2-6] We are unable to agree with defendants' contention that the verdict is not supported by substantial evidence. Although defendant Busick was the only eye witness to the accident the jury, whose duty it was to weigh the evidence and determine the credibility of witnesses, was not required to accept his version of the accident as being true. In addition to the presumption of negligence, arising from the fact that defendant Busick was driving on the wrong side of the highway, there was other evidence in conflict with the claim that the accident was unavoidable. The expert who testified on behalf of defendants concerning the manner in which the draglink might have become disconnected prior to the accident stated that if the steering mechanism had been broken in such manner as he described the front wheels would have "jackknifed" and, as the forward motion of the truck continued, the front tires would have skidded. However, there were no skid marks made by defendant's truck. From the manner in which the trucks collided the jury might well have inferred that the steering gear was broken by the force of the impact rather than by some other cause prior to the accident. The evidence shows that the left front wheel of defendant's truck climbed up on the left front fender of the truck driven by the deceased and that the underpinning of defendant's truck was "skinned off" and the frame bent. From an examination of several pictures showing the damaged trucks, which were introduced in evidence, it is evident that the draglink and the pitman-arm both could easily have been broken by the force of the collision. The evidence also shows that during the night preceding the accident defendant Busick had driven approximately 185 miles and had been without sleep for from 17 to 19 hours. The presumption of negligence on the part of defendant Busick was of course evidence which, considered in relation to other evidence inconsistent with defendant's version of the accident, created a conflict which it was the duty of the jury to resolve. Plaintiff introduced no evidence which was wholly irreconcilable with the presumption of negligence and the presumption therefore remained as evidence in the case. Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529.

[7-9] During the course of the trial defendants offered the testimony of a witness concerning the results of an experiment which he had conducted with a truck of the same make and design as that driven by defendant Busick, in an effort to show how the steering gear of the truck could have become dislocated prior to the collision. This evidence was excluded and defendants now assign the ruling as error. Defendants proposed to show that with the truck used in the experiment traveling on a paved highway similar in character to the highway on which the accident occurred, when an unyielding object was placed between the shackle bolt at the rear of the left front spring and the rear housing of the draglink, and the driver turned the steering wheel to the right, the draglink was forced off the pitman-arm knuckle within a distance of less than 40 feet, spreading the housing of the draglink in the same manner as appeared from an inspection of the draglink involved in the accident; also that the same test was made with the truck standing still with the same result. The manner in which the draglink became dislocated from the pitman-arm was never established by direct evidence, the only testimony on the subject being that of an expert who testified concerning the various circumstances which might have caused the failure of the steering gear to function prior to the accident. It is to be noted that in the proffered experiment the witness used

a piece of cement and a rock picked up on the side of the road and two different pieces of metal which he placed between the shackle-bolt and the draglink. No such objects were found at the scene of the accident. It is a general rule that the admission of testimony concerning experiments is within the discretion of the trial judge, who must determine whether the experiments would be helpful to the jury in deciding the issues. We are not authorized to disturb the judgment of the trial judge in this particular unless abuse of discretion be shown. We find no such abuse here.

[10-13] Defendants assign as error the refusal of the trial court to give certain requested instructions on the subject of burden of proof. They complain especially of the failure to give an instruction in which it is pointed out that defendants contend that the car was properly greased and inspected and that they had no knowledge of any mechanical defect. In other instructions given by the court the jury was correctly informed that "the burden is upon the plaintiff to prove by a preponderance of evidence that a defendant was negligent and that such negligence was a proximate cause of the death of the deceased," and further that "The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he has failed to fulfill his burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that the cause of the accident was one not involving negligence on defendants' part as it is that negligence on his part was a proximate cause, then, because the conflicting probabilities are equal, a case against the defendant has not been established." The jury was also informed of the meaning of "preponderance of evidence" and was told how to weigh conflicting evidence. The refusal of the court to give several requested instructions on the subject of unavoidable accident is also assigned as error. The trial court did inform the jury that one of the defenses relied on by defendants was that the collision was the result of an inevitable accident without negligence on their part, because of an unforeseeable mechanical failure of the steering gear. In another instruction the jury was told that: "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it. Both negligence and proximate cause, as defined in these instructions, are requisites for founding liability." Defendants' contention that the court erred in refusing to give their requested instruction on contributory negligence is also without merit, for in other instructions, the jury was fully and fairly instructed on that subject. The requested instructions on the above mentioned subjects which were refused by the court were all repetitious in nature, containing elaborations of principles correctly stated in the instructions given. Some of them contained references to defendants' evidence which placed undue emphasis thereon. The refusal to give the requested instructions was therefore not error, for the trial court is not required to instruct the jury in the particular language requested by a party if the subject matter of the requested instruction is fully and fairly covered in other instructions given to the jury.

[14-16] Defendants contend that the court erred in refusing their requested instruction on the subject of damages, conceding, however, that in general the substance of the proposed instruction was covered by other instructions. They assert that the court failed to instruct the jury that recovery was to be limited to the pecuniary value of the child's life to the parent for the probable duration of the parent's life, or the joint lives of parent and child. The court charged the jury that if they found plaintiff to be entitled to a verdict she was to be awarded such sum as, "under all the circumstances of the case, may be just compensation for the pecuniary loss she has suffered by reason of the death of her son. * * * In weighing these matters, you may consider the age of the deceased and of plaintiff, the physical condition of deceased and of plaintiff as it existed at the time of the death and immediately prior thereto; their respective expectancies of life as shown by the evidence. * * * You may, in so far as the same are shown by the evidence, consider the expectancy of life, the health, and the

earning capacity of plaintiff and of the deceased * * * and all other facts in evidence that throw light upon the question of pecuniary loss." The American Experience Table of Mortality, which was introduced in evidence, showed plaintiff's life expectancy to be 8.54 years and deceased's expectancy to be 34.43 years. The foregoing instructions fully and fairly covered the matters which defendants claim were omitted. The assertion that under the instructions the jury was authorized to and did bring in a verdict for more than the amount which was shown by the evidence to be plaintiff's pecuniary loss is based entirely upon defendants' claim that the jury was required to find that plaintiff's life expectance was 8.54 years. The jury was correctly instructed to the effect that it was not bound by the precise estimates of life expectancy as shown by the mortality tables, nor was it required to accept the estimates as to past earning capacity of the deceased son. Herron v. Smith Bros., Inc., 116 Cal.App. 518, 522, 2 P.2d 1012. Since the evidence discloses that plaintiff was in unusually good health and had never suffered from any serious illness, the jury might well have found that plaintiff's life expectancy exceeded that shown by the mortality table. It is a matter of common knowledge that many persons live beyond the period of life allotted them by the mortality roles. Coughman v. Harman, 135 Cal.App. 49, 58, 26 P.2d 851. The court did not err in refusing the requested instructions.

We can agree with some of the statements made by the able counsel for appellants in furtherance of the object of the appeal but we cannot agree with his views on the subject of "California Jury Instructions," which has been generously endorsed and used by the bar. Counsel states that nearly all of the court's instructions were taken from this work, which he characterizes as "a labor-saving, loose-leaf book." He states that most of the instructions contained therein are not adaptable to specific theories of a case except at the cost of labor and rearrangement and that the work "does not contain the whole gospel of the law by a long shot." This is the first adverse criticism of the work in question by a member of the bar which has come to our attention. Unquestionably "California Jury Instructions" has saved much labor on the part of trial judges and it should be added that this work has saved considerable labor on the part of the justices of the reviewing courts of the state. We have found that the instructions prepared by the authors, which we have been called upon to review, contain accurate statements of pertinent principles of law presented in a manner fair to both sides of the litigation. By their use trial judges have been able to inform juries fairly and fully concerning the law applicable to the issues before them. The natural result is that now a smaller number of judgments are reversed because of erroneous instructions than in former times.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

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51 Cal.App.2d 744

REMILLARD BRICK CO. v. REMILLARD-DANDINI CO.

Civ. 11932.

District Court of Appeal, First District, Division 2, California.

May 6, 1942.

1. Trial ⇐395(1)

In action to recover on note, finding of trial court of amount paid and amount owing and unpaid was a sufficient finding on the issue of payment.

2. Trial ⇐395(1)

In action on note, finding that none of the allegations of maker's answer except as set forth in findings were true was a sufficient finding on the issue of failure of consideration.

3. Bills and notes ⇐491

Where original agreement providing that defendant would receive credit on its secured notes for payment of taxes which were a lien on property it acquired from plaintiff was supplanted by subsequent oral agreement providing for substitution of unsecured notes of lesser amount, in action to enforce payment of new notes defendant had burden of showing new agreement provided for tax credits.

4. Bills and notes 🔑516

Where original agreement, providing that defendant would receive credit on its secured notes for payment of taxes which were a lien on property it acquired from plaintiff, was replaced by subsequent oral agreement providing for substitution of unsecured notes of lesser amount, in absence of evidence that subsequent agreement also provided for tax credits, defendant was not entitled to credit on new notes for payment of such taxes.

5. Bills and notes 🔑489(3)

In action on a note, defendant who claimed credit for money paid on behalf of plaintiff to an accountant and who had failed to allege any agreement for credit of such payment by way of counterclaim in his answer or to show existence of any agreement for credit of such payment, was not entitled to credit for such payment.

6. Contracts 🔑152

A contract must be construed with reference to the words which it contains, and words which have been erased or crossed out are not to be considered except in ascertaining the intention of the parties where the contract is ambiguous.

7. Bills and notes 🔑125

Where no interest is specified in a note, interest is payable from the maturity date at the rate of seven per cent. per annum.

8. Bills and notes 🔑97(2)

Where original agreement under which defendant executed its secured notes and gave other consideration for plaintiff's assets including certain accounts receivable was supplanted by subsequent oral agreement under which plaintiff accepted defendant's unsecured notes in lesser amount, in absence of evidence that plaintiff guaranteed accounts receivable, or failed to execute formal assignment thereof after a request for such assignment by defendant, or that subsequent agreement contemplated anything but payment of unsecured notes in cash, defendant could not claim partial "failure of consideration" by reason of inability to collect accounts receivable.

See Words and Phrases, Permanent Edition, for all other definitions of "Failure of Consideration".

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Remillard Brick Company against Remillard-Dandini Company, to recover upon promissory notes. From judgment for plaintiff, defendant appeals.

Affirmed.

W. E. Licking, of San Francisco, for appellant.

Johnson & Harmon and Wm. H. Henderson, all of San Francisco, for respondent.

SPENCE, Justice.

In this action to recover on certain promissory notes, plaintiff obtained judgment for the amount found by the trial court to be due as principal, interest and attorney's fees. Defendant appeals from said judgment.

The amended complaint contained four counts. The first count was based on a $6,500 promissory note dated February 28, 1935, and a similar note in like amount given in renewal thereof on December 9, 1936. Plaintiff sought to recover only interest on the first-mentioned promissory note and to recover principal and interest on the last-mentioned renewal note. The second count was based on a $6,000 promissory note dated February 28, 1935, which note was payable in installments of $100 per month. The third and fourth counts were based upon other promissory notes but these counts were dismissed by plaintiff at the outset of the trial.

The main issues presented to the trial court were those of alleged payment and of alleged partial failure of consideration. In support of its claims on these issues, defendant relied upon an agreement between plaintiff and defendant dated May 18, 1934. Said agreement was not pleaded in the answer nor was any counterclaim pleaded therein.

After introducing said promissory notes and evidence of nonpayment, plaintiff rested. Defendant then offered the agreement of May 28, 1934, which was admitted over the objection of plaintiff. Defendant also introduced other evidence concerning various dealings of the parties.

It appears that the action represents but one phase of the litigation in which said parties have been involved. In 1934, plaintiff corporation was engaged in the manufacture and sale of bricks and owned both real and personal property which the defendant corporation desired to acquire. By the above mentioned agreement plaintiff agreed to sell to defendant certain real and personal property which apparently included practically all of the assets of plaintiff. Defendant agreed to issue to plaintiff 300 shares of its capital stock, to pay plaintiff's current accounts payable which were listed in an attached schedule, and to execute in favor of plaintiff two promissory notes in the total sum of $60,000 secured by a mortgage. It was further provided that the defendant would take the real property subject to taxes but that all payments made by defendant on account of taxes which were then a lien on the real property should be credited by plaintiff "on account of said promissory notes hereinbefore referred to."

The parties proceeded under this agreement but about one year later, a new agreement was made. The new agreement was not reduced to writing and the minutes of a directors' meeting of the defendant corporation constitute practically the only evidence of said agreement. Said minutes refer to the embarrassment of defendant in its financing by reason of the existence of its indebtedness to plaintiff; to the fact that plaintiff owned one-half of the stock of defendant; to the fact that negotiations had been in progress between plaintiff and defendant resulting in a new agreement whereby plaintiff agreed "to cancel the mortgage notes for $60,000 and to take in lieu thereof unsecured notes of this corporation for a sum aggregating $20,500." Said minutes show that a motion was carried authorizing the officers of defendant to execute a series of notes in favor of plaintiff aggregating $20,500. The notes in question here were among the notes executed by defendant pursuant to said authorization.

The unusual bookkeeping practices of plaintiff and defendant are revealed by the evidence. These practices may be explained by certain facts not heretofore mentioned. Mr. A. O. Dandini was the president and a principal stockholder of defendant. Mrs. Lillian Dandini, his wife, was the president and a principal stockholder of plaintiff. As above indicated, plaintiff was a principal stockholder of defendant. Defendant originally acquired all of its property from plaintiff. It took over the brick business including the plant, the office, the records and the clerical help. Prior to the organization of defendant, Mr. Dandini was secretary of plaintiff, which office he continued to hold for some time thereafter. Later he became vice-president of plaintiff and continued to hold that office until 1939 or later. After the acquisition of the business by defendant, defendant collected rents for plaintiff on properties which plaintiff had not conveyed to defendant. Defendant purported to keep two accounts in relation to its affairs with plaintiff. For some time after the transfer, plaintiff kept no accounts, Mrs. Dandini apparently relying on Mr. Dandini and defendant to make the collections of rent and to keep proper accounts reflecting the status of the affairs of plaintiff and defendant. In referring to this situation, counsel for defendant stated on the trial "* * * there wasn't any distinction between them and us up until very recently, as it was two family corporations with practically all papers in the same basket."

The two above-mentioned accounts kept by defendant were (1) the "note account" and (2) another account which was called in the testimony the "open account," or the "general account," or the "general open account" or the "transfer account" or the "general transfer account." A photostatic copy of the "note account," or that portion of the note account starting with June 1, 1939, and showing a balance at that date of $23,078, appears in the transcript as an exhibit marked "Plaintiff's A for Iden." We find no showing that this "note account" was admitted in evidence but, in any event, the series of figures found on said exhibit appears to offer little assistance in determining the issues presented. The other account above-mentioned does not appear in the transcript either as an exhibit for identification or as an exhibit admitted in evidence. The secretary of defendant testified that said account "consisted of a number of items both by way of debit and credit; that is a number of different transactions." He stated that it covered interest, rents, tax payments and other matters but "that account does not reflect any particular status * * * does not reflect a true balance due at any date to the Remillard Brick Company." One item of $1,850, and possibly others, were admittedly not chargeable to plaintiff. The secretary of defendant testified that the above-mentioned balance of $23,078 shown by the so-called note account as of June 1, 1939, included the above-mentioned notes issued in 1935 and aggregating $20,500 and also a further sum of $5,000 which was received from plaintiff in 1935 and for which no note was given. This note account totaling $25,500, was apparently reduced by carrying purported balances over from the other account. Later the above-mentioned $5,000 item, which was not evidenced by a note, was transferred by defendant from the note account to the other account and was finally charged off by defendant "as barred by the statute of limitations." It further appears that defendant credited itself on the note account with certain sums which it could not or did not collect on certain accounts receivable of plaintiff which were included in the property covered by the agreement of 1934. There was nothing however to show that plaintiff guaranteed the payment of any of said accounts receivable. We have discussed some of the aspects of these two accounts for while said accounts were not introduced in evidence, frequent reference was made thereto in the evidence and some of the items of said accounts were relied upon by defendant in support of its defenses of payment, or partial payment, and partial failure of consideration.

The trial court found with respect to the first count, that only interest to December 2, 1938, had been paid and that the entire principal sum of $6,500 and interest from December 2, 1938, remained owing and unpaid. It further found with respect to the second count that interest to March 1, 1940, had been paid and that a portion of the principal had been paid, leaving owing and unpaid on principal the sum of $1,929.28 together with interest from March 1, 1940. It further fixed the reasonable amounts for attorneys' fees. It further found that "none of the allegations of defendant's answer except as herein set forth and incorporated are true." Judgment was entered in favor of plaintiff in accordance with said findings.

[1, 2] Defendant first contends that the trial court erred in failing to make findings on certain material issues but our review of the pleadings leads us to the conclusion that the trial court made findings responsive to all the material issues made by the pleadings. On the issue of payment, the trial court found the amount paid and the amount remaining owing and unpaid on each note. On the issue of failure of consideration, the general finding above quoted was a finding against the allegation of defendant's answer creating that issue.

[3, 4] Defendant further contends that the trial court erred in not crediting defendant with a tax payment of $1,588.41 made by defendant. It claims that the taxes paid by said tax payment were a lien on the real property in 1934 when the agreement of 1934 was made and that, under the provisions of that agreement, defendant was entitled to have said tax payment credited on the notes involved here. We find no merit in this contention. The provisions of the agreement of 1934 referred to credits to be given on the secured notes totalling $60,000. About one year after the execution of said agreement, the parties entered into a new agreement whereby the secured notes totalling $60,000 were cancelled and plaintiff accepted unsecured notes totalling $20,500. There is no evidence whatever to show that the new agreement provided for any credits to be given to defendant on the last-mentioned notes for any tax payments theretofore or thereafter made. The burden was on the defendant to show the existence of such an agreement and defendant failed to assume that burden. In this connection, defendant says that the findings are inconsistent in that certain tax payments were credited upon the notes involved here while the $1,588.41 payment made in 1937 was not so credited. Be that as it may, we find nothing in the record to justify the crediting of the last-mentioned tax payment upon said notes.

[5] Defendant further contends that the trial court erred in not crediting defendant with a payment of $380 made by defendant to Lester Herrick and Herrick, a firm of accountants. We find no merit in this contention. In support thereof, defendant again refers to the agreement of 1934. That agreement provided that defendant would assume and pay certain accounts payable of plaintiff as part of the consideration of that agreement. There was no provision for crediting defendant upon any notes with any sums so paid. Among the accounts payable listed in said agreement was an item of $1,850 due to said accountants. This amount was thereafter paid by defendant and defendant erroneously charged this payment against plaintiff on its books. It waived any claim to credit for that item at the time of the trial. It did claim credit, however, for an item of $380 paid by defendant to said accountants which it claimed was due to said accountants from plaintiff for work done by said accountants after the execution of the agreement of 1934. Here again defendant failed to introduce any evidence of any

agreement which entitled it to a credit upon the notes involved here for said payment of $380. If defendant paid said item under the claimed circumstances, it could have properly set forth a counterclaim in its answer for the amount so paid but it failed to do so. In the absence of any agreement to credit said payment as a payment on the notes involved here, defendant may not complain that the trial court did not credit it as such payment. Borland v. Nevada Bank, 99 Cal. 89, 94, 33 P. 737, 37 Am.St. Rep. 32; Goodfellow v. Goodfellow, 219 Cal. 548, 556, 27 P.2d 898.

[6] With respect to the note involved in the second count, defendant contends that the trial court erred in charging defendant with interest on said note. This contention arises out of the fact that when said note was executed upon a printed form, a line was drawn through the printed words "Said installments shall bear interest after maturity at the rate of seven per cent (7%) per annum." The material portion of the note, showing the portion through which the line was drawn, reads as follows:

"For Value Received, Remillard-Dandini Company, a California corporation, hereby promises to pay to Remillard Brick Company, or order, the sum of Six Thousand Dollars ($6000.00), payable in installments of One Hundred Dollars ($100.00) monthly, commencing June 1, 1935. ~~Said installments shall bear interest after maturity at the rate of seven per cent. (7%) per annum,~~ and in the event that any installments of this note shall not be paid when due, then the whole of said promissory note shall, at the election of the holder, without notice, become forthwith immediately due and payable."

In 17 C.J.S., Contracts, § 317, p. 734, it is said "Contracts must be construed with reference to the words which they contain, and words which have been erased or crossed out are not, under some authorities, to be considered; it has been said, however, that such words may be considered in ascertaining the intention of the parties where the contract is ambiguous." See Kennon v. Shepard, 236 Mass. 57, 127 N.E. 426; Watson v. Paschall, 93 S.C. 537, 77 S.E. 291; Straub v. Screven, 19 S.C. 445; Curtis v. M. L. Virden Lumber Co., 159 Miss. 454, 132 So. 341.

[7] Reading said note, without reference to the stricken words, we find nothing ambiguous. Defendant concedes that where no interest is specified in a note, interest is payable from the maturity date at the rate of seven per cent per annum. Nesbit v. MacDonald, 203 Cal. 219, 263 P. 1007; Bank of United States v. Foreman, 102 Cal.App. 756, 283 P. 874. The fact that said words were stricken is therefore wholly immaterial and the trial court properly awarded plaintiff interest on said note from maturity.

[8] Defendant finally contends that the trial court erred in not reducing defendant's obligation on said notes by the sum of $2,025.33, which was the amount by which it was claimed that the consideration had failed. Defendant bases its claim of partial failure of consideration with respect to the notes here involved upon the agreement of 1934, which agreement, as above stated, related to the secured notes in the total sum of $60,000. Defendant apparently argues that, while plaintiff agreed, by the 1934 agreement, to transfer this account, known as the Bottali account, to defendant, no further instrument assigning said account was ever made by plaintiff and that defendant received no money from Bottali in payment of said account. But it does not appear that any instrument assigning any account receivable was ever made or was ever contemplated by the parties or was ever requested by defendant. Nor does it appear that plaintiff guaranteed the payment of any of said accounts receivable. Furthermore, we have heretofore indicated that a new agreement was made about one year after the making of the 1934 agreement whereby plaintiff agreed to cancel the secured notes for $60,000 and to accept unsecured notes in the total sum of $20,500. There is nothing in the record to show that the new agreement contemplated payment of the last-mentioned notes in any manner other than by payment in cash according to their tenor or that the new agreement was of such nature that defendant could claim credits against the last-mentioned notes or partial failure of consideration thereof by reason of any provision of the agreement of 1934 or any alleged partial failure of consideration for the $60,000 notes. On the contrary, and with respect to this particular account, defendant insists that the uncontradicted evidence shows an "oral agreement made between the parties about two months following the making of the agreement of May 18, 1934, under which oral modification, the Bottali account was

not transferred to the defendant." Giving full effect to this testimony offered by defendant, it appears clear that when the new agreement for notes totalling $20,500 was made some months thereafter, such agreement was made in the light of the previous oral agreement above referred to and that defendant may not now claim that there was a partial failure of consideration in the sum of $2,025.33 with respect to said last-mentioned notes.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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51 Cal.App.2d 693

PEOPLE v. SMITHLE.

Cr. 1791.

District Court of Appeal, Third District, California.

May 4, 1942.

1. Criminal law 🔑673(5)

In prosecution for incest, instruction that evidence of other acts of sexual intercourse between defendant and his daughter than that charged in information was admissible to prove defendant's adulterous disposition was not erroneous.

2. Criminal law 🔑371(9)

Where a particular adulterous or incestuous act is selected for the basis of a prosecution, evidence of other acts of sexual intercourse not too remote in time is admissible to show the adulterous or incestuous disposition of the defendant and the probability of his committing the act charged.

3. Criminal law 🔑814(12)

In incest prosecution, refusal to give instructions concerning effect of complaining child's previous unchaste character on child's credibility as a witness was not error, where no evidence was introduced of child's previous unchaste character, and trial court gave full instructions on credibility of witnesses and care required in scrutinizing child's testimony.

4. Incest 🔑14

Evidence was sufficient to sustain conviction for incest.

◆

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Frank Smithle was convicted of incest, and he appeals from the judgment of conviction and from an order denying a new trial.

Affirmed.

Frank Smithle in pro. per., and S. K. Brantley, Jr., of Merced, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

STEEL, Justice pro tem.

The appellant was charged with the crime of incest alleged to have been committed upon his daughter thirteen years of age. He was found guilty by a jury and has appealed from the judgment of conviction and from the order denying a new trial.

Appellant is the father of seven children, the youngest being of the age of six months. In June, 1941, appellant's wife was placed in the Sonoma State Home for the Feeble Minded and the household duties were thereafter performed by various housekeepers employed from time to time. The complaining witness testified that her father commenced having intercourse with her after her mother had been removed to the state home. On the evening of August 28, 1941, the date alleged in the information, appellant came to her room after she had gone to bed and performed an act of sexual intercourse. We deem it unnecessary to recite the details of this detestable offense. The complaining witness told a clear and convincing story and appears to have a mentality equal to that of the average child of her age.

[1, 2] Appellant first complains of an instruction given by the court to the effect that evidence of other acts of sexual intercourse between the appellant and his daughter were admissible to prove the adulterous disposition of appellant. We find no merit in the objection to this instruction. Where a particular adulterous act is selected upon which a prosecution is based, evidence of other acts of sexual intercourse, not too remote in time, are admissible for the purpose of showing the

adulterous or incestuous disposition of the defendant and the probability of his committing the act charged. People v. Fuhrman, 130 Cal.App. 267, 19 P.2d 821; People v. Koller, 142 Cal. 621, 76 P. 500; People v. Christian, 48 Cal.App. 646, 192 P. 182. The evidence here was not admitted as "corroborative evidence tending to support the one specific offense" as the court instructed in the case of People v. Vaughan, 131 Cal.App. 265, 21 P.2d 438, 442, cited by appellant and which was held to be objectionable under the rules set up by section 19, article VI of the Constitution.

[3] Further complaint is made because of the trial court's refusal to give two instructions proposed by appellant to the effect that if the complaining child testified that the act of intercourse was accomplished by force and fear, and the evidence showed the child to be of previous unchaste character, then the jury may find that as a witness the child's testimony is not credible. Appellant cites the case of People v. Pantages, 212 Cal. 237, 297 P. 890, as authority for these offered instructions. The factual situation surrounding the two cases are fundamentally different. The instant case is not a rape case involving force and violence but rather a case where a father has committed a most reprehensible outrage upon his compliant daughter. There was no evidence introduced of previous unchaste character of the little girl, and we fail to see wherein the offered instruction can be held to apply to the evidence in this case. In the court's given instructions the jury was fully instructed as to the law upon all phases of the case including that of credibility of witnesses, and in addition the court gave two instructions regarding the duties of the jurors to scrutinize with great care and caution the testimony of the complaining witness.

[4] Finally it is argued that the evidence is insufficient to support the verdict of guilty and in particular "there was no satisfactory evidence to show that it was appellant and not someone else who had intercourse with the complaining witness." The authorities cited in support of this contention relate to the rule of innocence where circumstantial evidence alone is relied upon to support a conviction. This is not a case of circumstantial evidence but to the contrary the record contains the direct testimony of the complaining witness which remained unshaken upon cross-examination. Also the testimony of the doctor, produced as a witness for appellant, who in a measure corroborated the complaining witness's testimony in that the doctor testified that a physical examination made shortly after the alleged offense occurred showed signs of probable recent contact.

The probation officer testified with reference to a conversation had with appellant after his arrest and in response to a question as to the possibility of the offense having occurred when appellant had been drinking, the appellant responded, "Well, I have been drinking pretty heavily, but I wouldn't say that I did and I wouldn't say that I didn't."

We have carefully examined the record and are satisfied that appellant, who was ably represented by counsel, had a fair trial and that the evidence clearly supports the verdict of guilty.

The judgment and order appealed from are affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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51 Cal.App.2d 645

MALINOW v. DORENBAUM.

Civ. 11903.

District Court of Appeal, First District, Division 1, California.

May 2, 1942.

Hearing Denied June 29, 1942.

1. Trusts ⚷237

In action to impress a trust upon property which plaintiff had caused to stand in name of decedent, evidence sustained findings that plaintiff not only acquiesced in decedent's asserted right to bequeath the property but also actively aided decedent in making of her will thereby "waiving" plaintiff's rights to claim the property. Civ.Code, § 2230.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Appeal and error ⚷1010(1)

The trial court's findings supported by substantial evidence in record must be upheld on appeal.

3. Trusts 🔑237

The statute, prohibiting trustee from participating in transaction concerning trust in which he has an interest adverse to beneficiary except with beneficiary's permission, applied to action to impress a trust upon property which plaintiff had caused to stand in name of decedent, where plaintiff acquiesced and actively aided decedent in her claims adverse to plaintiff's interest with full knowledge of all facts which might affect plaintiff's decision. Civ.Code, § 2230.

4. Trusts 🔑237

A beneficiary consenting to course of conduct by trustee cannot thereafter attack the transaction.

5. Trusts 🔑231(1)

A rebuttable presumption of fraud and undue influence arises in any transaction by which trustee gains an advantage.

6. Appeal and error 🔑1008(1)

In action to impress a trust upon property which plaintiff had caused to stand in name of decedent, whether executrix overcame presumption of fraud and undue influence arising from trust relationship between plaintiff and decedent was for trial court. Civ.Code, § 2230.

7. Gifts 🔑49(1)
Trusts 🔑372(3)

In action to impress a trust upon property which plaintiff had caused to stand in name of person who later died, evidence sustained implied finding that plaintiff, at time of execution of will by such person bequeathing the property, made a gift of property to such person and that trusts then existing were then terminated.

8. Appeal and error 🔑1050(1)

In action to impress a trust upon property which plaintiff had caused to stand in name of decedent, admission of testimony of decedent's will and of inventory of her estate was not prejudicial notwithstanding neither will nor inventory was offered in evidence, where reference to will was made during trial to show plaintiff's acquiescence in decedent's adverse claims.

9. Appeal and error 🔑219(2)

The question whether findings were outside of issues raised by pleadings could not be raised for first time on appeal.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Herman Malinow against Lena Dorenbaum, as executrix of the estate of Glika Goldman, deceased, to impress a trust upon the real and personal property standing in the name of deceased. From a judgment for defendant, plaintiff appeals.

Affirmed.

Henry S. Cohen and Bernard B. Cohen, both of Los Angeles, for appellant.

Erlich & Alpert, H. P. Erlich, and Arnold D. Alpert, all of Los Angeles, for respondent.

E. P. MURPHY, Justice pro tem.

This is an appeal from a judgment in favor of defendant and respondent in an action brought by appellant to impress a trust upon certain real and personal property standing in the name of Glika Goldman, deceased, hereinafter referred to as the decedent. The defendant and respondent Lena Dorenbaum is the executrix of decedent's estate. Other named defendants were joined because they are banks in which the moneys involved were on deposit and they have no interest on this appeal.

The property here in litigation consists of several bank accounts standing in the name of decedent at the time of her death in 1940 but concededly the sole and separate property of appellant several years prior to that time. Also involved is a deed of trust to certain real property situate at Los Angeles, California, in which deed of trust the decedent is named as beneficiary.

The complaint alleged that a fiduciary relationship of trust and confidence existed between appellant and decedent and that the property involved was transferred to the name of decedent by appellant with the understanding that decedent would hold same in trust for appellant and upon decedent's promise and assurance that she would return same to appellant upon demand which, it is alleged, she failed and refused to do. The trial court so found and its findings in this respect are not challenged. However, in order properly to understand the issues raised on this appeal it is necessary to review the testimony concerning the relationship between appellant and decedent, the character of the property which constituted the trust res and the creation of the trust. It is substantially as follows:

Decedent was a niece of appellant and upon her arrival in California from Poland, her homeland, in 1926 she took up her residence with appellant in his home at Los Angeles and continued to live there until the time of her death in 1940. At the time of her immigration decedent was 48 years of age and appellant was 68 years old. She came to this country, at appellant's expense, and took up her residence with appellant under an understanding that he would support her and she would be his housekeeper.

In 1933 and 1934 appellant made two equal deposits totalling $4,000 in the United States post office in the name of decedent. In 1938 these post office deposits were transferred to two bank accounts opened in the joint names of decedent and appellant and in 1939 the accounts were transferred from their joint names to the separate name of defendant. This transfer was made in July, 1939, following decedent's return from the hospital where she had undergone an operation for cancer in the year 1938. In 1937 another $1,000 bank deposit had been made by appellant in the name of decedent and it remained unchanged in any respect. Appellant testified that when he opened these accounts he told decedent that he was doing so to protect her in case he died first and that during his lifetime she was to turn the money over to him on demand, to which arrangement she consented. He testified that his reason for transferring the accounts to the sole name of decedent was because of her threat to leave him unless he did so. He testified that on several occasions he had requested decedent to return the money on deposit to him but that she always refused or postponed doing so, replying that she was ill and suffering and did not want to be bothered about it. It also appears that certain other moneys and real property were similarly transferred to decedent but subsequently returned to appellant. The deed of trust to the Los Angeles property was executed in 1935 and named decedent as beneficiary but appellant paid the consideration for same. A balance of $600 remained due under said deed of trust at the time of the filing of the complaint herein.

It appears that a few weeks prior to her death in 1940 decedent made a will, under the terms of which appellant was to receive, for life, the income from the property devised and bequeathed thereunder and thereafter the estate was to go to certain named beneficiaries. The evidence is undisputed that decedent at no time owned or possessed any property other than that here involved and, although her will was not received in evidence, it is clear that the property devised and bequeathed thereunder is the same property that is the subject of this litigation.

In connection with the execution of decedent's will, the trial court found that appellant, by his conduct and acts, had not only acquiesced in decedent's asserted right to bequeath the property but had actively aided her in the making of the will and that he had, therefore, waived his rights and was estopped to claim the trust res as his own. Appellant contends that this finding is erroneous. We proceed, therefore, to a review of the testimony relating to the execution of the will.

Mr. Alpert, the attorney who drew the will, testified that about March 1, 1940, he was asked by respondent to go to the home of decedent to draw a will for her and that upon arriving there he was admitted by appellant who introduced him to decedent and told him that decedent wished to draw a will and that decedent "told me she had a few thousand dollars and other property and * * * she told me that she wanted the income of the property to go to Mr. Malinow" "and thereafter to go to her relatives and other friends, and some charity which is set forth in the will." He then testified that "At this point Mr. Malinow asked her what would become of him if he became ill, that he did not believe that the income would be sufficient to take care of him, so Glika Goldman turned to me and asked me if I could put a provision in the will that the bank would pay enough money over to him for his illness only, and no more, because she did not want any portion of it to go to his relatives. At that point he stated that he had had some disagreement with his relatives, that they did not treat him right, and that she did not want the money to go to his relatives." Later in his testimony, in response to a question asked by the court, the witness repeated that it was Mr. Malinow, the appellant, who stated to him that decedent did not want any of the property to go to his family because his relatives had not treated them well. He then testified that a week or two after the will had been drawn and sent to decedent, appellant brought it back to his office and told him that there were a couple of words in the will that decedent did not like and asked him to change them and that this was done and thereupon appellant paid him the sum of $10 and took the will with him.

The respondent, a neighbor of decedent, testified that she had known decedent for about three years; that appellant had told her that the doctor who attended decedent had stated that decedent did not have long to live because she had a cancer; that appellant at that time asked respondent if she could recommend an attorney, whereupon she recommended Mr. Alpert and appellant then requested her to ask Mr. Alpert to come to his house to draw a will for decedent. Respondent also testified that it was at the joint suggestion of decedent and appellant that she was named executrix in the will.

One of the subscribing witnesses to the will testified that at the time she witnessed it appellant was present and stated to her that he wanted everything he had given decedent to go to her relatives and not to his own relatives because they did not care for him. She also testified that the possibility of appellant becoming ill and being unable to take care of himself was mentioned at the time and that appellant then stated he trusted respondent to take care of him. The other subscribing witness did not testify, but it was stipulated that her testimony, if given, would be to the same effect.

Appellant's testimony in regard to the execution of the will was as follows:

"Q. Now, will you relate to the court just what was said by you and what was said by her when she told you she was going to make a will? A. I said to her that she has no right to make a will because she has no property at all, it is all mine. There was a certain time that I assigned to her for fear that I may die first and she be left in poverty, she be a burden to everybody, I didn't want her to be a burden to anybody because my children didn't need anything of my estate, and also they are well fixed, I thought she have the benefit of it, serving in my house, waiting on me and so on, when I am dead she entitled to what I have, and I am perfectly satisfied she should have it when I am dead, but before I die the property is mine, was my savings, I say, 'from the last fifty years that I made in Los Angeles, you want to give away to strangers, is that right.'

"Q. What did she say? A. She said, 'Mrs. Dorenbaum told me that as long as I have property in my name, or anything in my name, that I have the right to give to anybody I want.'

"Q. Was there anything said in case you refused to carry out her wishes about making the will? A. She says she is going to Mrs. Dorenbaum's, she make the will over there if I won't let her make the will in my house.

"The Court: Let me see if I correctly understand you: You say on this occasion when you discussed making a will, that she then said, in reply to your statement that she had no property, that so long as she had anything in her name, she had a right to leave it to anyone she wanted to. Is that the substance of it, and had she talked like that at any time before? A. No. There was a time when she went to the hospital for her operation, at that time she was faithful to her promise, and she gave me back the property which she had in her name, but afterwards there was a change in her attitude, I don't know why.

"Q. Will you explain what you mean about giving back the property? You mean the real estate? A. The real estate, yes sir.

"The Court: All right.

"Q. (Mr. Cohen): Mr. Malinow, did you have any other conversation with Glika along the lines you have just testified to, other than this one time? A. Oh, several times after the will was made, I kept on talking to her, when I see she doesn't feel very bad, so I thought we talk it over, bring the subject up again, that she is doing wrong, and sometimes she says, 'Don't bother me, don't you see I am suffering? Why you discuss with me about money? I am suffering, leave me alone.'"

Appellant admitted that he had taken the will to the office of Mr. Alpert to have the changes requested by decedent made, but denied any discussion as to his receiving the income from the estate for life.

Appellant's daughter testified that she had a conversation with decedent two days before the latter's death at which time decedent told her that she had done wrong and asked the witness to destroy the will. However, the following day this witness testified, in response to inquiries made by the court, that she had never discussed the will with decedent and that she knew nothing about the will until after decedent's death.

[1, 2] It can thus be seen that there is ample evidence to support the findings of the trial court to the effect that appellant

not only acquiesced in decedent's asserted right to bequeath the property in question, but that he also actively aided her in the making of the will, thereby waiving his rights to claim the trust res as his own. Appellant's testimony to the contrary simply created a conflict in the evidence which the trial court determined adversely to him; and it is well settled, of course, that this court must uphold the findings of the trial court if there is any substantial evidence in the record to support them. Andrews v. Reidy, 131 Cal.App. 334, 336, 21 P.2d 457; Coulter Dry Goods Co. v. Munford, 38 Cal.App. 231, 175 P. 900.

[3, 4] In its findings the trial court cited and apparently relied upon section 2230 of the Civil Code of this state, which provides that a trustee may not take part in any transaction concerning the trust in which he has an interest adverse to his beneficiary, except: "When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so." Although appellant challenges the applicability of this section of the code to the case at bar, we believe that it does apply here. As has been seen, appellant acquiesced and actively aided decedent in her claims adverse to his interest and it is clear that he did so with full knowledge of all the facts which might affect his decision. See Crenshaw v. Roy C. Seeley Co., 129 Cal.App. 627, 632, 19 P.2d 50. Moreover, it is well settled that where a beneficiary has consented to a course of conduct by the trustee, a rule permitting the cestui to attack the transaction later on would, as the court said in Colton v. Stanford, 82 Cal. 351, 378, 23 P. 16, 21, 16 Am.St.Rep. 137, "convert a rule intended to prevent fraud into one creating an incentive to, and a cover of, fraud." And see Bogert, Trusts and Trustees, Vol. 4, § 941; Walker v. Doak, 210 Cal. 30, 34, 290 P. 290; Miller v. Security-First Nat. Bank of Los Angeles, 219 Cal. 120, 129, 25 P.2d 420.

[5, 6] Although a presumption of fraud and undue influence arises in any transaction in a trust relationship by which a trustee gains an advantage, it is a rebuttable presumption. Whether respondent met the burden and overcame the presumption was for the determination of the trial court. Schurman v. Look, 63 Cal.App. 347, 355, 218 P. 624.

[7] Moreover, even if the doctrine of acquiescence declared by Civil Code section 2230 has no application, the evidence as above recounted clearly sustains the implied finding that plaintiff, at the time the will was executed, made a gift of the property to Glika Goldman, and that the trusts then existing were then terminated. His activities in connection with the execution of the will can be explained only on that theory. If this theory is sound, and we think it is, then Glika Goldman, of course, has testamentary power over the property.

[8] Neither the will of the decedent nor the inventory of her estate was offered in evidence, but testimony relating to the same subject matter was introduced over objection of appellant's attorneys, and it is contended that the trial court committed prejudicial error in receiving this evidence. We are satisfied that appellant was not prejudiced, as claimed, for it is apparent that reference to the will was made during the trial because it was a link in the chain of circumstances showing that appellant acquiesced in decedent's adverse claims and the will also figured in conversations bearing on the question of acquiescence on the part of appellant.

[9] Appellant also contends that since no special defense was pleaded, no special issues were raised by the pleadings and, therefore, the question of appellant's acquiescence was not an issue in the case and the findings in this respect were outside of the issues raised by the pleadings. This question was not raised during the trial, although evidence on that issue was introduced and it was treated as an issue in the case. The question cannot now, on appeal, be raised for the first time. Lawrence v. Ducommun, 14 Cal.App.2d 396, 399, 58 P.2d 407; Dunphy v. Guaranty Bldg., etc., Ass'n, 11 Cal.App.2d 419, 422, 53 P.2d 1036.

We find no error in the record and, therefore, the judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

51 Cal.App.2d 512

KING v. NEW MASONIC TEMPLE ASS'N.

Civ. 13355.

District Court of Appeal, Second District, Division 2, California.

April 28, 1942.

1. Appeal and error 🔑927(3)

In reviewing a judgment predicated on a motion for nonsuit, the reviewing court must view the evidence in the light most favorable to plaintiff.

2. Landlord and tenant 🔑167(8)

Where property is leased for a public or semi-public purpose, and it is not safe for that purpose or there is a dangerous condition, the existence of which is known to lessor or should be known by the exercise of reasonable diligence, lessor is liable to a third person for damages resulting from that condition.

3. Landlord and tenant 🔑164(1)

A lessor is not liable to his lessee for injuries resulting from unsafe condition of leased property.

4. Corporations 🔑1

A corporation is a distinct legal entity in the eyes of the law, separate and apart from its members.

5. Landlord and tenant 🔑167(8)
Tenancy in common 🔑3

Where incorporated club leased lodge room for meetings, plaintiff who sustained injuries in stepping into depression while attending meeting was not a "tenant in common" with club, but she was a "third person" to whom lessor owed duty of reasonable care to have premises in a safe condition.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant in Common" and "Third Person".

6. Landlord and tenant 🔑169(11)

In action against lessor for injuries sustained by plaintiff in stepping into a depression in lodge room leased by incorporated club while attending a club meeting, evidence was sufficient to go to the jury on questions whether lessor was negligent, whether negligence was a proximate cause of injuries, and whether plaintiff was contributorily negligent.

Appeal from Superior Court, Los Angeles County, Leslie E. Still, Judge.

Action for personal injuries by Florence R. King against the New Masonic Temple Association. From a judgment for defendant, plaintiff appeals.

Reversed.

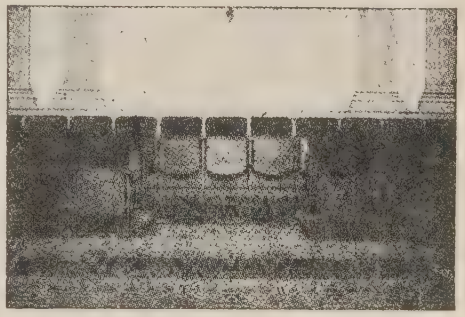
Cupp, Hunt & Henderson, of Los Angeles, and Joseph A. Ball and Kenneth Sperry, both of Long Beach, for appellant.

Spray, Davis & Gould, of Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendant New Masonic Temple Association after the trial court granted said defendant's motion for a nonsuit in an action to recover damages for personal injuries received by plaintiff.

The following is a picture of the accident hereinafter described:



[1] Viewing the evidence in the light most favorable to plaintiff, as we must in reviewing a judgment predicated on a motion for a nonsuit (Guyer v. Pacific Elec. Ry. Co., 24 Cal.App.2d 499, 500, 75 P.2d 550), the material facts are:

The Woman's City Club of Long Beach is a civic and social corporation organized pursuant to division 1, title 12, part 4 of the Civil Code. On October 6, 1939, the club had been in existence for approximately twenty-seven years and had a membership of several hundred women. Its affairs were managed and controlled by a board of directors and officers. Regular meetings of the club were held each Friday at 2 p. m. from October 1 to May 1. All members of the club paid a $2 initiation fee and annual dues of $2 each. A member was entitled to three guest cards per year. Non-members were admitted to club meetings upon the payment of 25 cents.

Gentlemen were welcome without charge at all regular meetings.

The Woman's City Club had been holding its regular meetings and programs since 1935 on the third and fifth floors of the New Masonic Temple, pursuant to an arrangement with defendant New Masonic Temple Association, which provided for the use of the fifth floor at $40 per meeting or the third floor at $20 per meeting, and which also provided that the lessor should furnish chairs for the meetings of the club. The lessee had nothing to do with preparing the room for occupancy, that matter being taken care of entirely by the lessor.

The room which was used on October 6, 1939, the date of the accident hereinafter described was known as the Corinthian Room and had three rows of fixed seats around the east, west, and north sides of the room, which were elevated on tiers, each row being six inches higher than the next preceding row. There were 118 stationary chairs on the west side of the room, an equal number on the east, and a somewhat lesser number on the north, with approximately 300 folding chairs in the open space in the center of the room. Access to the second and third tiers of seats on the west side of the room was obtained by the use of a passageway at the northwesterly corner of the room. The first row of chairs was on a platform six inches above the level of the floor and the other two rows were each six inches above the first and second rows respectively.

At about the center of the stationary seats on the west side of the room there was a break or open space between the first and second rows of seats. Instead of a six-inch step from the top row of seats to the next lower level there was a twelve-inch step. This opening was designed to accommodate a large chair when the room was used for lodge purposes. The covering of the floor, including the raised portions thereof at the side was all made of the same material. On the day in question the lodge chair had been removed by the janitor from the opening above described, and nothing had been placed therein, nor was the opening roped, nor was there any other indication that the opening was of a greater depth than the usual six-inch step from one level to another on the sides of the room. The opening thus left was five feet wide, five feet three inches from front to back, and twelve inches deep.

Prior to October 6, 1939, plaintiff had been in the Corinthian Room on two occasions. On the date mentioned she entered the room about 1:30 p. m. at the northwest corner, turned to her right and ascended by three steps to the top row of seats. She then went along the row until she came to a vacant seat which she occupied. A few minutes later she saw her sister enter the room, and, observing two seats together on the main floor of the room, arose from the seat, walked sideways along the aisle between the sceond and third row of seats toward the opening described above. When she reached the opening she stepped down, believing that there was merely a six-inch step. However, in place of the six-inch step was the twelve-inch depression and plaintiff fell, receiving personal injuries. To recover damages for her injuries she instituted the present action.

It is necessary for us to determine two questions which will be stated and answered hereunder seriatim.

First: Did the defendant lessor owe plaintiff a duty with respect to the condition of the leased premises?

This question must be answered in the affirmative and is governed by the following established principle of law:

[2] Where property is leased for a public or semi-public purpose and at the time is not safe for the purpose for which it is leased or there is a dangerous condition on the premises known to the lessor or which by the exercise of reasonable diligence he should have known existed, the lessor is liable to a third person for damages resulting from the condition of the leased property. (Boothby v. Town of Yreka City, 117 Cal.App. 643, 649, 651, 4 P.2d 589; Junkermann v. Tilyou Realty Co., 213 N.Y. 404, 108 N.E. 190, 191, L.R.A.1915F, 700; 32 Am.Jur. (1941), Landlord & Tenant, 668, 535.)

[3-5] De Motte v. Arkell, 77 Cal.App. 610, 247 P. 254 is inapplicable to the facts of the present case. In the De Motte case the lessee of the premises was the Odd Fellows Lodge which was an unincorporated association. Plaintiff De Motte was a member of the lodge and as such was a tenant in common with his fellow members of the leased premises and therefore was not entitled to maintain the action against the lessor under the established rule that a lessor is not liable to his lessee for injuries resulting from the unsafe condition of the leased property. In the instant case, however, the lessee was a corporation, which is a distinct legal entity in the eyes of the law and, therefore, separate and apart from its members. (6a Cal.Jur. [1932] 67, sec. 18; 73, sec. 21.) Hence, plaintiff was not a tenant in common of the leased premises with the corporation. She had no right to alter or make any changes in the leased premises and was not a tenant thereof. Therefore, so far as the instant case is concerned, she was a third party within the purview of the general rule above stated, and such rule is applicable to the present case.

Second: Did the evidence establish negligence on the part of the defendant lessor?

[6] For the purposes of the motion for a nonsuit this question must be answered in the affirmative. We believe the facts as stated above are susceptible of the fair inference that plaintiff having ascended three steps to attain the top row of seats was justified in assuming from the general construction of the room and the identity of pattern of the floor covering that there were three steps to the main floor, and that therefore defendant lessor was negligent in not providing a guard around the depression or a warning of some type.

These were questions which in our opinion should have been left to the determination of the trier of fact from all of the evidence presented. (See Oles v. Kahn Bros., 81 Cal.App. 76, 81, 253 P. 158; Touhy v. Owl Drug Co., 6 Cal.App.2d 64, 44 P.2d 405.)

Applying the above rules to the facts of the instant case, we find that plaintiff was a third person to whom defendant lessor owed a duty of reasonable care, that for the purposes of the motion for a nonsuit there was substantial evidence to sustain a finding that the lessor defendant was negligent, and that its negligence was a proximate cause of plaintiff's injury, also that plaintiff was not contributorily negligent.

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and W. J. WOOD, J., concurred.

51 Cal.App.2d 626

CAMPBELL et al. v. CITY OF SANTA MONICA.

Civ. 13227.

District Court of Appeal, Second District, Division 2, California.

May 1, 1942.

Hearing Denied June 29, 1942.

1. **Municipal corporations** ⚷740(1)

A city is liable only for its own shortcomings.

2. **Automobiles** ⚷297

The fact that city may reasonably foresee that motorists or pedestrians will use streets or sidewalks in a negligent manner to the injury of others does not make the city a joint tort-feasor with every motorist or pedestrian who uses them to the injury of another.

3. **Municipal corporations** ⚷762(3)

A city may by ordinance prohibit a misuse or negligent use of its streets and sidewalks, but its failure to enforce such an ordinance imposes no liability upon it, in the absence of statute.

4. **Municipal corporations** ⚷740(1)

By making and enforcing ordinances regulating the use of streets and sidewalks, a city exercises a "governmental power", so that for any breach thereof, the city is not liable. Gen.Laws 1937, Act 5149.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Power".

5. **Automobiles** ⚷308(1)

The question regarding the extent of duties which are imposed by the Public Liability Act is a "question of law" to be determined by court, and not a "question of fact" for jury, in action for injuries sustained by pedestrian struck by automobile being operated on sidewalk. Gen.Laws 1937, Act 5149.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

6. **Municipal corporations** ⚷762(3)

The scope of protection afforded by Public Liability Act making city liable for dangerous or defective condition of public streets and property is against a physically dangerous or defective condition of the streets and sidewalks, and the statute is not designed to protect against moving objects. Gen.Laws 1937, Act 5149.

7. Automobiles ⚿278

Where city restricted use of sidewalk to pedestrians and motor vehicles which held permits from chief of police, city was not liable for injuries sustained by pedestrian struck by automobile which was unlawfully operated on the sidewalk, notwithstanding failure of city to erect barriers or warning signs. Gen.Laws 1937, Act 5149.

◆

Appeal from Superior Court, Los Angeles County; Rex Hardy, Judge pro tem.

Personal injury action by John Michael Campbell, a minor, etc., and others, against the City of Santa Monica. From an adverse judgment, the City of Santa Monica appeals.

Reversed.

Hearing denied; CARTER, J., dissenting.

Jennings & Belcher and Louis E. Kearney, all of Los Angeles, for appellant.

Joseph Scott, J. Howard Ziemann, and Cuthbert J. Scott, all of Los Angeles, for respondents.

HANSON, Justice pro tem.

The question for decision is whether the defendant city is liable for injuries sustained by plaintiff John M. Campbell, a minor, as a result of being struck by a privately owned automobile driven by a member of the public along a wide sidewalk known as the "Promenade."

The Promenade, or sidewalk, located in the city of Santa Monica, runs parallel to the Pacific Ocean and immediately adjacent to its beach for a distance of approximately two miles. The Promenade is of concrete and is twenty feet in width. As indicated, it is a promenade or walk for the use of pedestrians, and is in no sense a highway for general public use. However, owing to its substantial construction and width an ordinance of the city authorizes its chief of police under certain conditions to grant special permits to trades people to drive upon it for the special purpose of making deliveries of merchandise to residents who live alongside of it, whether they do or do not have direct means of egress and ingress to the main traveled thoroughfare, Roosevelt Highway, that parallels it some one hundred feet to the east. Otherwise, the ordinance in question bars all vehicular traffic upon the Promenade as well as on all other sidewalks in the city except at and within intersections with driveways or streets. A street known as Colorado runs east and west in Santa Monica across the Promenade to a large pier in the ocean, onto which vehicular traffic is permitted. Immediately to the south of Colorado Street is Moss Street, which runs parallel to Colorado Street and which also crosses over the Promenade and terminates at the pier without requiring the use of the Promenade except as a point for crossing.

At the time of the accident an overhead crossing or bridge was being erected from the pier above the Promenade and the highway which parallels it. At the time, the bridge construction which was being carried on blocked traffic along the highway. Accordingly, a motorist coming on the highway from the south was compelled at Moss Street, the first street to the south of Colorado, to turn left onto that street, as it was blocked to the east. Upon turning left his way led to the pier. However, Seaside Street, immediately to the south of Moss Street and running parallel to it, had a large "detour" sign with an arrow pointing to the right, which was plainly visible to motorists. The defendant Hoyt, who was driving a car owned by defendant Schmalzer, wishing to drive north, disregarded the sign at Seaside and, finding his way blocked at Moss Street, turned to the left, as he could not there turn to the right. As a consequence he found his only alternative to driving onto the pier, and there turning around and retracing his route, was to turn onto the Promenade. This he did, and after he proceeded on it for about a mile he struck and seriously injured the minor plaintiff, who was in the act of running across the Promenade.

While plaintiffs named the driver and owner of the car as defendants along with the city of Santa Monica, they dismissed their action against them on the trial and proceeded only against the city and its officers. The trial court, sitting with a jury, directed a verdict against the city's officials other than the mayor, but refused to direct a verdict in favor of the city and its mayor. The jury returned a verdict in favor of the mayor but against the city, and assessed the total damage in the sum of $11,905.

Plaintiffs predicated liability against the city on the theory that it was proximately negligent (1) in permitting vehicular traffic on the Promenade, (2) in not erecting signs or barriers to prevent automobiles from using the Promenade, and (3) in not erecting signs to warn pedestrians of the presence of vehicular traffic on the Promenade. The case was submitted to the jury on these grounds. In the view we take of the case we see no actionable negligence on the part of the city on the record submitted to us. For that reason we shall have no occasion to discuss rulings on evidence nor some of the challenged instructions which are claimed to be prejudicial.

[1-4] The problem before us is not one of legal causation, which is argued at length, but of defining the boundaries of municipal liability. It is axiomatic that a city is liable only for its own shortcomings. Where a city provides streets or sidewalks, or both, it does so with the expectation that motorists and pedestrians will make a lawful and not an unlawful use of them. The fact that the city may reasonably foresee that some motorists and pedestrians will use them in a negligent manner to the injury of others does not make it a joint tort-feasor with every motorist or pedestrian who uses them to the injury of another. While a city may by ordinance prohibit a misuse or negligent use of its streets and sidewalks, its failure to enforce such an ordinance imposes no liability upon it, in the absence of statute. This is so regardless of whether its failure is occasioned by want of barricades or signs or for want of necessary police officers. In the instant case the city, although not required to do so, posted detour signs at the very points such signs would be of help to a motorist who chose to regard them rather than to disregard them. The city did all and more than it was required to do. By statute the cities of this state are required, where they provide streets and sidewalks, to construct and maintain them so that they are neither defective nor dangerous to the traveling public. But neither this statute nor any other imposes a duty upon the city to control their use so as to avoid accidents upon them. By making and enforcing ordinances regulating the use of streets and sidewalks the city exercises a governmental power, and so for any breach thereof there is no liability upon it.

[5-7] What duty, then, did the city owe to the plaintiffs? The answer is, none, except for such rights, if any, as are accorded by the Public Liability Act, Gen.Laws 1937, Act 5149. The question as to the extent of the duties which are imposed by that act is one of law, to be determined by the court, and not one of fact for the jury. Under the act mentioned the city is liable only for a "dangerous or defective condition of [its] public streets * * * and property." The scope of the protection afforded by the statute is against a physically dangerous or defective condition of streets and sidewalks. The statute is not designed to protect against moving objects such as motor vehicles upon streets or highways, but only as to risks directly due to a physically dangerous or defective street or sidewalk. Here the Promenade itself was neither dangerous nor defective. The harm in this case was caused, not by the condition of the Promenade or the want of barriers or signs barring its use by vehicles without a permit, but by the negligent operation of a motor vehicle. It rested with the legislative body of the city to regulate the use of the Promenade. That body chose to restrict its use to pedestrians and motor vehicles which held a permit from its chief of police. It could have restricted the use to pedestrians only or to motorists only, or permitted its use by both. The city owed the plaintiffs no duty to restrict the use nor to barricade against motorists who did not hold permits to use it. The Promenade is not dangerous nor defective just because it is so constructed that motor vehicles can readily drive upon and along it.

Upon the evidence in this case there was nothing to submit to the jury, and so the city's motion for a directed verdict should have been granted.

Judgment reversed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

51 Cal.App.2d 653

EASTMAN et al. v. ATCHISON, T. & S. F. RY. CO. et al.

Civ. 11795.

District Court of Appeal, First District, Division 1, California.

May 4, 1942.

Rehearing Denied June 3, 1942.

Hearing Denied July 2, 1942.

1. Railroads 🔑348(4)

Failure to comply with statutory regulations as to ringing bell and blowing whistle of train upon approaching a street crossing is "prima facie evidence" of negligence. Civ.Code, § 486.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

2. Appeal and error 🔑1002

Where the evidence was conflicting as to whether train crew complied with statutory requirements as to ringing bell and blowing whistle upon approaching a street crossing, the implied finding of the jury adverse to railroad company was binding on appeal. Civ.Code, § 486.

3. Appeal and error 🔑1002

Testimony of a witness who was in a position to hear the bell or whistle of a locomotive approaching street crossing that he heard neither was sufficient to raise a conflict with positive testimony that such warnings were given so as to render implied finding of the jury adverse to railroad company binding on appeal. Civ.Code, § 486.

4. Evidence 🔑588

Court may reject positive testimony where its inherent improbability is such as to deny it all claim to belief, or where the witness is in some manner impeached.

5. Evidence 🔑574

Evidence as to the mechanical impossibility that an electrically controlled wigwag crossing signal, having failed to go into operation when train reached contact point 760 feet from crossing, should commence to operate only when the train entered the crossing and as to inability of witness to see signal at that time was insufficient to warrant rejection of positive testimony of witness that he observed the signal three separate times while approaching crossing in automobile, and that it did not begin to operate until train entered crossing.

6. Appeal and error 🔑1002

Conflicts in the testimony must be resolved in the trial court.

7. Appeal and error 🔑994(2), 1003

The credibility of witnesses and the weight to be given to their testimony are matters which necessarily ought to be determined by the triers of the facts.

8. Evidence 🔑586(3)

Testimony of one witness that as he approached grade crossing in an automobile he observed wigwag signal three separate times and that it did not commence operating until train entered crossing, and that he heard no warning signal either by whistle or bell, notwithstanding testimony to the contrary by numerous other witnesses, was sufficient to establish negligence of the train crew, rendering railway company liable for death of motorist in another automobile struck by train at the crossing.

9. Negligence 🔑136(9)

It is only where but one conclusion can reasonably be drawn from the evidence that the question of negligence becomes a "question of law" for the court to determine.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

10. Negligence 🔑136(3, 9)

Even in the absence of conflict in the evidence, contributory negligence is a "mixed question of law and fact" which should be left to the jury if different conclusions upon the matter may rationally be reached from the evidence adduced.

See Words and Phrases, Permanent Edition, for all other definitions of "Mixed Question of Law and Fact".

11. Railroads 🔑324(1)

The tracks of a steam railroad are a sign of danger so that one intending to cross must avail himself of every opportunity to look and listen, the degree of care to be exercised being dependent upon the circumstances.

12. Railroads 🔑328(1)

If there are obstructions to the view, one about to cross a railroad crossing is required to exercise a greater amount of care.

13. Railroads 🔑330(2)

A traveler, approaching a railroad crossing at which a bell or warning device has been erected, is not required to exercise the same degree of care for his own safety as if no such device were provided, but neither may he blindly rely upon such device, but, knowing he is approaching a point of danger, he must exercise reasonable care in looking and listening for any approaching train.

14. Railroads ⚷350(28)

Where there was evidence that no warning of train's approach to crossing was given by bell or whistle, as required by statute, and that wigwag warning signal was not operating, whether motorist was guilty of contributory negligence barring recovery for his death resulting from train colliding with his automobile was for the jury. Civ.Code, § 486.

15. Death ⚷58(1)

Where death results from an accident so that the lips of the injured party are thus sealed, the presumption, in the absence of evidence to the contrary, that deceased exercised ordinary care for his own safety is "evidence" in the case and is to be so considered, unless the evidence of the party in whose favor the presumption is sought to be invoked is in conflict therewith.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

16. Death ⚷58(1)

Where presumption that deceased exercised ordinary care for his own safety is not controverted by evidence of the party in whose favor the presumption is sought to be invoked, such presumption raises a conflict with the opposing evidence of adverse party, and jury is warranted in finding in accordance with the presumption.

17. Death ⚷103(1, 3)

Where evidence adduced at trial of death action did not establish as a matter of law that decedent was guilty of contributory negligence and was legally sufficient to establish negligence of defendants, defendants' motions for directed verdicts were properly denied.

18. Railroads ⚷351(18)
Trial ⚷296(4)

Instructions that the same quantum of care is not required in crossing railroad tracks guarded by a warning safety device as in crossing an unguarded crossing were not subject to criticism that jury was thereby given erroneous impression that if wigwag signal was not working, decedent was not required to look and listen before crossing tracks, particularly in view of other instructions with respect to the care required before driving a vehicle across railroad tracks.

19. Appeal and error ⚷1064(1)

An instruction correctly stating the care required of a person before driving a vehicle across railroad tracks was not rendered prejudicially erroneous as tending to confuse jury by qualifying statement that such duty of care is not an absolute one that the law can or does arbitrarily standardize in advance for all circumstances.

20. Death ⚷58(1)
Evidence ⚷60, 89

That there were eyewitnesses to grade crossing collision between train and automobile resulting in death of motorist did not render inapplicable the presumptions of law to which each party was entitled at the outset of the trial that every person takes ordinary care of his own concerns and that he obeys the law, which presumptions are a form of prima facie evidence that will support finding in accordance therewith in the absence of evidence to the contrary and must be weighed against evidence in conflict therewith to determine which, if either, predominates.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Mary Belle Eastman and others against the Atchison, Topeka & Santa Fe Railway Company and others for the death of Lawrence W. Eastman resulting from a collision between an automobile driven by decedent and a passenger train. From a judgment in favor of plaintiffs, defendants appeal.

Judgment affirmed.

Hearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

Robert Brennan, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellants.

Nichols & Richard, of Oakland, and Arthur L. Shannon, of San Francisco, for respondents.

KNIGHT, Justice.

Defendants appeal from a judgment for $20,000 entered upon the verdict of a jury in an action for damages arising out of a collision between a local, five-car Santa Fe passenger train and an automobile driven by Lawrence W. Eastman. The collision occurred about 8:30 p. m., Saturday, June 24, 1939, in the city of Albany, at the Solano Avenue crossing of the Santa Fe track. Eastman was the sole occupant of the automobile, and he died shortly after the accident from the injuries received. At the close of the evidence defendants moved for directed verdicts upon the following grounds: that plaintiffs failed to prove that the defendants, or either of them, were guilty of any negligence that proximately contributed to the accident; that the evidence proves that plaintiffs' decedent was guilty of negligence that proximately contributed to the accident; and that there was not sufficient evidence of negligence to support a verdict. The motions were denied. As ground for reversal defendants urge that the evidence is legally insufficient to sustain the verdict and judgment; that the trial court erred in denying their motions for directed verdicts; and that it gave instructions at the request of plaintiffs and of its own motion which were prejudicially erroneous.

Solano Avenue runs in a generally east-west direction. It is the main artery through the city, and along the center the Southern Pacific Company maintains a single track thereon for its interurban trains. It is intersected by Masonic Avenue, and approximately 75 feet east of the Masonic Avenue intersection the Santa Fe main line single track runs parallel with Masonic Avenue, and crosses Solano Avenue in a northerly and southerly direction. The defendant company maintained a wigway signal on the north curb line of Solano Avenue, about 15 feet west of its track; also a cross-arm signal on the opposite side of the street. The wigwag signal consisted of a pendulum-like disk which when set in motion oscillated back and forth, and automatically turned on a red light and started the ringing of a bell. A two-story structure, 20 by 20 feet, called the Masonic Tower, stood just west of the wigwag, about 40 feet west of the Santa Fe track, and 15 or 20 feet north of the north curb line of Solano Avenue. It was owned and maintained by the Southern Pacific Company, wherein it kept a tower-man to give signals for the operation of trains of both railroad companies over the crossing. There was a hedge growing a few feet distant from the easterly side of the tower and parallel therewith; also a couple of small trees; and two poles stood near the hedge, all within the property line.

The decedent was a real estate salesman and lived near the scene of the accident. Shortly before it occurred he had phoned to his wife from San Pablo Avenue that they were going out for the evening with some other salesmen, and he told her he would pick her up in a few minutes in front of a drug store on Solano, about a block from their home, where he would stop for some cigarettes. He drove easterly along Solano Avenue, and as he was crossing the track his car was struck by the train which entered the crossing from the north side. The record is barren of any evidence showing that upon approaching the track the decedent slackened the rate of speed he was travelling, and it affirmatively shows without conflict that before attempting to cross the track he did not stop; but it was claimed by plaintiffs that the wigwag signal did not start operating until the engine entered the crossing, and that the engine crew gave no warning whatever of the approach of the train. On those issues defendants introduced an abundance of convincing testimony showing that the wigwag was in full operation continuously from the time the train reached a point more than 500 feet up the track; furthermore that the locomotive whistle was sounded twice, the first time several hundred feet distant from the crossing, and again as it reached and entered the crossing; and that the engine bell was ringing and its headlight burning. But the question here presented is whether it may be so held as a matter of law in view of contrary testimony given by a witness produced by plaintiffs who saw the accident as he approached the crossing in his automobile from the west side.

The following is a résumé of the evidence relied on by defendants: The Southern Pacific tower-man, stationed in the Masonic Tower, testified that he heard the train whistle first when it was probably half a mile north of the intersection, and he cleared the signals for the passing of the train; that when the train was 700 or 800 feet away he heard it give the regular crossing whistle—two long blasts and two short; and it whistled again just before it crossed Solano Avenue; that it started to give the regular crossing whistle but "there was something peculiar about the last two whistles that drew my attention that there might be something wrong"—"when he started to whistle these two last shorts he kind of drawed one out a little bit, that's what called my attention, so I thought something was wrong, and I glanced across the street and I saw this automobile speeding there almost to the train"; that the automobile was then 40 or 50 feet from the track, travelling toward the train at a "very high rate of speed," estimated by the witness to be from 35 to 40 miles an hour. He further testified that when the train was 500 or 600 feet away the wigwag began to operate; that when the engine was 500 feet away the wigwag was working—the bell on the wigwag was ringing and the light was burning; that he had seen the headlight of the engine when it was 300 or 400 feet up the track; and that the train was travelling 12 or 15 miles an hour; that when it stopped the engine and the first car were just past the south curb line of Solano Avenue, and the third car was right across the street.

The engineer of the train (one of the defendants herein) giving his testimony by way of deposition, testified that the train was travelling between 13 and 15 miles an hour as it approached the crossing at Solano Avenue; that the engine had an automatic bell which was ringing, and the last time he sounded the whistle was just before he reached Solano Avenue, and that he stopped sounding it only upon reaching the street. In describing the accident he stated he first saw the automobile about 20 feet from the track, east of the signal tower; it was "coming at a pretty good rate" and he "couldn't tell whether it was going to hit the pilot or not"; it "dashed right across in front of the engine," and the moment he saw it he immediately applied the emergency brakes, shut the throttle off and turned on the "sanders," but before he could fully apply the brakes the train hit the automobile; that the train stopped about a car's length after the impact, the third car blocking the street. He stated that he did not notice whether the wigwag was operating as he approached the crossing, but that it was in full operation the entire time the train stood on the crossing; and that after he backed the train to clear the crossing he got out to investigate and the wigwag was still working.

The fireman on the train testified that the train was travelling about 15 miles an hour; that the bell was ringing automatically—the engineer had turned it on at Richmond; that the first whistle was given when the train was about 300 feet north of the crossing—"two longs and two shorts"—and then it sounded as if the engineer started to blow another crossing whistle and ended with a long blast; that his attention was attracted by this whistle, and he glanced over in time to see the engineer "turn loose the whistle cord and grab the emergency brake valve"; that he then saw the headlights "coming through" the front end of the locomotive (he was on the opposite side from which the automobile was approaching), and he next saw the automobile come out on the left (his) side of the locomotive and roll over into the vacant lot. Afterwards the train was backed over the crossing and the fireman said he and the engineer both got down and examined the wigwag and it was working.

In addition to the foregoing, defendants produced two witnesses who lived near the scene of the accident, and they testified that they heard the warning given of the approach of the train. One, Don Carter, lived on the corner of Masonic and Solano, on the south side of Solano, and was in his bathroom on the east side of the building (facing the track). He testified that he heard the train coming, and "the thing that called my attention to something being wrong was a long blast of the whistle, and then I heard a crash"; that the train gave the ordinary two long and two short blasts, and then a long warning blast immediately before the crash occurred. The other witness was Mrs. Harriss, who lived about 300 feet north of Solano, between Masonic and the Santa Fe tracks. She testified that she heard the train whistle just before it passed her house; that it was whistling as it went by, and the bell was ringing; that her little 20 months old daughter heard the whistle and wanted to watch the train go by, which was the reason Mrs. Harriss noticed the train; then suddenly it became very quiet and she went to look, and saw the train had stopped, the rear end of it just opposite the house next to Harriss's.

The witness produced by plaintiffs was William J. Yore, an employee of the National Park Service. He was driving a Plymouth coupe and was accompanied by his mother-in-law, who sat beside him holding in her lap Yore's infant niece, a year and a half old. Yore testified that he was driving westerly on Solano Avenue, about 15 to 20 miles an hour; that when he reached a point about 100 feet from the railroad track he looked north and could see some 300 feet up the track, but did not see or hear any train; that he looked at the wigwag and it was not operating; that when he was 60 or 70 feet from the track he could see 400 or 500 feet up the track but still saw no train; that he looked at the wigwag again and it was not operating; that when he was about 50 feet from the track he saw the decedent's car approaching in the opposite direction, about 30 feet from the track; that it was "proceeding at a leisurely rate"; that when he (the witness) was about 30 feet from the track he saw the headlight of the approaching train, which was then 60 or 70 feet up the track, and he pulled in to the curb and stopped about 12 or 15 feet from the track; that the wigwag was not going just before the train hit the crossing, but as the train came up to the crossing and just before it passed in front of him the wigwag started and he heard "a very slight bell"; that up to that time he heard no bell at all, and at no time did he hear any whistle.

[1-3] It is doubtless the law that failure to comply with the regulations prescribed by section 486 of the Civil Code as to ringing the bell and blowing the whistle of a railroad train upon approaching a street crossing is prima facie evidence of negligence on the part of the railroad company (Parker v. Southern Pacific Co., 204 Cal. 609, 269 P. 622; Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291, 24 P. 661); and that where the evidence is conflicting as to whether the train crew complied with such statutory requirement, the implied finding of the jury adverse to the railroad company is binding on appeal. Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327; Pietrofitta v. Southern Pacific Co., 107 Cal.App. 575, 290 P. 597; Hoffman v. Southern Pacific Co., 215 Cal. 454, 11 P. 2d 387. Furthermore, the courts have held that if a witness is in a position to hear the bell or the whistle of the locomotive and he testifies he heard neither, such testimony is sufficient to raise a conflict with positive testimony to the contrary that such warnings were given. Jones v. Southern Pacific Co., 74 Cal.App. 10, 239 P. 429; Lindsey v. Pacific Electric Ry. Co., 111 Cal.App. 482, 296 P. 131; Lahey v. Southern Pacific Co., 16 Cal.App.2d 652, 61 P. 2d 461; Hamilton v. Pacific Electric Ry. Co., 12 Cal.2d 598, 86 P.2d 829; Thuet v. Southern Pacific Co., 135 Cal.App. 527, 27 P.2d 910. Applying those legal principles to the state of the record here, it is apparent that unless some legal justification is shown for the rejection of Yore's testimony, it is sufficient to support the implied finding of the jury that defendants were negligent, irrespective of the amount of testimony introduced by them in contradiction thereof.

[4] Defendants contend, however that with respect to Yore's testimony the situation calls for the application of the rule that a court may reject positive testimony where its inherent improbability is such as to deny it all claims to belief (Dierks v. Newsom, 49 Cal.App. 789, 194 P. 518; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513); that this rule applies where the testimony bears within itself "the seeds of its own destruction," as where it is inherently improbable, or its destruction is wrought from without, as where the witness is in some manner impeached (Market Street Ry. Co. v. George, 116 Cal.App. 572, 3 P.2d 41, 43); and that this is such a case; that beyond doubt Yore's testimony was proved to be inherently untrue. The main point defendants make in this behalf is that the uncontradicted evidence produced by them as to the construction and mechanical operation of the wigwag proves conclusively that it was mechanically impossible for the wigwag to start operating as claimed by Yore, just as the train reached the crossing. The evidence consisted of the testimony given by C. M. Morris, the signal maintainer for the Santa Fe in that district; and the facts established thereby were these: An electric wire or connection runs northward from the Solano Avenue crossing where the signal is installed to a point 760 feet up the track, and at the end of the wire there is a device that starts the wigwag operating. It is at that point that the train makes the contact from one rail to the other by shorting the circuit and starting the wigwag. The contact is made by the first wheels of the locomotive, so that when the locomotive passes over the point of contact 760 feet north of the crossing the wigwag starts operating. The contact can be made at no other point north of the crossing, and after the wigwag is started it will not stop until the train passes over the Solano Avenue crossing. There the relay interlocks and the signal stops operating. While the train stands on the crossing the wigwag operates continuously. He testified positively that there was no possible way of starting the wigwag by a train approaching from the north except from

this point of contact 760 feet north of the crossing; that if it does not start when the train reaches that point, it will not start at all. Furthermore he testified that in performing his duties as signal maintainer he had inspected this wigwag the day before the accident and two days after the accident; that on both inspections the wigwag was in perfect working order; that the work of inspection consists in cleaning the wigwag and seeing if the contacts are good; then placing a bar across the track at the contact point, which drops the relay at the wigwag and starts its operation.

Another point made by defendants is that if as Yore claimed the wigwag did not start to operate until the engine crossed into the intersection, he could not have seen the wigwag start at all because at that very moment it was cut from his view by the passing train. They make the additional point that according to Yore's testimony as to the speed of the train and of his automobile, and the distances travelled by each, the train must have travelled over 400 feet in less than a second, which they claim was impossible. Finally, defendants refer to the apparent unusual interest Yore took in the case, by going out to the scene of the accident on two different nights following the coroner's inquest. The first night he took certain measurements by pacing the distances; and the second night he spent an hour counting the automobiles passing over the crossing.

[5-8] We are of the opinion that the facts and circumstances relied upon by defendants are not of such a character as would warrant the rejection of Yore's testimony under the rule defendants seek to invoke; but on the contrary that they properly fall within the operation of the well-settled doctrine that conflicts in the testimony must be resolved in the trial court, and that the credibility of witnesses and the weight to be given to their testimony are matters which necessarily must be determined by the triers of the facts. Yore's testimony as to the operation of the wigwag is not comparable with that challenged in the case of Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992, cited by defendants, for there the testimony of the witness as to whether the wigwag was moving and was lighted with the bell ringing as he approached the crossing was, as the court there stated, negative and amounted to no more than that he saw the wigwag for the first time when within 6 feet of the crossing, and that its movements within his view began at that time; while here Yore testified that he observed the wigwag three separate times; first when he was 100 feet from the crossing, again when he was about 60 or 70 feet therefrom, and a third time when he was 30 feet from the crossing, and that at none of those times was it operating. It is our conclusion, therefore, that for the reasons hereinabove stated, defendants' contention that the evidence is not sufficient to establish negligence on their part is not sustainable.

[9-13] Nor can we uphold defendants' second major contention that the evidence as a matter of law establishes contributory negligence on the part of the decedent. It is only where but one conclusion can reasonably be drawn from the evidence that the question of contributory negligence becomes one of law for the court to determine. Even in the absence of conflict in the evidence, contributory negligence is a mixed question of law and fact which should be left to the jury, if different conclusions upon the matter may rationally be reached from the evidence adduced. Robbins v. Southern Pacific Co., 102 Cal.App. 744, 283 P. 850. In dealing with the question of contributory negligence in cases of this kind, the court in Will v. Southern Pacific Co., 18 Cal.2d 468, 116 P.2d 44, 47, said in part: "The tracks of a steam railroad are a sign of danger, and one intending to cross them must avail himself of every opportunity to look and listen. The degree of care to be exercised is dependent upon the circumstances in the particular case. If there are obstructions to the view, one is required to take a greater amount of care. Herbert v. Southern Pac. Co., 121 Cal. 227, 53 P. 651. However, the same quantum of care is not required of a traveler approaching a railroad crossing at which a bell or signal has been erected to warn him of danger. Vaca v. Southern Pac. Co., 91 Cal.App. 470, 267 P. 346; Gregg v. Western Pac. R. R. Co. [supra] 193 Cal. 212, 223 P. 553; Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183. A railroad company will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk in railroad crossings by assuring them, through the erection of safety devices, that the danger has been removed or minimized, and, at the same time, to hold them to the same degree of care as would be required if those devices had not been provided.

Gregg v. Western Pac. R. R. Co., supra; Marini v. Southern Pac. Co., 201 Cal. 392, 257 P. 74. This does not mean that a person approaching a guarded crossing may blindly rely upon the absence of warning by a watchman, or the silence of an automatic signal, and proceed without further regard for his own safety. Knowing that he is approaching a point of danger he must still use reasonable care in looking and listening for any approaching trains. Failure to do so constitutes contributory negligence, as a driver may not cross tracks in reliance upon the safety appliances installed by the railroad with complete disregard for his own safety and recover damages for injuries sustained by reason of his own failure to use reasonable care. Crawford v. Southern Pac. Co., supra." In addition to the cases above cited there should be added Ogburn v. Atchison, etc., Ry. Co., 110 Cal.App. 587, 294 P. 491, 494, wherein several of the cases cited in Will v. Southern Pacific Co. are reviewed; and in quoting from Gregg v. Western Pac. R. R. Co., 193 Cal. 212, 223 P. 553, it is said: "If a reasonably prudent person situated as appellant was situated, and seeing what he then saw and knew, would have been justified in acting upon appearances as appellant assumed to do, or, if reasonably prudent men would disagree as to whether appellant exercised ordinary care in the premises, then the case should have gone to the jury. The invitation to cross, the failure to ring the bell or sound the whistle, as required by the provisions of section 486, Civil Code, are elements which must be considered with all the other facts and circumstances of the entire case."

[14] The present case is admittedly a guarded crossing case, and testimony was placed before the jury that as the train neared the crossing the engine crew gave no warning of its approach and the wigwag was not operating. Therefore, under the circumstances of the case and the law as declared in the decisions above cited, a lesser degree of care was reasonably to be expected from the decedent than would have been the case had the wigwag signal not been installed and used at that particular crossing. While the presence of this automatic device did not relieve the decedent from exercising such care for his own protection as was reasonable under the circumstances, the question of the precise measure of care still legally required of him was not a question of law, but depended upon the circumstances there existing, and was one of fact upon which the jury's determination is conclusive on appeal. Lahey v. Southern Pacific Co., 16 Cal.App.2d 652, 61 P.2d 461; Ogburn v. Atchison, etc., Ry. Co., supra; Will v. Southern Pacific Co., supra.

[15, 16] Defendants state that if the decedent had exercised ordinary care he would have seen the headlight of the approaching train; but under the rule of the authorities cited, this was one of the questions of fact to be considered and determined by the jury. To this may be added the application of the principle that where death has resulted from the accident and the lips of the injured party are thus sealed, it will be presumed, in the absence of evidence to the contrary, that the deceased exercised ordinary care for his own safety. Robbins v. Southern Pacific Co., supra, citing Larrabee v. Western Pac. R. R. Co., 173 Cal. 743, 161 P. 750. This presumption is evidence in the case, and is to be so considered, unless it is overcome by satisfactory evidence, that is, unless the evidence of the party in whose favor the presumption is sought to be invoked is in conflict therewith (Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529); where it is not so controverted, it merely raises a conflict with the opposing evidence, and the jury is warranted in finding in accordance with the presumption. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590, citing numerous cases; Smellie v. Southern Pacific Co., supra.

[17] Since, therefore, the evidence adduced at the trial did not establish as a matter of law that the decedent was guilty of contributory negligence, and was legally sufficient to establish negligence on the part of defendants, the motions for directed verdicts were properly denied.

[18] The first four instructions assigned as erroneous are obviously based on the legal doctrine declared in the cases above cited, especially the Robbins, Gregg, Ogburn and Will cases, to the effect that a person crossing a railroad track guarded by safety devices is not required to exercise the same quantum of care which would be required of him if he were crossing an unguarded crossing. Defendants' criticism of the instructions is that they were calculated to give the jury the impression that if the wigwag was not working the decedent was not required to carefully look and

listen before crossing the railroad track, and that therefore the instructions were misleading. We do not agree that the instructions are subject to such criticism, and especially when they are read and considered with the following instruction which the court also gave: "You are further instructed that the tracks of a railroad when visible are in themselves a warning of danger. Before one drives a vehicle into the space which would be occupied by a train if it were to pass over such tracks, it is his duty to use every reasonable opportunity to look and listen for the approach of train, engine or car on the tracks, and what is included in the term 'every reasonable opportunity,' depends on all the surrounding circumstances as they would be met and viewed by a person of ordinary prudence if he occupied the same position as the one whose conduct is in question. If the view of the tracks is obstructed, then greater caution is required in approaching them. If the obstruction is such that one cannot obtain, without stopping, a reasonably assuring view of the tracks, in both directions, before entering the dangerous track area, then ordinarily it is his duty to stop, and if necessary to alight from his vehicle to obtain such a view. However, the duty I have mentioned of making precautionary observations of railroad tracks is not an absolute one; that is to say, it is not one that the law can arbitrarily standardize in advance for all circumstances, nor does the law attempt to do so."

[19] However, defendants attack the correctness of this latter instruction upon the ground that the qualifying words of the last sentence thereof "make a highly prejudicial instruction out of what, without them, would have been a good instruction." In this regard defendants state that the court first lays down the correct standard of conduct and then in the last sentence "strikes down this standard of conduct" and thus confused the jury. It is evident, however, that the language used in said last sentence cannot be deemed prejudicial because it is founded upon and substantially conforms to the legal doctrines stated in Robbins v. Southern Pacific Co., supra; Ogburn v. Atchison, etc., Ry. Co., supra; Hoffman v. Southern Pacific Co., 101 Cal. App. 218, 281 P. 681; also Cooper v. Southern Pacific Co., 43 Cal.App.2d 693, 111 P. 2d 689, which may be taken as additional authority in support of the conclusions arrived at herein respecting the matter of conflicting evidence and the issue of contributory negligence.

[20] The following is the remaining instruction to which defendants object: "At the outset of this trial each party is entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence, and will support findings in accordance therewith in the absence of evidence to the contrary. Where there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption, and any evidence that may support the presumption, to determine which, if either, predominates. Such deliberations, of course, shall be related to, and in accordance with my instructions on the burden of proof." The instruction finds full support in the Smellie, Lahey and Westberg cases, to which reference has already been made. We are unable to agree with defendants' contention that where there are eyewitnesses to the accident the presumption is not applicable. See Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510; Westberg v. Willde, supra; Scott v. Sheedy, 39 Cal.App.2d 96, 102 P.2d 575, and other cases cited in plaintiffs' brief.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

51 Cal.App.2d 613

BURNETT v. HOOVER BALL & BEARING CO.

Civ. 12953.

District Court of Appeal, Second District, Division 3, California.

April 30, 1942.

As Modified May 26, 1942.

1. Appeal and error 🔑1166
Courts 🔑122

In action for breach of contract where order was made striking out claim for $3,500 and prayer was amended to demand $913.23, the subject matter of the action was not within jurisdiction of the superior court, and judgment was reversed with direction to transfer action to proper court.

2. Appeal and error 🔑185(1)

A judgment rendered by a court without jurisdiction of the subject matter is void and the judgment should be reversed even though the point is not raised by the parties.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action for breach of contract by C. L. Burnett against the Hoover Ball & Bearing Company, wherein the defendant filed a counterclaim. From an adverse judgment, defendant appeals.

Reversed, with directions.

Goodspeed, McGuire, Harris & Pfaff, of Los Angeles, for appellant.

James B. Salem, of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff's two alleged causes of action were in substance as follows: First, that plaintiff was a distributor of defendant's products under a written agreement, and defendant terminated the relationship without giving plaintiff sixty days' notice as required by the agreement, to plaintiff's damage in the sum of $600 for loss of profits; and that defendant removed all of its consigned products from plaintiff's place of business and thereby damaged plaintiff in the sum of $3,500, the reasonable value of his business. Second, that defendant did not give plaintiff credit for a part of the products repossessed by defendant, to plaintiff's damage in the sum of $116.40. The prayer was for $4,216.40.

Defendant's motion to strike out plaintiff's allegations relative to the $3,500 for loss of the business was granted. Defendant denied the other allegations, and alleged a counterclaim of $305.98 for merchandise sold.

After the order was made striking out the $3,500 item, plaintiff filed an amendment to the complaint claiming $195.83 as commissions, and amended the prayer by omitting the $3,500 and including the $195.83. As amended the prayer was for $913.23.

Defendant appeals from the judgment in favor of plaintiff for $750.

[1, 2] The order having been made striking out the claim for $3,500, and the prayer having been amended to demand $913.23, the subject matter of the action was then not within the jurisdiction of the superior court Jacobson v. Superior Court, 1936, 5 Cal.2d 170, 174, 53 P.2d 756. Since a judgment rendered by a court without jurisdiction of the subject matter is void Hahn v. Kelly, 1868, 34 Cal. 391, 402, 94 Am.Dec. 742; Capital Bond, etc., Co. v. Hood, 1933, 218 Cal. 729, 731, 24 P.2d 765, the judgment should be reversed even though the point is not raised by the parties.

The judgment is reversed and the superior court is directed to transfer the action to a proper court having jurisdiction of the subject matter.

SCHAUER, P. J., and SHINN, J., concurred.

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51 Cal.App.2d 700

KOSTUROS et al. v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11957.

District Court of Appeal, First District, Division 2, California.

May 5, 1942.

1. Dismissal and nonsuit 🔑60(2)

Where case was called for trial on date originally set and continued one day because of defendant's nonappearance caused by reliance on new trial date set by clerk upon defendant's demand for jury trial and on following day plaintiff examined one witness after which trial was continued to date set by clerk which was more than five years from commencement of action, the calling of the witness stayed the application of the statute requiring dismissal of actions not brought to trial within five years. Code Civ.Proc. § 583.

2. Courts ⚷189(1)

Rule of municipal court permitting defendant within five days after notice of setting to make demand for jury trial and deposit jury fee did not permit clerk to control calendar of the court. Rule 13 of the Municipal Court.

3. Courts ⚷189(1)

Under rule of municipal court permitting defendant within five days after notice of setting to make demand for jury trial and deposit jury fee, where defendant made timely demand for jury but did not deposit fees, and clerk set new date for trial, when case came on for trial as originally noticed court had jurisdiction to proceed at that time with a jury or to continue the cause to some other date. Rule 13 of the Municipal Court.

4. Dismissal and nonsuit ⚷60(6)

Where after action had been set for trial defendant demanded jury trial and had clerk set new date, but failed to deposit jury fees, and municipal court on date originally noticed called case, continued it one day, permitted plaintiff to examine one witness and then continued case to date set by clerk which date was more than five years from commencement of action, in absence of evidence that defendant was not in court when witness was examined and did not consent to partial trial or that a jury would not have been called on that date, municipal court properly denied motion to dismiss for failure of plaintiff to bring case to trial within five years. Code Civ.Proc. § 583.

◆

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Mandamus by William Kosturos and others against the Municipal Court of the City and County of San Francisco, and others, to require defendants to dismiss proceeding against petitioner on ground that proceeding was not brought to trial within five years from time it was commenced. From adverse judgment, petitioners appeal.

Affirmed.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for appellants.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

The petitioners appeal from a judgment denying them a writ of mandate to require the municipal court to dismiss a proceeding against them upon the ground that the action was not brought to trial within five years from the time it was commenced. The cause was tried upon the record of the proceedings in the municipal court and comes here upon a stipulated transcript in the nature of a judgment roll.

The action was begun on March 13, 1936. Notice of time of trial set for March 11, 1941, was served on March 5, 1941. The defendants on March 7, 1941, demanded a jury trial and had the clerk of the court set the trial for April 16, 1941. The court did not concede the power of the clerk to thus change the time of trial, and, on March 11th, the day originally set, was prepared to proceed. The defendants did not appear on that date, and the trial was continued to the following day, at which time one witness was called by the plaintiff and testified. The cause was then continued to April 16th, which was beyond the five-year period fixed in section 583 of the Code of Civil Procedure.

[1-3] The calling of this witness was sufficient to stay the application of the code section. City of Los Angeles v. Superior Court, 15 Cal.2d 16, 21, 98 P.2d 207. There is nothing in rule 13 of the Rules of the Municipal Court which permits the clerk to control the calendar of the court. That rule permitted these defendants "within five days after notice of setting, (to) make demand for jury trial and deposit said fees." They made the demand within time, but did not deposit the fees. When therefore the cause came on for trial as duly noticed on March 11th it was within the jurisdiction of the court to proceed at that time with a jury, or to continue the cause to some other date. The record here discloses nothing more than that defendants failed to appear on March 11th and that the trial was by the court ordered continued until the following day. It does not appear but that defendants were then present in court and consented to the partial trial, and it does not appear but that, if

they had then insisted upon a trial by jury, a jury would have been called forthwith.

[4] Upon the record as presented we must assume that the trial court denied the petition for the writ upon the ground that petitioners failed to make proof that they were entitled to the writ and that their conduct in the proceedings was to take a technical advantage of the plaintiffs in the action in order to invoke the operation of section 583 of the code. If it should be said that the ruling of the trial court was too technical, it must be remembered that petitioners' "contention is somewhat technical, and it is not improper to meet it with a technicality." Clemens v. Gregg, 34 Cal. App. 272, 279, 167 P. 299, 302.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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51 Cal.App.2d 641

ARNOLD v. PARKENING et al.

Civ. 13584.

District Court of Appeal, Second District, Division 2, California.

May 1, 1942.

Hearing Denied June 29, 1942.

1. Conspiracy ⇨18

A complaint charging that a defendant, who owed duties of a fiduciary to plaintiff, procured properties and moneys for himself and a corporation and arranged for issuance of all the corporate stock to another defendant when the plaintiff was entitled to one-half of any stock issued and as a consequence to one-half of profits, and that the defendants with complete knowledge of plaintiff's rights conspired to defraud plaintiff, sufficiently stated a cause of action.

2. Appeal and error ⇨938(5)

Where appeal was on judgment roll which did not disclose whether evidence upon which court found against appellant came in with or without objection, appellate court was required to assume that the evidence came in without objection.

3. Pleading ⇨12

Where plaintiff charged that he was entitled to participate in properties, the nature, character and description of which were unknown to him and generally prayed that appealing defendant should be required to account to plaintiff, the appealing defendant could not complain because he was not more directly charged with fraud of which court found him guilty.

4. Appeal and error ⇨877(2)

In action for an accounting by partner against copartner and his alleged conspirator, where court found that secret profits received by the alleged conspirator belonged to the partnership, the alleged conspirator could not complain because he was required to account to one of the two partners he had defrauded rather than to the partnership.

5. Appeal and error ⇨1073(7)

Where plaintiff and defendant who were partners agreed to form a corporation from which each was entitled to receive one-half of stock but defendant partner and another allegedly conspired to defraud plaintiff and in pursuance thereof all of the corporate stock was issued to the other, in action for an accounting, even if money was technically payable to corporation rather than to the partners, judgment requiring the other to pay secret profits to plaintiff was not required to be reversed in view of fact that the defendant partner had withdrawn much more from the business than the plaintiff.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action for damages for conspiracy by Jules Arnold against O. H. Parkening, Robert B. McElroy and others. From an adverse judgment, Robert B. McElroy appeals.

Affirmed.

Daily & Gallaudet, of Glendale, for appellant.

Bautzer & Ryan, of Hollywood, and Perry Bertram, of Los Angeles, for respondent.

HANSON, Justice pro tem.

The complaint alleged that the plaintiff and the defendant Parkening entered into an agreement, partly in writing and partly oral, for the formation of a corporation to carry on a real estate business in which each was to share equally; that pending its formation plaintiff deposited $1,000 in a checking account in the joint name of the parties; that the parties as lessees entered into a lease for certain premises to be occupied by them as the office of their business; that they purchased in their joint names certain fixtures and personal property at the time located in the office; that the parties acquired certain properties for their use and benefit and of the corporation; that articles of incorporation were prepared and filed and a charter was issued by the state in the corporate name "O. H. Parkening, Inc."; that defendant Parkening represented to plaintiff that he was interested in purchasing plaintiff's interest in their joint venture and in the corporation, and that pending negotiations therefor plaintiff agreed with Parkening that no application for a permit to issue stock should be made; that the parties continued their joint venture thereafter until September 9, 1940, when without the knowledge of plaintiff Parkening procured a permit from the commissioner of corporations authorizing the corporation to issue all its stock to defendant McElroy for the sum of $1,000 in cash; that McElroy had knowledge of all the facts as alleged, and conspired with Parkening to prevent the issuance of one-half of the corporate stock to plaintiff, and thereby prevented him from participating in valuable interests which the corporation had acquired. The prayer, among other things, asked that the defendants be required to account for any profits received by them for or on account of the corporation.

The trial court found that appellant McElroy conspired with the defendant Parkening to defraud the plaintiff, and that in the course of the conspiracy McElroy received certain properties and moneys from Parkening, or at the instance of Parkening, in which plaintiff was entitled to an undivided one-half interest. Accordingly the court entered judgment against McElroy for $900 and the costs of suit, and in addition decreed that he held certain real property in trust for plaintiff.

The appeal is on the judgment roll by McElroy alone. He is here contending that no cause of action was stated against him and so his demurrer on that ground should have been sustained. Moreover, he contends that the complaint did not charge him with having improperly procured any properties or moneys belonging to plaintiff, and that as a consequence the finding is outside the issues.

[1] First: We think the demurrer to the complaint was rightly overruled. The complaint charged Parkening, who owed the duties of a fiduciary to plaintiff, with having procured properties and moneys for himself and the corporation and with arranging for the issuance of all the corporate stock to McElroy, when the plaintiff was entitled to one-half of any stock issued and as a consequence to one-half of the profits, corporate or otherwise. It went on to allege that the nature, extent and character of the property was not known to plaintiff but was known to Parkening and McElroy, and that they with complete knowledge of his rights conspired to defraud him of those rights. Without further detailing the charges made in the complaint, we are completely satisfied it sufficiently stated a cause of action, good against the general demurrer.

[2, 3] Second: There is no adequate showing on the record before us that the findings went beyond the issues. While it is true that the complaint does not directly charge McElroy with having received property or money equitably belonging to the plaintiff, it prayed that he be required to account to the plaintiff. Whether the evidence upon which the court found against appellant came in with or without objection necessarily is not disclosed by the judgment roll. Accordingly we must assume it came in without objection. As plaintiff charged that he was entitled to participate in properties the nature, character and description of which were unknown to him, and prayed generally that appellant should be required to account to him, appellant cannot complain that he was not more directly charged with the fraud of which the court found he was guilty.

[4, 5] Third: A further contention made by the appellant is that the findings are contradictory. This is based on a statement in the findings that a secret profit of $900 received by McElroy belonged to the partnership of plaintiff and Parkening; and this being the case, appellant argues that it was recoverable only by the partnership entity and not by the plaintiff. But the action was not in debt but for an accounting, and so appellant may not complain that he is required to account to one of two partners he defrauded. If the court

erred, and we do not know that it did, in requiring appellant to pay over the entire sum of $900 rather than one-half of that sum, no such error is assigned. In that connection we observe that the court not only found that Parkening was insolvent but that he had withdrawn from the business the sum of $11,018.90 and the plaintiff only the sum of $533.51. No doubt it was for that reason, along with the fact that the court found the appellant equally guilty with Parkening in defrauding plaintiff, that it ordered judgment for the full sum of $900. Even if the sum was technically payable to the corporation rather than the two so-called partners, it is of no materiality. In either situation it was the plaintiff who was in fact defrauded, and a corporate veil is too thin to screen a wrongdoer in the circumstances of this case.

The judgment is affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

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51 Cal.App.2d 674

MOORE et al. v. MILLER.

Civ. 12806.

District Court of Appeal, Second District, Division 3, California.

May 4, 1942.

Hearing Denied July 2, 1942.

1. Negligence 🔑93(2)

The negligence of a husband in operating an automobile in which wife was riding when she was injured would be imputable to wife so as to bar her recovery from driver of truck with which automobile collided.

2. Automobiles 🔑246(56)

Where no evidence was introduced to controvert statutory presumption that collision between automobile and truck occurred outside business or residence district, court properly instructed that collision occurred outside business or residence district. Vehicle Code, § 758, St.1941, p. 2718; Code Civ. Proc. § 1961.

3. Automobiles 🔑209

"Overtaking", within statute requiring motorist to give audible warning before overtaking vehicle proceeding in same direction, means to come or catch up with in a course or motion, rather than to catch up with and pass. Vehicle Code, §§ 528–531, St. 1935, pp. 182, 183.

See Words and Phrases, Permanent Edition, for all other definitions of "Overtaking".

4. Automobiles 🔑209

A truck which had swerved slightly to the right before commencing U-turn was a "vehicle proceeding in same direction" as following vehicle within statute requiring motorist to give audible warning before overtaking vehicle proceeding in the same direction. Vehicle Code, § 528, St.1935, p. 182.

See Words and Phrases, Permanent Edition, for all other definitions of "Vehicle Proceeding in Same Direction".

5. Automobiles 🔑209

Under statute requiring motorist to give audible warning before overtaking "vehicle proceeding in the same direction", lines of progress of two vehicles need not be exactly parallel or identical but it is sufficient if they are proceeding substantially in the same direction. Vehicle Code, § 528, St. 1935, p. 182.

6. Automobiles 🔑209

The purpose of statute requiring motorist to give audible warning before overtaking vehicle proceeding in the same direction is to warn overtaken driver that another vehicle is approaching and is about to pass, and warning should be given in time to enable such driver to safeguard himself against danger of collision. Vehicle Code, § 528, St.1935, p. 182.

7. Automobiles 🔑245(81)

Under statute requiring motorist to give audible warning before overtaking vehicle proceeding in the same direction, proper time for warning is ordinarily question of fact for jury. Vehicle Code, § 528, St.1935, p. 182.

8. Automobiles 🔑244(44)

Evidence that plaintiff's automobile was traveling considerably faster than defendant's truck, had turned left to pass truck and was only 50 feet behind truck when truck started U-turn, and that there was other traffic in street, authorized instruction that it was plaintiff's duty to give audible warning before overtaking truck and supported implied finding of violation of statute requiring such warning. Vehicle Code, § 528, St.1935, p. 182.

9. Automobiles 🔑209

The failure to obey statute requiring motorist to give audible warning before overtaking vehicle proceeding in the same direction is negligence as a matter of law. Vehicle Code, § 528, St.1935, p. 182.

10. Automobiles 🔑244(58)

Evidence that plaintiff's automobile was traveling considerably faster than defendant's truck, had turned left to pass truck and was only 50 feet behind truck when truck started U-turn, that there was other traffic in street, and that defendant was not aware of plaintiff's presence, supported implied finding that plaintiff's negligence in not sounding warning was proximate cause of collision with truck. Vehicle Code, § 528, St.1935, p. 182.

11. Appeal and error 🔑1008(1)

The finding by trier of facts that plaintiff's negligence was a proximate cause of accident in which he was injured was binding on appellate court.

12. Automobiles 🔑172(6)

The statute providing that where roadway is divided into three or more lanes vehicle shall be driven as nearly as practicable entirely within single lane and shall not be moved therefrom until driver has first ascertained that such movement can be made with safety is intended to regulate use of lanes and not making of turns. Vehicle Code, §§ 526, 540–546, St.1935, pp. 181, 184–186.

13. Automobiles 🔑246(48)

In action for injuries from collision with defendant's truck, which, after straddling line between two lanes of four-lane street, swerved slightly to right and then commenced a U-turn when collision occurred with plaintiff's following automobile, instruction on statute requiring vehicle to be driven within single lane and not to be moved therefrom until driver has ascertained that such movement can be made with safety was properly refused. Vehicle Code, §§ 526, 540–546, St.1935, pp. 181, 184–186.

14. Trial 🔑241

Where plaintiff motorist's speed, as shown by skid marks as well as direct testimony, was in issue, refusal of plaintiff's requested instruction quoting statute requiring brakes capable of stopping vehicle within specified distances for specified speeds was not erroneous, since no inference of plaintiff's speed could be drawn, under statute, from length of skid marks in absence of showing that plaintiff's brakes were not better than minimum statutory requirements. Vehicle Code, § 670, St.1935, p. 222.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Sarah M. Moore and others against Art V. Miller for injuries sustained in a collision between an automobile and a truck. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

Ira J. McDonald, of Los Angeles, for appellants.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and White McGee, Jr., all of Los Angeles, for respondent.

SHAW, Justice pro tem.

This action was brought by the plaintiffs to recover for personal injuries received by them, respectively, in a collision between an automobile owned and driven by plaintiff Boyd L. Moore and a truck driven by defendant, and for damages to the automobile from the same collision. After a jury trial judgment went for defendant, from which plaintiffs appeal.

The accident occurred on Whittier Boulevard June 26, 1939, at a little before 7 p. m., and as a result of it each plaintiff suffered serious personal injuries and substantial damage was done to the automobile. There is little conflict in the evidence. References hereinafter to the plaintiff mean the plaintiff Boyd L. Moore, unless otherwise stated. Whittier Boulevard at the scene of the accident is divided into four lanes by a double white line in the center and a single white line on each side. The defendant was driving his truck easterly on Whittier Boulevard and plaintiff was going in the same direction a short distance behind him. According to plaintiff, when he first saw defendant's truck his own car was straddling the white line south of the center line, and defendant's truck was 150 feet ahead and in approximately the same position. The defendant turned his truck a little to the right and swung over, as he says, two or three feet, or as plaintiff says, five or six feet; then he turned left across the street in front of plaintiff. Defendant testified that his intention was to make a U-turn, and his destination was property occupied by him on the north side of the street in the block in which he turned. Before turning he looked several times into his rear-view mirrors, one of which was on the door post and one inside, but did not see plaintiff's car before the collision. When he turned, plaintiff's car was at a distance variously estimated at from fifty to ninety feet behind him. Several witnesses said defendant gave no signal for this turn and he was uncertain whether he gave one or not. Defendant had been driving more slowly than plaintiff, who was gaining on him (at a rapid pace, plaintiff admitted in a deposition read at the trial), and when defendant swerved to the right plaintiff turned entirely into the lane next the center line for the purpose of passing defendant and put his foot on the accelerator, but did not at any time sound his horn. When plaintiff realized defendant was turning left, he put his brakes on full force and kept them on, but could not stop in time, and the two vehicles came together in the middle of the street, the front end of plaintiff's car striking the left side of defendant's truck about its center. Plaintiff testified that before the accident he was driving forty to forty-two miles per hour, that he did not slow down until defendant started to turn left, and that he was still going fifteen or twenty miles per hour when the vehicles collided. A deputy sheriff who arrived a few minutes after the accident testified that plaintiff's car made skid marks eighty-four feet long and the truck made marks showing it had been shoved sidewise five feet.

[1] Plaintiffs contend that whether the jury's verdict was based on a finding of plaintiff's contributory negligence or of defendant's freedom from negligence, it lacks support in the evidence, that plaintiff's negligence, if any, was not a proximate cause of the accident, that defendant was negligent as a matter of law, and that the trial court erred in the giving and refusing of instructions. The plaintiff Boyd L. Moore was the husband of the other plaintiff, and any contributory negligence on his part would therefore be imputable to her and bar her action for the personal injuries she suffered in the accident. Smarda v. Fruit Growers' Supply Co., 1934, 1 Cal. App.2d 265, 268, 36 P.2d 701.

Defendant contends that plaintiff was guilty of contributory negligence in not sounding his horn as he approached defendant's truck, and in connection with this contention we may consider the plaintiffs' claim that an instruction given on this subject at defendant's request was erroneous. That instruction reads as follows: "You are instructed that section 528 of the California Vehicle Code in force and effect at the time and place of this accident, provided, in part, as follows: 'The driver of a motor vehicle, when traveling outside of a business or residence district and under other conditions where necessary to insure safety, shall give audible warning before overtaking a vehicle proceeding in the same direction.' You are further instructed that the place where this accident occurred was outside of a business or residence district, therefore if you find that at the time of, or immediately before, the accident in question the plaintiff Mr. Moore was overtaking the truck driven by Mr. Miller in the same direction then it was the duty of Mr. Moore to give an audible warning before overtaking the said vehicle."

The part of section 528 of the Vehicle Code, St.1935, p. 182, quoted in this instruction is preceded in the section by this heading: "The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to the limitations and exceptions hereinafter stated."

[2] Plaintiff argues that he was not overtaking the defendant and therefore was not required by section 528 of the Vehicle Code to sound his horn, and that "the duty to give an audible warning was made absolute by the instruction." The quoted criticism of the instruction is not borne out by its language, for that plainly makes the duty conditional on the jury's finding that plaintiff was overtaking defendant's truck. The instruction does inform the jury that the place where the accident occurred was outside of a business or residence district. This was a fact upon which the Vehicle Code conditioned plaintiff's duty to give audible warning. The defendant therefore had the burden of proving it, in support of his plea of contributory negligence, but he could properly rely for such proof upon the presumption

declared by section 758 of the Vehicle Code, as it stood at the time of the trial, before the 1941 amendment, St.1941 p. 2718, that every highway is outside of a business or residence district. No evidence controverting this presumption appears in the record; hence the jury were bound to find according to it, Code Civ.Proc. § 1961, and the trial court properly declared to the jury that the fact was as presumed.

[3-5] Was the plaintiff required to sound his horn under the circumstances appearing in the record? The provision of section 528 of the Vehicle Code on this question, stated as one of the rules governing "the overtaking and passing of vehicles proceeding in the same direction," is that "the driver of a motor vehicle * * * shall give audible warning before overtaking a vehicle proceeding in the same direction." The word "overtaking" means "to come or catch up with in a course or motion." Webster's New International Dictionary, 2d Ed.; Ringwald v. Beene, 1936, 170 Tenn. 116, 92 S.W.2d 411, 413. Webster's Dictionary also gives as another meaning, "To catch up with and pass, as in an automobile," but we do not think the word is so used in this provision of the Vehicle Code. The introductory language of section 528 refers to both overtaking and passing as if they were separate acts, and so do sections 529, 530, 531, and 533, which deal with the same general subject, while the clause now to be construed refers only to "overtaking." The legislative history of the provision here in question shows that it has been gradually changed for the apparent purpose of accelerating the giving of the signal. In the "Vehicle Act" of 1915, section 20, subdivision (f), it was made the duty of the person operating "an overtaking vehicle" to give the signal "before passing a vehicle proceeding in the same direction." Stats.1915, p. 407. The "California Vehicle Act" of 1923, in section 125, required "the driver of an overtaking motor vehicle" to signal audibly "before passing or attempting to pass a vehicle proceeding in the same direction." Stats.1923, p. 557. By these provisions the vehicle must be in a condition of "overtaking" before any signal was necessary, and at first the signal was to be given "before passing;" later it must be "before passing or attempting to pass." Now the signal must be given "before overtaking." This is obviously intended to denote an earlier stage of the proceedings than that heretofore required, and means, "before coming or catching up with" the other vehicle proceeding in the same direction. The defendant's truck in this case was clearly a vehicle "proceeding in the same direction" as plaintiff's automobile, up to the time the truck turned across the street in front of the automobile. its status in that respect not being altered by the mere fact that the truck swerved slightly to the right before turning left. The lines of progress of two vehicles need not be exactly parallel or identical in order to bring them within the meaning of the phrase last quoted. It is sufficient if they are proceeding substantially in the same direction.

[6-9] The statute does not declare the exact distance or time "before overtaking" at which the audible signal must be given. But the warning is intended for the benefit of the driver of the overtaken vehicle. Day v. Pickwick Stages System, 1933, 134 Cal.App. 92, 98, 25 P.2d 16. Its purpose is to warn him that another vehicle is approaching and is about to pass him, and it ought to be given in time to enable him to safeguard himself against the danger of collision. The proper time for such warning is ordinarily a question of fact for the jury. In this case the plaintiff was traveling at a speed considerably greater than that of defendant, had turned left for the purpose of passing him, and was only fifty feet behind him, according to one witness, when the defendant started his U-turn, and there was other traffic in the street, some of which was coming from the opposite direction and close enough to prevent defendant from going over there at the time of the accident. Upon these facts, we cannot say that the jury's conclusion, implied in their verdict, that the proper time for plaintiff to give an audible warning to defendant had arrived and passed while the two vehicles were proceeding in the same direction, is without support in the evidence. Failure to obey the statute in this respect is, of course, negligence as a matter of law. Cadwell v. Anschutz, 1935, 4 Cal.2d 709, 52 P.2d 916; Ketchum v. Pattee, 1940, 37 Cal.App.2d 122, 131, 98 P.2d 1051. Plaintiff relies on the case last cited to support his argument that the statute did not require him to sound his horn, but it is not in point on that subject. It merely holds that the provision of section 528 of the Vehicle Code which we are considering does not apply to a driver who passes a parked vehicle, because such vehicle is not "pro-

ceeding in the same direction"; the decision does not concern itself with the meaning of the word "overtaking" or relate to any facts such as we have here.

[10, 11] The conclusion that plaintiff's negligence in not sounding his horn was one of the proximate causes of the collision likewise finds sufficient support in the evidence. The defendant was not aware of plaintiff's presence on the street or of the fact that any vehicle was nearing and about to pass him. If plaintiff's horn had been sounded, even at the moment before or just after defendant began his left turn, it is reasonably probable that defendant would have heard it and that at the speed he was then going (estimated by him in his testimony at around fifteen miles per hour) he could and would have stopped his turn and kept out of plaintiff's way. The case is much like Cadwell v. Anschutz, supra, 1935, where plaintiff attempted to pass defendant's car without giving any signal and the defendant, also without signal, turned left from the shoulder onto the two-lane pavement. The court held, under the above-mentioned provision of section 125 of the Vehicle Act of 1923, that plaintiff was negligent in not sounding his horn, and further, that, "It is reasonably probable that if plaintiff had sounded his horn before attempting to pass defendant's car, he would have delayed his change of course or have taken appropriate precautions. This being so, it seems clear that plaintiff's negligent act was a contributing factor to the injury," and thereupon reversed a judgment for plaintiff. The same conclusion as to proximate cause must be reached here. We find none of the cases cited by plaintiff controlling here. In Young v. Cerrato, 1934, 2 Cal.App.2d 421, 424, 37 P.2d 1063, it appeared that defendant knew of the approach of plaintiff's vehicle behind him and the court upheld a verdict finding that plaintiff's failure to sound his horn was not the proximate cause of the collision. The situation is quite different where defendant does not know of plaintiff's approach. In Fate v. Gross, 1923, 61 Cal.App. 146, 149, 214 P. 465, the plaintiff who had not given warning of his approach was not passing or attempting to pass the defendant, who, after signaling his intention to park his car at the curb, suddenly and without warning turned left in front of plaintiff, who was only 15 feet away. The Vehicle Act then in force required a signal to be given "before passing" and the court held that plaintiff had not violated it, and then added that it was a question of fact for the trial court whether plaintiff could have prevented the collision by sounding a warning, and affirmed the judgment for plaintiff based on a finding that plaintiff was not guilty of contributory negligence. Here the finding by the trier of facts is the other way and its decision on the question of fact is binding upon us.

[12-13] Plaintiff requested and the court refused an instruction which quoted to the jury a part of section 526 of the Vehicle Code and informed them that violation of it by defendant constituted negligence. The part of this section so quoted provides that where a roadway is divided into three or more clearly marked traffic lanes, "a vehicle shall be driven as nearly as practical [practicable] entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." It is contended that defendant violated this provision both when he swerved to the right and when he turned to the left. Upon the evidence it seems more likely that defendant's swerve to the right brought him into compliance with this provision of the code, for he had previously been straddling the line between two lanes, according to the plaintiff. Defendant himself does not clearly dispute this, but possibly means that he was in the right-hand lane before the swerve. On either view of this swerve no violation of this provision of the code by defendant, which could have been a proximate cause of the accident, appears, and no instruction regarding it was needed. Section 526 is plainly intended to regulate the use of lanes, and not the making of turns; hence it does not apply to the left turn. The matter of turns is covered in detail by sections 540 to 546, which are in a chapter headed, "Turning and Starting and Signals on Stopping and Turning," while section 526 is in a different chapter whose heading does not mention turns. Section 544, in the chapter on turns, is the provision applicable to defendant's conduct in making his left turn and it declares, in part: "No person shall turn a vehicle unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement." The jury was properly instructed on this provision

of the law. No instruction on section 526 was necessary.

Plaintiff argues that defendant's left turn would, when it first began, look to him like a move from one lane to another, and therefore the instruction on section 526 was proper and should have been given. But the application of sections 526 and 544 does not depend on the impression someone else may have of the driver's conduct; the question is, what is he actually doing? If he is in fact making a turn, as distinguished from a change of lanes, section 544 is applicable and section 526 is not.

[14] Plaintiff also requested an instruction in the words of subdivision (a) of section 670 of the Vehicle Code, relating to brakes. This was not given. This part of section 670 provides that no person shall operate on any highway any motor vehicle unless it is equipped with brakes adequate to stop it on described types of pavement having a specified grade within specified distances for specified speeds. We do not think such an instruction was required in this case. Defendant contends here and may have contended at the trial that plaintiff was going too fast and that this was negligence contributing to the accident. The direct testimony of plaintiff's speed when defendant started to turn fixes it at from thirty-five to forty-two miles per hour. The stopping distances set forth in section 670 for these speeds are all much greater than the distance in which plaintiff tried to stop. Defendant argues from the skid marks that plaintiff was going at even greater speeds, for which no stopping distances are set forth in the section. While plaintiff stated that his car was in good condition, there was no evidence at all as to the distance in which its brakes would stop it at any speed. Such evidence might have enabled the jury to infer something as to plaintiff's speed when he first applied his brakes by comparing such distance with the length of the skid marks and his speed at the time of the collision. But no such inference could be drawn from section 670. While there may be a presumption, as plaintiff suggests, that his brakes were sufficient to comply with that section, there is no presumption that they were not even better. Section 670 merely sets forth minimum requirements with which every car must comply. It does not enable us to determine what is the actual stopping distance of any particular car.

Our conclusion on the points already discussed renders it unnecessary to consider defendant's contentions that plaintiff was guilty of contributory negligence other than his failure to sound his horn, or plaintiff's contention that defendant was negligent as a matter of law. No conclusion we might reach on any of these matters could affect the opinion already stated that the verdict is sufficiently supported by the evidence of plaintiff's failure to sound his horn.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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51 Cal.App.2d 668

TROMPETER & CO. v. MONACO et al.

Civ. 11896.

District Court of Appeal, First District, Division 1, California.

May 4, 1942.

1. Municipal corporations 🔑907

The Moratorium Act of 1935 staying any action by the holder of any special assessment bond issued for any public improvement until February 28, 1937, except where the interest upon such a bond is delinquent at time the proceeding is commenced, is valid. Gen.Laws Supp.1935, Act 5104f, § 1.

2. Municipal corporations 🔑955(1¼)

An action to foreclose street improvement bonds, upon which the legal interest due after maturity had not been paid although all coupon interest had been paid, was barred by the statute of limitations when brought more than four years after maturity of the bonds, since the provisions of the moratorium act of 1935, that the act should not prohibit foreclosure of such bond where "any interest on such bond" was delinquent, referred to "legal interest" after maturity as well as to "coupon interest" before maturity of the bonds, and the time extension provisions of such act were therefore inapplicable. Gen.Laws Supp.1935, Act

5104f, §§ 1, 3; Gen.Laws 1937, Act 8199, § 76a.

See Words and Phrases, Permanent Edition, for all other definitions of "Coupon Interest" and "Legal Interest".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Trompeter & Company against Emma Monaco, and others, to foreclose street improvement bonds. From a judgment for plaintiff, defendants appeal.

Reversed.

Marcus, Rabwin & Nash, of Los Angeles, for appellants.

James E. Bates, of Los Angeles, for respondent.

MURPHY, Justice pro tem.

Plaintiff and respondent herein brought suit to foreclose two street improvement bonds issued under the Street Improvement Act of 1911, Gen.Laws 1937, Act 8199. The bonds covered two parcels of real property owned by Emma Monaco. From a judgment rendered in favor of plaintiff and respondent, defendants Emma Monaco and Armand Monaco prosecute this appeal upon a written stipulation of facts. Summarized, these facts are as follows:

Respondent is the owner and holder of two street improvement bonds, Nos. 19 and 20 of Series 3 issued by the city of Los Angeles under the Street Improvement Bond Act of 1911. Two parcels of real property owned by appellant Emma Monaco are covered by the bonds in question. The bonds were issued on November 14, 1924, and matured on January 2, 1935. On July 11, 1935, appellant Emma Monaco paid all of the accrued interest on the bonds up to the time of maturity. The unpaid balance of principal amounted to $140.23 on bond No. 19 and $140.02 on bond No. 20. Appellant paid no interest accruing after maturity. In addition to the amounts heretofore mentioned, respondent claims interest on each bond of approximately $78 and a penalty of $104, as provided for in the act under which the bonds were issued.

There are no provisions in the bonds which require the payment of any interest after maturity, although section 76a of the Bond Act requires the court in the foreclosure action to award interest "up to the date of the judgment." In addition section 3289 of the Civil Code provides that: "Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before * * *." On one or more occasions between the 11th of July, 1935, and the 28th of February, 1937, appellants herein offered to pay to the city treasurer of Los Angeles interest on the bonds accruing after maturity, which interest payments were refused by the city treasurer.

The street bonds involved in this proceeding matured on the 2d of January, 1935. The last payment of principal on each of the bonds due on that date was not paid. For more than four years thereafter appellants remained in default on these payments. Respondent's action was begun on the 17th of January, 1940, at which time appellants were still in default.

Appellant argues that by the terms of section 76a of the Street Improvement Act of 1911, an action to foreclose bonds issued pursuant to said act must be commenced within four years after the due date of the last installment.

[1] Section 1 of the Moratorium Act of 1935 (Deering's Gen.Laws Supp.1935, Act 5104f, Stats.1935, p. 72) provides as follows: "Subject to the provisions hereinafter mentioned, no proceeding at law or otherwise shall be commenced or continued by the holder of any special assessment bond issued for any public improvement in the State of California that constitutes a lien upon any real property described in said bond, to foreclose or enforce the lien thereof, until February 28, 1937. After the expiration of thirty days from the date this act takes effect, this act shall not prohibit the commencement of any such proceeding in any case where any interest upon such bond is delinquent at the time any such proceeding is commenced."

Section 3 of the same act extends the limitation on an action to foreclose an assessment bond for the period of time that foreclosure or enforcement thereof is prohibited by said act. The section provides as follows: "The period of time within which any proceeding or action must be taken or filed to foreclose or enforce the lien of such special assessment bond pursuant to any law or laws is hereby extended for such period of time as such foreclosure or enforcement is prohibited according to the provisions of this act. * * *"

The validity of such statutes is no longer open to question. In Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481, the principle was enunciated to the effect that in the stress of economic emergency the relief of debtors is a legitimate subject of state legislation. The case involved the Minnesota mortgage moratorium law enacted in that state in 1933. The Supreme Court of the United States held that while contracts are made subject to the police power of the state, and that in an emergency this power may be exercised to prevent strict enforcement of a contract, the exercise of such power should be reasonable, and that one of the main requirements be that the party otherwise entitled to enforce the terms of a contract receive reasonable compensation during the time his ordinary remedy is postponed. It was urged that the Minnesota act was invalid on the ground that it was repugnant to article I, section 10 and the Fourteenth Amendment to the Constitution of the United States. The United States Supreme Court, however, held that the act was not a violation of the so-called contract clause for the reason that the mortgagee, in order to obtain the protection of the act, had to pay interest on the obligation in addition to the rental value of the property.

Respondent contends that the Moratorium Act of 1935 extends the statute of limitations in respondent's favor for a period of nineteen months and twenty days, that is, until the 11th of July, 1940. Thus, it is argued, the action would be within the extended statute of limitations since the action was filed on the 17th of January, 1940. Respondent relies on section 1 of the Moratorium Act which provides, in part, that "this act shall not prohibit the commencement of any such proceeding in any case where any interest upon such bond is delinquent at the time any such proceeding is commenced."

It is urged that the legislature in employing the language "any interest upon such bond" intended the words "upon such bond" to be words of limitation. Otherwise, respondent argues, the legislature would have omitted the words "upon such bond." The only interest provided for in the bonds upon which suit to foreclose was brought is the "coupon" interest; that is, interest reflected by the coupons attached to the bonds.

[2] To this argument we cannot subscribe. We think it clear that by the provisions of section 1 of the Moratorium Act a bondholder was not prohibited from commencing an action to foreclose a bond in any case where "any interest" upon such bond was unpaid and delinquent at the time the action was begun. We believe the words "any interest" refer to legal interest due on the bonds after maturity as well as to coupon interest due before maturity. Under section 76a of the Bond Act and section 3289 of the Civil Code, supra, interest was due after maturity. No accrued interest on the bonds after maturity was ever paid by appellants.

Appellants were delinquent in the payment of legal interest from January 2, 1935, and for a period of more than four years before the commencement of this action on January 17, 1940. Respondent could have brought suit at any time within the four-year period beginning January 2, 1935. Their failure to do so constitutes a bar within the meaning of section 76a of the Street Improvement Act of 1911. § 3289, Civ.Code; Casey v. Gibbons, 136 Cal. 368, 371, 68 P. 1032; Puppo v. Larosa, 194 Cal. 717, 720, 230 P. 439; Reidy v. Miller, 85 Cal.App. 764, 260 P. 361.

We think it clear that under the provisions of section 1 of the Moratorium Act of 1935, the period laid down by statute within which an action to foreclose could be commenced was extended only for the time during which the property owner was not delinquent in the payment of "any interest" due on the bonds. That appellants were delinquent in the payment of legal interest for more than four years prior to the filing of this action is admitted in the agreed facts. During this entire period no prohibition operated to prevent bringing an action to foreclose the bonds in question. Respondent failed to do this and is, therefore, barred by the provisions of section 76a of the Street Improvement Act of 1911.

We, therefore, hold that the expression "any interest" means not only reflected coupon interest due upon the bonds before maturity, but legal interest after maturity. To restrict these words "any interest" to "coupon interest" alone would subject the act to the fatal violation of the contract clauses of both the federal and state constitutions.

It is our opinion, therefore, that respondent's action is barred by section 76a of the Street Improvement Act of 1911. The judgment heretofore entered is, therefore, reversed.

PETERS, P. J., and WARD, J., concurred.

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51 Cal.App.2d 630

WILKINSON v. MARCELLUS.

Civ. 13407.

District Court of Appeal, Second District, Division 2, California.

May 1, 1942.

1. Appeal and error 🔑1015(3)

Where new trial was granted plaintiff for insufficiency of the evidence to sustain jury's verdict for defendant, District Court of Appeal could not reverse order unless court was compelled to hold that a verdict for plaintiff would not have found sufficient support in the evidence given at the trial.

2. Appeal and error 🔑933(1)

On appeal by defendant from an order granting plaintiff a new trial after verdict for defendant, evidence was required to be considered in light most favorable to the plaintiff.

3. Automobiles 🔑244(16)

In action by highway patrolman for injuries sustained while proceeding along through highway when motorcycle collided with defendant's automobile at intersection, evidence was sufficient to sustain verdict for motorist.

4. Appeal and error 🔑933(1)

On appeal by defendant from an order granting plaintiff a new trial after verdict for defendant, question for determination was whether, drawing all reasonable inferences in favor of plaintiff, evidence would have sustained a verdict for plaintiff.

5. Automobiles 🔑171(5)

Circumstances of traffic on a through highway as a motorist approaches intersection with through highway must govern motorist's conduct in determining whether those traveling on highway are approaching so closely to intersection as to constitute an "immediate hazard" within meaning of the Vehicle Code relating to yielding the right of way. Vehicle Code, § 552, St.1935, p. 187

See Words and Phrases, Permanent Edition, for all other definitions of "Immediate Hazard".

6. Automobiles 🔑245(80)

The question whether a motorist acts with due care or negligently in proceeding across a through highway at intersection must generally be left to the jury's determination in view of all circumstances. Vehicle Code, § 552, St.1935, p. 187.

7. New trial 🔑68

In action against motorist by highway patrolman for injuries sustained while proceeding along through highway when motorcycle collided with motorist's automobile at intersection, evidence was sufficient to support a verdict for patrolman if such a verdict had been returned by the jury, and hence trial court did not err in granting patrolman's motion for new trial after verdict for motorist. Vehicle Code, § 552, St.1935, p. 187.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Robert L. Wilkinson against Frank L. Marcellus to recover for injuries suffered by plaintiff when motorcycle on which he was riding collided with an automobile driven by defendant. From an order granting a new trial, the defendant appeals.

Order affirmed.

Spray, Davis & Gould, of Los Angeles, for appellant.

Birger Tinglof, of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which he suffered when the motorcycle on which he was riding collided with an automobile driven by defendant. A jury returned a verdict in favor of defendant and thereafter the trial court granted a motion for a new trial. Defendant has appealed from the order granting the new trial.

[1, 2] In granting a new trial the court based its order upon all the grounds stated in the notice of intention to move for a new trial "and especially and particularly upon the grounds that the verdict of the jury is against the law and that the evidence is insufficient to justify or sustain the verdict of the jury." Since the new trial was granted for insufficiency of the evidence this court cannot reverse the order unless we are compelled to hold that a verdict in favor of plaintiff would not have found sufficient legal support in the evidence given at the trial. Wendling Lbr. Co. v. Glenwood Lbr. Co., 153 Cal. 411, 95 P. 1029. The evidence of course must be considered in the light most favorable to plaintiff (respondent).

The accident occurred after dusk on United States Highway 99, commonly known as Garvey Road, at its intersection with Sunset Avenue in West Covina. Garvey Road extends in an easterly and westerly direction and is a 66 foot paved highway divided into two 10 foot concrete lanes on each side of a double-marked center line, with an 18 foot asphalt shoulder on the north and south sides of the four 10 foot concrete lanes. A boulevard stop sign is located at the southeast corner of the intersection. The vehicles using the highway were lighted at the time of the accident.

Plaintiff testified that he was a sergeant in the California highway patrol and on the evening of the day of the accident, November 13, 1939, he was operating in the performance of his duty a motorcycle which was in good mechanical condition; he was 200 feet east of Sunset Avenue when he observed defendant's car before it entered the intersection and before it had reached the boulevard stop, or the limit line, while it was going 4 or 5 miles an hour; another car going towards plaintiff and passing in front of defendant temporarily blocked plaintiff's view, and when he next saw defendant's car it was just entering the intersection; at that moment plaintiff was 125 feet east of the intersection, and he immediately applied his brakes, but defendant kept going straight ahead, without deviation to the left or right, across the intersection, at a speed which attained a maximum of 15 to 18 miles per hour, directly in front of plaintiff's rapidly approaching motorcycle; in an attempt to avoid the collision plaintiff constantly maintained his application of brakes for a distance of 113 feet up to the point of impact.

Orville Vest testified that he was standing on the lighted filling station grounds on the southeast corner of the intersection in question; that defendant stopped his car 16 or 18 feet south of the limit line and about 8 feet south of the boulevard stop sign; that defendant started straight across the main highway at 10 or 12 miles per hour without making any stop at the boulevard stop sign or at the "stop limit line"; that when defendant's car reached the center of the main highway, plaintiff's motorcycle was about 75 feet east of the center of the intersection, at which time the witness heard the application of plaintiff's brakes.

[3, 4] The evidence was conflicting and unquestionably was sufficient to sustain the verdict in favor of defendant. But the question now to be determined is whether, drawing all reasonable inferences in favor of plaintiff (respondent), the evidence also would have sustained a verdict in his favor. Counsel for plaintiff argues that defendant "barged out on to the through highway directly in plaintiff's path, knowing that plaintiff was approaching at the permissible speed of 45 miles per hour, only 125 feet away," and did not stop or swerve his car to avoid the impact; and that plaintiff did everything possible in a futile attempt to extricate himself from the position of danger in which defendant's actions had placed him.

[5-7] In deciding whether he could rightfully proceed across Garvey Road, a "through highway," defendant was bound by the rules set forth in section 552 of the Vehicle Code, St.1935, p. 187, which reads as follows: "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle

so about to enter or cross the through highway." It is to be noted that the legislature has not set a hard and fast rule for the conduct of drivers approaching through highways but has provided the general rule that such drivers must yield the right of way to others travelling on the highway who are approaching so closely as to constitute "an immediate hazard." Our complex traffic problems are such that the circumstances of the traffic on a through highway as a driver approaches must govern his conduct in determining whether it is an immediate hazard. Whether a driver acts with due care or negligently in proceeding across a through highway must as a general rule be left to the determination of the jury in view of all the circumstances. We are satisfied that the evidence was sufficient to support a verdict in plaintiff's favor if such a verdict had been returned by the jury.

The order is affirmed.

McCOMB, J., concurred.

MOORE, Presiding Justice.

I concur in the judgment.

The opinion of Mr. Justice WOOD states that the evidence was sufficient to sustain the verdict in favor of defendant but that the question now to be determined is whether the evidence and its reasonable implications would also have sustained a verdict in favor of plaintiff.

New trials should not be granted solely because the conflicting evidence would have justified a verdict for the losing party. The trial judge must weigh and consider the evidence with the same care as that exercised by him when there is no jury. Green v. Soule, 145 Cal. 96, 78 P. 337. When the verdict is reasonable in view of the law and the evidence, a new trial is not to be granted solely because the jury might lawfully have decided for the losing party. It is only when the trial judge is persuaded that injustice would triumph if the verdict should be permitted to stand. When after a judicious consideration of the record, he concludes that the "evidence is insufficient to justify or sustain the verdict" as in this case, it is his duty to grant a new trial. Condee v. Gyger, 126 Cal. 546, 59 P. 26. Upon appeal from such order made upon the ground of insufficiency of evidence, to warrant our interference, it must be made to appear that "a verdict in favor of the moving party would not have found sufficient legal support in the evidence given on the trial." Wendling Lbr. Co. v. Glenwood Lbr. Co., 153 Cal. 411, 95 P. 1029, 1031.

51 Cal.App.2d 719

VAN FLEET et al. v. HEYLER.

Civ. 12771.

District Court of Appeal, Second District, Division 3, California.

May 5, 1942.

Hearing Denied July 2, 1942.

1. Appeal and error 🔑1068(3)

Where jury found for defendant, alleged error in instructions was not prejudicial to plaintiffs if evidence was insufficient to support a verdict against defendant.

2. Appeal and error 🔑930(1)

In determining whether evidence would support verdict for automobile guests on issue of host's willful misconduct, on appeal from judgment for host, appellate court must view evidence most favorably to guests resolving all conflicts in their favor. Vehicle Code, § 403, St.1935, p. 154.

3. Automobiles 🔑245(24)

Evidence that motorist proceeded at about 85 miles per hour on cloudy night on a 20-foot wide wavy and rough-surfaced road with soft shoulders when lights indicated that vicinity was inhabited was sufficient for jury on issue of motorist's "willful misconduct" in action for injuries to guests. Vehicle Code, § 403, St.1935, p. 154; § 511, St. 1937, p. 618.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

4. Automobiles 🔑181(7)

Mere speed may demonstrate driver's "willful misconduct" within automobile guest statute, when considered in relation to width and surface of, and presence or lack of traffic on, highway and question whether automobile is driven before or after dark. Vehicle Code, § 403, St.1935, p. 154; § 511, St. 1937, p. 618.

5. Evidence ⇨10(1)

The appellate court took judicial notice of facts that road on which automobile accident occurred was main highway from Los Angeles to Reno and other parts of Nevada, that it led to many fishing, hunting, and camping resorts, that fishing season was still open at time of accident, and that a considerable amount of traffic passed over the road.

6. Automobiles ⇨181(7)

Speed above statutory limit, although not constituting negligence as matter of law, is a matter to be considered on question of misconduct, and in connection with other circumstances may support a finding of "willful misconduct" within automobile guest statute. Vehicle Code, § 403, St.1935, p. 154; § 511, St.1937, p. 618.

7. Automobiles ⇨181(1)

"Willful misconduct" within automobile guest statute is the intentional doing of something with knowledge, express or implied, that serious injury is a probable as distinguished from possible result, or the intentional doing of an act with a wanton and reckless disregard of its possible result. Vehicle Code, § 403, St.1935, p. 154.

8. Automobiles ⇨181(1)

As regards host's liability to injured guests for willful misconduct, while presence of driver's family or friends in automobile is a fact to be considered in determining driver's state of mind, it is not conclusive. Vehicle Code, § 403, St.1935, p. 154.

9. Automobiles ⇨181(1)

An intent to injure anyone is not a necessary ingredient of "willful misconduct" within automobile guest statute. Vehicle Code, § 403, St.1935, p. 154.

10. Trial ⇨253(4)

An instruction that there could be no willful misconduct rendering motorist liable to injured guests unless motorist realized probability of injury was erroneous for withdrawing from jury's consideration "implied knowledge", which is the possible inference that man of ordinary prudence would have realized the probable consequences, and the possibility of injury to guest, and motorist's reaction thereto. Vehicle Code, § 403, St. 1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Knowledge".

11. Trial ⇨194(1)

An instruction having effect of comment on weight of evidence is not necessarily erroneous. Const. art. 6, § 19.

12. Automobiles ⇨181(7)

In action for injuries to automobile guests, instruction that unreasonableness of speed alone only constitutes negligence and not willful misconduct was erroneous, since speed may be so unreasonable as to constitute "willful misconduct". Vehicle Code, § 403, St.1935, c. 154; § 511, St.1937, p. 618.

13. Automobiles ⇨159

In action for automobile guests' injuries, instruction on duty of person confronted with sudden peril was erroneous for excusing host if he used his best judgment, since one who is subject to "sudden peril" rule must act as a reasonably prudent person would act under similar circumstances. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Sudden Peril".

14. Automobiles ⇨159

In action for automobile guests' injuries, instruction that "sudden peril" rule must be applied even though host's negligence contributed to peril was erroneous, since one claiming benefits of rule must be without such negligence. Vehicle Code, § 403, St. 1935, p. 154.

15. Automobiles ⇨246(54)

In action for automobile guests' injuries resulting from host's willful misconduct, instruction on duty of person confronted with sudden peril was erroneous, since "sudden peril" rule applies to negligence cases and has nothing to do with "willful misconduct", which is something more than negligence, however gross. Vehicle Code, § 403, St. 1935, p. 154.

16. Trial ⇨234(4)

An instruction that, if motorist was confronted by sudden peril and used his best judgment to extricate his guests, jury should find for motorist, was erroneous as a "formula instruction", since motorist whose willful misconduct has caused guests' injuries cannot escape liability by using his best judgment or even by acting as ordinarily prudent man after peril is upon him, notwithstanding it comes on him suddenly as culmination of his misconduct. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Formula Instruction".

17. Automobiles ⚷246(21)

An instruction that, if accident causing injuries to guests occurred while motorist was endeavoring to avoid a collision, "such circumstances must be considered in defendant's favor", was erroneous even if quoted phrase could not have been understood by jury as a direction to return a verdict for motorist. Vehicle Code, § 403, St.1935, p. 154.

18. Automobiles ⚷224(6)

An instruction that guests could not recover for injuries if guests could have left automobile was erroneous in view of showing that guests had such opportunity, since rule is not that guest must, where he knows driver's conduct is improper, leave automobile merely if he has reasonable opportunity to do so, but that he must leave it if person in exercise of ordinary care would do so under the circumstances. Vehicle Code, § 403, St.1935, p. 154.

19. Trial ⚷296(1)

Where there is direct conflict between differing sets of instructions, correct instructions do not cure error of wrong ones, since it is impossible to ascertain which were followed by jury.

20. Trial ⚷296(1)

Correct instructions did not cure error of wrong instructions because court instructed jury to consider all instructions as a whole and harmonize them if possible, in view of impossibility to harmonize positively conflicting instructions based on fundamentally different theories of law.

21. Trial ⚷295(1)

The appellate court must consider all instructions as a whole and harmonize them if possible.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Harry Van Fleet and others against David B. Heyler to recover for injuries sustained by plaintiffs while riding in defendant's automobile. From a judgment for defendant, plaintiffs appeal.

Reversed.

Haight, Trippet & Syvertson, Arthur L. Syvertson, and Randolph L. Shinn, all of Los Angeles, for appellants.

Tripp, Penney & Callaway and D. Paul White, all of Los Angeles, for respondent.

SHAW, Justice pro tem.

The plaintiffs were guests of defendant in his automobile, on a trip from Beverly Hills to a fishing location on the Owens River. While defendant was driving the automobile, it ran off the pavement and turned over. As a result of this accident both plaintiffs received serious personal injuries, for which they sue in this action. The complaint is based on wilful misconduct of defendant. The answer denies such misconduct and alleges contributory negligence on the part of each plaintiff. After trial by a jury, a verdict for defendant was returned, upon which a judgment in defendant's favor was entered. Both plaintiffs appeal from this judgment.

[1, 2] It is not contended by plaintiffs that the evidence does not support the verdict, their whole claim of error being directed at the instructions to the jury. On the other hand, defendant contends that the evidence does not show wilful misconduct on his part, and is thus insufficient to support a verdict against him, if one had been found, and that hence any error regarding instructions cannot be regarded as prejudicial and affords no grounds for reversal. If defendant's premise be conceded, the conclusion which he draws is undoubtedly correct. Young v. Vallejo, etc., Co., 1927, 202 Cal. 638, 642, 262 P. 327. Under section 403 of the Vehicle Code, St.1935, p. 154, either wilful misconduct or intoxication of a driver is necessary to render him liable for injuries to a guest, and intoxication is not alleged or shown here. We therefore examine the evidence to determine whether it would support a verdict in favor of plaintiffs on the issue of wilful misconduct, before considering their contentions; and in passing upon this question we must, of course, take the view of the evidence most favorable to plaintiffs resolving all conflicts and all conflicting inferences in their favor, so far as is reasonably possible.

The plaintiff William Clinton Van Fleet is the 12-year-old son of the plaintiff, Dr. Harry Van Fleet, and the term "plaintiff" will be used hereinafter to designate Dr. Van Fleet only, except as otherwise indicated. The parties to the action left Beverly Hills at 4:15 p. m. on October 7, 1938, accompanied by Dr. Van Fleet's wife and by the defendant's wife and 13-year-old son. Their route led them through Palmdale, Mojave, Red Rock Canyon, Lone Pine and Independence to the scene of the accident, which occurred at or about 9 p. m., at a point 8 miles north of Independence. A short distance north of Palmdale defendant drove his car at a speed of 100 miles per hour for a short distance. The plaintiff and Mrs. Van Fleet remonstrated at this and defendant reduced his speed to between 70 and 80 miles per hour. Night overtook them at Mojave. Beyond there the defendant drove so fast through some dips in the road as to make the plaintiff "concerned about it," and at a very bad dip "we were all thrown off the seat." Defendant then slowed down, and "the driving was conservative," as plaintiff put it, to Lone Pine, a distance of 90 miles. They reached Lone Pine at 8 p. m. and stopped there for dinner. On leaving Lone Pine, plaintiff offered to drive for the rest of the trip, but the defendant insisted on driving. They reached Independence, 16 miles north of Lone Pine, without mishap. The road from Independence to the scene of the accident had a two-lane pavement 20 feet wide, with a wavy surface, rough in places, and soft shoulders, and along it were numerous signs bearing the words, "soft shoulders." The defendant knew the shoulders were of dirt. After leaving Independence the defendant started to increase his speed, raising it to 80 miles per hour. As they rounded a curve at this speed, a chuck wagon without lights, going in the same direction, suddenly loomed up ahead. Plaintiff yelled, "Dave, cut it down; this is a curve," and defendant put on his brakes, pulled his car abruptly to the left, but stayed on the pavement, and got safely past the chuck wagon. Defendant testified that at this time he felt "uncomfortable." The accident occurred 3 or 4 minutes later. For a couple of miles after the chuck wagon was passed, the speed was "reasonable," according to plaintiff; then defendant increased his speed until it reached 82 miles per hour. Going at this rate he passed a "slight turn" which was 8-10ths of a mile south of the scene of the accident. He maintained a speed between 80 and 90 miles per hour until he reached the scene of the accident. He admitted after the accident that he had been going "85." After passing the curve last mentioned he approached on a straightaway a place of habitation referred to as the "Circle Dot Pack Station." At this time the moon was obscured by clouds, but the lights of the pack station were visible, some of them streaming out of the front door. The defendant saw the lights, and testified that they were bright enough to prevent him from seeing sooner than he did the pack train which occasioned the accident. As the automobile was about opposite the pack station, a train of pack mules crossing the road from west to east became visible, 100 to 150 feet ahead, the last one being about in the center of the pavement, leaving the left half of the pavement clear. The defendant applied his brakes, swerved his car to the left with a skid, passed the mules without hitting them, but got the wheels of his car off the pavement upon the shoulder; then the car shot across to the right, ran off the pavement on that side, hit a ditch in which a little stream crossed the road, and turned over.

[3] From all these facts and circumstances we think the jury, under proper instructions, could reasonably have concluded that the defendant was guilty of wilful misconduct proximately causing the accident. They might easily have believed that defendant was "'knowingly flirting with danger' without necessity compelling him to take the chance"—a sort of conduct which has several times been held to be wilful misconduct. (Rawlins v. Lory, 1941, 44 Cal.App.2d 20, 24, 111 P.2d 973, 975; Francesconi v. Belluomini, 1938, 28 Cal. App.2d 701, 705, 83 P.2d 298; Chandler v. Quinlan, 1938, 25 Cal.App.2d 646, 648, 78 P.2d 235; Berryman v. Quinlan, 1938, 29 Cal.App.2d 608, 610, 85 P.2d 202; Parsons v. Fuller, 1937, 8 Cal.2d 463, 468, 66 P.2d 430.)

[4] Defendant contends, however, that the only circumstance to be considered in support of this conclusion is his speed, and that speed alone does not amount to wilful misconduct. Our views on this point are well expressed in an opinion by Judge Bishop of the Appellate Department of the Superior Court of Los Angeles County, in People v. Nowell, 1941, 45 Cal.App.2d Supp. 811, 114 P.2d 81, 82. There the question for decision was whether the defendant was shown to be guilty of "reckless driving," as defined in section 505 of the Vehicle Code St.1935, p. 175. The court held such driving to be the same

thing as the wilful misconduct mentioned in section 403 of the Vehicle Code, which we now have under consideration, "so far as they are concerned with the state of mind of the driver, whose conduct is in question," and extensively reviewed the authorities on wilful misconduct, reaching conclusions which are satisfactory to us. We quote from that decision as follows (45 Cal.App.2d Supp. pages 813 and 814, 114 P.2d page 82): "Of necessity, when referring to the speed of an automobile, there is involved the highway on which it travels, with its width, surface and the presence or lack of traffic upon it. There is involved, too, the factor of visibility; was the car driven before or after dark? When considered in relation to these matters, mere speed, without other acts, may demonstrate wilful misconduct or that the driving is reckless. * * * [The court] in Fisher v. Zimmerman, 1937, 23 Cal.App.2d 696, 73 P.2d 1243, had before it a case where a speed of 85 miles an hour was the only misconduct involved. The court noted, however, that the driving was at night (as it was in our case); the highway had soft shoulders (a circumstance of no consequence if the driver keeps on the roadway); and there was another car upon the highway. The court stated (23 Cal.App.2d pages 701, 702, 73 P.2d page 1246): 'It is generally held that mere speed, of itself, does not constitute willful misconduct. This may not always be true. There may be a point at which the speed becomes so excessive, the danger of injury to the passenger so probable, that such extreme speed alone might be held to be willful misconduct.' The court continued its treatment of the subject by quoting from Hall v. Mazzei, 1936, 14 Cal.App.2d 48, 57 P.2d 948, 950: '"We do not wish to be understood as holding that mere speed may never constitute willful misconduct if indulged in under certain conditions. Willful misconduct, like negligence, must relate to the time, place, person and surrounding circumstances, and must be measured by them. Excessive speed under some circumstances may amount to negligence, under others to gross negligence, and under still others to willful misconduct."'"

[5, 6] In this case speed was not "alone." The accident occurred at night, while the moon was hidden by clouds. The pavement was only 20 feet wide and had soft shoulders and a wavy, sometimes rough, surface. While the scene of the accident was in a remote, comparatively uninhabited part of the country, roads in such regions are not necessarily untraveled. We may take judicial notice of the facts that this particular road is the main highway from Los Angeles to Reno and other parts of Nevada, that it leads to many fishing, hunting and camping resorts, that the fishing season was still open at the time of the trip, and that a considerable amount of traffic passes over the road. Just a few minutes before the accident defendant had had a definite warning that the road was not entirely empty, and that the other occupants did not all carry lights, when he came suddenly on the unlighted chuck wagon and had to make an abrupt turn to avoid it. Before him were the lights of the pack station as a further indication that the vicinity was inhabited and persons or objects might be on the road. In spite of all this he accelerated his speed to 82 or more miles per hour soon after passing the chuck wagon and maintained that speed or increased it to 85 miles per hour; not slowing down at all as he approached an obvious habitation and lights that interfered with his vision. This speed was nearly twice the speed (45 miles per hour) which the Vehicle Code, § 511, St.1937, p. 618, then fixed as the prima facie maximum limit of reasonable speed; and although the code did not declare speed above this limit to be even negligence as a matter of law, such speed is a matter to be considered on the question of misconduct, and in connection with other circumstances may support a finding of wilful misconduct.

[7] Defendant further contends that there is no evidence "of a frame of mind of the defendant of a character to constitute 'wilful misconduct.'" There are conflicting statements in the decisions which undertake to define "wilful misconduct." But on consideration of the cases on the subject, and reconciling them as far as possible, we find them to divide "wilful misconduct" into two distinct lines of action, either of which will render a driver liable to his guest for its results, as follows: first, "the intentional doing of something * * * with a knowledge that serious injury is a *probable* (as distinguished from a possible) result"; and, second, "the intentional doing of an act with a wanton and reckless disregard of its *possible* result." Both of these statements are quoted from Howard v. Howard, 1933, 132 Cal.App.

124, 129, 22 P.2d 279, 281 (emphasis by the court there), and have been approved in the many later cases reviewed in People v. Nowell, supra, 45 Cal.App.2d Supp. pages 815 and 816, 114 P.2d 81.

The first alternative stated in Howard v. Howard, supra, doing an act with knowledge of its probable results, etc., is qualified by the cases to this extent, that the knowledge may be either express or implied. (Turner v. Standard Oil Co., 1933, 134 Cal.App. 622, 626, 25 P.2d 988. This case is approved on this point in many later cases, including Meek v. Fowler, 1935, 3 Cal.2d 420, 425, 45 P.2d 194; Weber v. Pinyan, 1937, 9 Cal.2d 226, 233, 70 P.2d 183, 112 A.L.R. 407; Robertson v. Brown, 1940, 37 Cal.App.2d 189, 194, 99 P.2d 288; Stacey v. Hayes, 1939, 31 Cal.App.2d 422, 426, 88 P.2d 165; Francesconi v. Belluomini, 1938, 28 Cal.App.2d 701, 703, 83 P.2d 298; Gimenez v. Rissen, 1936, 12 Cal.App.2d 152, 157, 55 P.2d 292; Hagglund v. Nelson, 1937, 23 Cal.App.2d 348, 352, 73 P.2d 265; Haas v. Jones, 1938, 29 Cal.App.2d 650, 652, 85 P.2d 579; and Rawlins v. Lory, 1941, supra.) The same rule has been expressed by use of the words "actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge." (Parsons v. Fuller, 1937, 8 Cal.2d 463, 468, 66 P.2d 430, 433; Porter v. Hofman, 1938, 12 Cal.2d 445, 448, 85 P.2d 447; Stacey v. Hayes, supra; Howard v. Howard, supra; and other cases referred to in those last cited.) In Stacey v. Hayes, supra [31 Cal.App.2d 422, 88 P.2d 167], this thought is amplified by the statement that "The probability of injury to the guest from such act or omission must have been an apparent consequence to a man of ordinary prudence and intelligence." This language was quoted in Rawlins v. Lory, supra, with the further comment that "In determining whether the circumstances are sufficient to disclose implied knowledge of such probability, an external standard is applied" and it was held by applying this "external standard" that the defendant there was charged with knowledge of the probable consequences of his conduct, such consequences being apparent to any person of ordinary prudence. This standard was applied in Jones v. Hathway, 1937, 22 Cal.App.2d 316, 320, 70 P.2d 681, 683, where the court said that "as a presumably reasonable man, had he exercised due care, defendant must have known, or must have been conscious of and appreciated the fact that to drive * * * [as he did] was likely to result in injury to plaintiff." The same view is set forth in the Restatement of the Law of Torts, in comment c appended to section 500, as follows: "In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct." (p. 1295.)

Our attention has been particularly called to the following quotation from Porter v. Hofman, 1938, supra [12 Cal.2d 445, 85 P.2d 448], a misconduct case: "Before liability arises there must be shown actual knowledge, or its equivalent, on the part of the defendant of peril to be apprehended coupled with a conscious failure to act to the end of averting injury." The latter part of this sentence cannot have been intended to take away the effect of the previous reference to the "equivalent" of actual knowledge, for in the next preceding paragraph we find the same reference, and also an approving quotation from another case Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, 512, of this expression of the same thought: "that which in the law is esteemed to be the equivalent of actual knowledge." In other words, even if some logical inconsistency can be found between the two parts of the sentence first quoted, the latter part of it, when considered with all the other parts of the opinion, does not carry with it the implication that actual knowledge by the driver of impending danger is necessary to constitute wilful misconduct. It means no more than this statement from Stacey v. Hayes, 1939, supra (in which a hearing was denied by the Supreme Court a few months after the decision of the Porter case): "Though there need be no actual conscious intent to injure the guest, the act done or the omission made must be intentional. The probability of injury to the guest from such act or omission must have been an apparent consequence to a man of ordinary prudence and intelligence." In the case at bar the jury could have found that when the defendant failed to slow down as he approached the pack station, as well as when he increased his speed just before that time, he acted consciously and intentionally and that the probability of injury to his guests under the then existing circumstances must have been apparent to a man of ordinary prudence and intelligence.

[8, 9] On the question of intent, defendant contends, quoting from Walker v. Bacon, 1933, 132 Cal.App. 625, 627, 23 P.2d 520, that "Willful misconduct refers to intentional acts, that is, acts designed to bring about the result involved in the suit," and argues further that because his own family was in the car he could not have had such an intent and was therefore not guilty of wilful misconduct. While the presence of a driver's family or friends in the car with him is a fact to be considered in determining his state of mind, it is by no means conclusive on the subject. In many of the cases where drivers have been held guilty of wilful misconduct, family or friends, or both, have been among their guests. The statement quoted by defendant from Walker v. Bacon, supra, appears in the opinion of only one judge, not concurred in by the other two, who joined in the decision for other reasons, and is not a correct statement of the law. On the contrary, it is implicit in the authoritative definitions of "wilful misconduct," and is also now settled by positive holdings that an intent to injure anyone is not a necessary ingredient of wilful misconduct. (Wright v. Sellers, 1938, 25 Cal.App.2d 603, 613, 78 P.2d 209; Rawlins v. Lory, 1941, supra; Hagglund v. Nelson, 1937, supra, 23 Cal.App.2d page 353, 73 P.2d 265; Stacey v. Hayes, 1939, supra; Hoffart v. Southern Pac. Co., 1939, 33 Cal.App.2d 591, 602, 92 P.2d 436.)

[10] Plaintiff contends that many of the instructions on the subject of wilful misconduct are erroneous. We find that several of them are not entirely consistent with the foregoing discussion of that term, but since a new trial must be had, at which the instructions can be made to conform to the law on this point as above stated, it is not necessary to discuss in detail all those complained of. One of them, given at defendant's request, reads as follows: "There can be no wilful misconduct unless the defendant himself realized that there was a probability, as distinguished from a mere possibility, of injury to the occupants of his car from his conduct. Even proof of such probability of injury will not alone establish such realization on his part. There must be a conscious disregard of probable consequences. You may, however, consider all of the surrounding circumstances in ascertaining such realization." This instruction was erroneous in at least two respects. By making it a condition of liability that defendant himself "realized" the probable consequences of his conduct, it withdrew from the consideration of the jury "implied knowledge" on defendant's part, that is, the possible inference that a man of ordinary prudence and intelligence would have realized those probable consequences, even though defendant himself did not, and thus ran counter to the first branch of the definition of wilful misconduct, as above stated; and by excluding from consideration the possibility of injury to a guest, and defendant's reaction thereto, it contravened the second branch of that definition.

[11, 12] Another instruction, given at defendant's request, reads: "The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof even of negligence. Under modern conditions with improved hard-surfaced highways and high speed automobiles, traveling at a high rate of speed is not necessarily unreasonable. Whether it is reasonable or unreasonable depends upon consideration of the character of the highway and country which is being traversed as well as all other surrounding circumstances. Nor will a mere finding of unreasonableness justify a finding of wilful misconduct, since unreasonableness alone only constitutes negligence, and not wilful misconduct." This and other instructions are criticized as being comments on the weight of the evidence. An instruction having that effect is not necessarily erroneous, since the adoption in 1934 of the amendment to section 19, article VI of the Constitution authorizing the court to "make such comment on the evidence * * * as in its opinion is necessary for the proper determination of the case." None of the cases cited by plaintiffs on this point gave consideration to this amendment, and with one or two exceptions they were decided before its adoption. It does not appear necessary here to determine the exact meaning and effect of the amendment as applied to civil cases, but it may be suggested that if the trial court informs the

jury that each of several facts mentioned is insufficient alone to support a particular finding, it ought to consider the possibility that all of the facts, taken together, might have a greater probative value and afford support for such finding; and if such is the case fairness would require that the jury be so advised. The instruction last quoted declares that "unreasonableness alone only constitutes negligence, and not wilful misconduct." To this proposition we cannot agree. Misconduct is often, if not always, unreasonable. Even if the declaration is to be limited by its context to speed, we do not agree that speed can never be so unreasonable as to constitute misconduct. See quotations above from People v. Nowell, 1941, supra.

[13, 14] At defendant's request the court gave the jury an instruction on the duty of a person confronted with sudden peril, as follows: "You are further instructed that if a driver of a vehicle is confronted with a set of circumstances which call for quick action, without time for deliberation, and he uses his best judgment and follows the course of action which seems to him best suited to prevent a collision, he cannot even be found to be negligent, nor guilty of wilful misconduct, simply because he did not do what some other person might have done if placed in the same position and confronted with the same set of circumstances.

"If you therefore find that defendant David Heyler was suddenly confronted with a situation of imminent peril, and that he used his best judgment and followed the course of action which seemed to him best suited to prevent a collision you must find against the plaintiffs and in favor of the defendant David Heyler. In such a situation you must find in the defendant's favor even should you determine that there was negligence on his part as a contributing cause to the sudden peril confronting him for, as I have instructed you, mere negligence is insufficient to establish liability on his part."

As a statement of the sudden peril rule this instruction is erroneous. It excuses the defendant if he used *his* best judgment and followed the course of action which *seemed to him* best suited to prevent a collision. One who is subject to this rule is required to act as a reasonably prudent person would act under similar circumstances. (19 Cal.Jur. 598; Mortensen v. Fairbanks, 1934, 1 Cal.2d 489, 492, 35 P.2d 1030.) The instruction sets up quite a different standard. It also fails, as a statement of this rule, in declaring that the rule must be applied even though defendant was negligent in a manner contributing to the peril. It is an essential part of the rule that one claiming its benefit be without such negligence. (19 Cal. Jur. 598; Mortensen v. Fairbanks, supra.)

[15] The latter deviation from the rule probably resulted from an effort to apply it to a case of wilful misconduct. This lights up the fundamental error of the instruction, which is that the rule itself is one applying to negligence cases, and has nothing to do with wilful misconduct, which is something more than negligence, however gross. The plaintiffs do not contend here and, as far as we can discover, did not contend at the trial, and there is nothing in the evidence to suggest, that the defendant's actions after he was confronted by the emergency of the sudden appearance of the pack train, amounted to wilful misconduct. But had any such question been raised, it could not have been answered by application of the sudden peril rule, and any instruction upon it would have been unnecessary, confusing and improper.

[16] The vice of this instruction is aggravated by the fact that its second sentence, appearing at the beginning of its second paragraph, is in effect a formula instruction. It directs the jury that if defendant was confronted by a sudden peril and used his best judgment to extricate himself and his guests, they must find in his favor. A driver whose wilful misconduct has brought his guest into a position of danger cannot escape liability for the results of his conduct by using his best judgment or even by acting as an ordinarily prudent man, after the peril is upon him, even though it comes on him suddenly as the culmination of his misconduct. Such action would indicate merely repentance, which, while it may mitigate punishment, never tolls guilt.

[17] In this connection the court also instructed the jury, at defendant's request: "On the issue of wilful misconduct, if you find that the accident occurred while defendant was endeavoring to avoid a collision, such circumstances must be considered in defendant's favor." We have some difficulty in determining the precise signification here of the last six words. The jury might have understood them as a

direction to return a verdict in defendant's favor; and if so regarded they are manifestly erroneous and prejudicial. For the reasons already stated this instruction should not have been given, whatever the meaning of the last part of it.

[18] We also find error in the following instruction, given at defendant's request: "Even if you find that this accident was proximately caused by wilful misconduct of defendant, plaintiffs are not entitled to recover if you find that they knew, or reasonably should have known of the alleged misconduct and had reasonable opportunity to have protected themselves from injury by leaving the car or by preventing defendant either from operating the car at all or in the manner alleged, and yet failed to avail themselves of such opportunity." The effect of this is that the plaintiffs must have left the car if they had reasonable opportunity to do so. In view of the undisputed fact that such an opportunity had presented itself to them when they stopped for dinner at Lone Pine, which they left half an hour or less before the accident, and the further fact, testified to by Dr. Van Fleet, that he had complained of defendant's driving before that time, the jury may have concluded, in the light of this instruction, that plaintiffs could not recover because they continued to ride, with defendant driving, beyond Lone Pine. The true rule on this point is not that a guest must, where he knows the driver's conduct is improper, leave the car merely if he has reasonable opportunity to do so, but that he must leave it, a reasonable opportunity being afforded, if a person in the exercise of ordinary care would do so under the circumstances. (Shields v. King, 1929, 207 Cal. 275, 278, 277 P. 1043; Dowd v. Atlas T. & A. Service Co., 1921, 187 Cal. 523, 529, 202 P. 870; Curran v. Earle C. Anthony, Inc., 1926, 77 Cal.App. 462, 471, 247 P. 236; see, also, Lindemann v. San Joaquin Cotton Oil Co., 1936, 5 Cal.2d 480, 507, 55 P.2d 870; McKinley v. Dalton, 1932, 128 Cal.App. 298, 304, 17 P.2d 160.) Here it appeared that, although Dr. Van Fleet had objected to defendant's driving on the earlier part of the trip, defendant had driven in a manner satisfactory to him for the last 90 miles before dinner; and in view of that fact and the other circumstances of the case the jury, if properly instructed, could reasonably have found that plaintiffs were not negligent in continuing in the car.

[19-21] On the points covered by some of the instructions which we hold erroneous, other instructions correctly stating the law were given at plaintiffs' request, and defendant claims that by reason thereof the errors, even if we find them to be such, need not lead to a reversal. But this is not a case where all the instructions, considered and construed as a whole, can be resolved into a correct and harmonious statement of the law. There is here direct and positive conflict between the differing sets of instructions. In such a case the correct instructions do not cure the error of those which are wrong, for it is impossible to ascertain which were followed by the jury. (Westberg v. Willde, 1939, 14 Cal.2d 360, 371, 94 P.2d 590.) Nor is the situation altered by the fact, to which defendant calls our attention, that the court further instructed the jury to do what is also our duty, viz: to consider all the instructions together as a whole and harmonize them if possible. Neither the jury nor this court can harmonize positively conflicting instructions based on fundamentally different theories of the law.

The judgment is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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MARDESICH v. C. J. HENDRY CO.

Civ. 12791.

District Court of Appeal, Second District, Division 3, California.

April 29, 1942.

Hearing Denied June 25, 1942.

1. Judgment ⚷256(1)

In customer's action against store owner for injuries sustained by fall from a ladder where findings were inadequate to support a judgment for either plaintiff or defendant, order denying defendant's motion to set aside and vacate judgment for plaintiff and enter judgment for defendant was required to be affirmed. Code Civil Proc. §§ 663, 663a.

2. Negligence ⚷117

A plea of contributory negligence of the adversary need not admit negligence on the part of the pleader.

3. Negligence ⚷82

When negligence of a plaintiff is pleaded as a separate and affirmative defense, either as a contributing or as the sole proximate cause of his injury, the principle applies that if the negligence of plaintiff, however alleged within the limits stated, contributes or operates as a "proximate cause" of his injury, he cannot recover.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

4. Appeal and error ⚷916(3)

In customer's action against store owner for injuries sustained by fall from a ladder, where defendant's assertion that the answer pleaded contributory negligence was not challenged by plaintiff, District Court of Appeal was required to regard the issues of fact raised by defendant's affirmative plea ascribing plaintiff's injuries solely and proximately to his own negligence as requiring an application of the law of contributory negligence.

5. Pleading ⚷182

In customer's action against store owner for injuries sustained by fall from a ladder, defendant's affirmative defense charging contributory negligence was deemed denied by plaintiff.

6. Negligence ⚷142

In customer's action against store owner for injuries sustained by fall from a ladder, trial court's use of the word "and" between the words "firmly" and "upon" in finding that it was not true that plaintiff negligently and carelessly failed to maintain his balance while going down the ladder or that plaintiff negligently and carelessly failed to place his feet firmly and upon the rungs of the ladder rendered that clause impotent as a negation of the correlative allegation of defendant's answer pleading contributory negligence.

7. Trial ⚷397(1)

In customer's action against store owner for injuries sustained by fall from a ladder, where defendant pleaded that plaintiff negligently and carelessly caused the ladder to become unbalanced and the evidence disclosed that plaintiff was in full control of the ladder when it became unbalanced, gripping it above its upper resting point, question as to whether plaintiff negligently caused the ladder to become unbalanced was a material question upon which defendant was entitled to have determinative findings.

8. Negligence ⚷142

In customer's action against store owner for injuries sustained by fall from a ladder with defense that plaintiff negligently caused the ladder to become unbalanced, trial court's finding that it was not true that plaintiff sustained the injury as the proximate result of his negligence or carelessness amounted to a determination that plaintiff's injuries were not the sole proximate cause of his negligence and was not equivalent to a definite and inclusive finding on the ultimate fact negating the existence of contributory negligence by plaintiff.

9. Negligence ⚷117

The words "carelessly" and "negligently" as used in answer charging asserted negligence of plaintiff and averring that each of specified acts was done negligently and carelessly were not synonymous, "careless" meaning free from care, not taking ordinary or proper care, and "negligence" implying omission of duty in doing or forbearing which when resulting in injury, rendered the negligent person liable for damages and hence it must be presumed that the pleader used the words as conveying different meanings.

See Words and Phrases, Permanent Edition, for all other definitions of "Careless" and "Negligence".

10. Negligence ⚷142

In customer's action against store owner for injuries sustained by a fall from a ladder, finding attempting to negate defend-

ant's allegation that each of specified acts was done negligently and carelessly, that it was not true that plaintiff negligently and carelessly did the acts, construed most favorably to plaintiff, implied both that the acts were done and that they were done carelessly or that the acts were done from which it would follow as a matter of law that plaintiff was contributorily negligent.

11. Trial ⚷395(1)

Findings following the conjunctive form attempting to negate allegations of answer charging asserted negligence of plaintiff and averring that each of specified acts was done negligently and carelessly are inadequate and imply the truth of the affirmative allegations in the pleading.

12. Appeal and error ⚷1071(6)

In customer's action against store owner for injuries sustained by fall from a ladder, trial court's failure to make positive findings on issue of contributory negligence in plaintiff's allegedly causing the ladder to become unbalanced while in full control thereof was prejudicial error.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Paul Mardesich against C. J. Hendry Company for personal injuries sustained from a fall from a ladder. From a judgment for plaintiff and an order refusing to vacate the judgment and enter judgment for defendant, defendant appeals.

Judgment reversed. Order affirmed.

Lasher B. Gallagher, of Los Angeles, and Arch Ekdale, of San Pedro, for appellant.

David A. Fall, of San Pedro, for respondent.

SCHAUER, Presiding Justice.

[1] Defendant, a dealer in marine hardware and fisherman's supplies, appeals from a judgment rendered against it after trial without a jury in an action for personal injuries sustained by plaintiff as a result of jumping or falling from an ordinary ladder furnished by defendant for use of customers on its premises. The judgment must be reversed because of failure of the trial court to make adequate findings on the issue of contributory negligence. Defendant also appeals from an order denying its motion to set aside and vacate the judgment in favor of plaintiff and to enter another and different judgment in favor of defendant. As the findings are inadequate to support a judgment for either plaintiff or defendant, the order must be affirmed.

Material Facts

The testimony is refreshingly devoid of contradictions; if substantial conflicts exist they are only in the inferences which may be derived from the established facts. The record discloses that on August 15, 1938, plaintiff, a fisherman, went to defendant's store for the purpose of purchasing cork floats. A clerk invited him to go to a warehouse, near to the store and operated by defendant, to see its stock of cork. Such stock was stored on a balcony several feet above the warehouse floor. The only means provided by defendant for gaining access to the balcony was an ordinary movable wooden ladder which stood on the rough warehouse floor and rested against the edge of the balcony floor with a portion of its uprights and one or two rungs projecting above such balcony floor. The ladder was not secured by cleats, spikes, hooks or otherwise at either top or bottom. It was near midday and the warehouse was well lighted. Plaintiff had been in the warehouse and used the ladder before and knew it was a movable ladder, not nailed in any particular place. All through his life, he said, from the time he could understand, he had known about ladders and that they could be picked up and carried around. He knew it was an old ladder at the time he used it on the day of the accident. It is not claimed that the ladder was defective in any way (unless its failure to be secured in position by nails, spikes, cleats or otherwise than by the forces of gravity and friction be deemed a defect) or that plaintiff believed that it was nailed or otherwise fastened to the floor or balcony or that he was deceived by its appearance. Under these circumstances, at the time in question, plaintiff followed the clerk in ascending the ladder. The ascent was without incident. On the balcony a sack of cork was selected and thrown to the main floor. Plaintiff then started to descend; he got no further than to place one or both feet on one or two rungs below the balcony floor level when the bottom of the ladder started to slide along the floor, whereupon he jumped or fell off and sustained injury to his foot and ankle.

The trial court found specifically "that the defendant was negligent in the following respects:

"(1) The ladder was not fastened to the balcony nor to the warehouse floor.

"(2) That there were no cleats, spikes or other contrivances in the center of the uprights or at any other point where the uprights rested on the floor or at the point of contact between the upper portion of the said ladder and the balcony which would prevent the uprights from sliding on the warehouse floor.

"(3) *That the defendant failed to warn the plaintiff of the condition of the said ladder.*"

The court also found "that the construction and condition of said ladder would have been disclosed by an inspection of the said ladder and than an investigation and inspection of the said ladder would have disclosed to any ordinarily prudent person that it was a very simple, ordinary, wooden ladder."

Besides denying negligence on its part defendant affimatively pleaded "As and for a Separate and Special Defense * * * that on the 15th day of August, 1938 * * * in said premises there was an ordinary ladder used for the purpose of climbing to and from a certain balcony in defendant's warehouse and on prior occasions the plaintiff had been upon the same premises and on said prior occasions the plaintiff had used the said ladder for the purpose of climbing up the same to get on said balcony *and for the purpose of climbing down the same to get on the floor of said warehouse* and on the said 15th day of August, 1938 the plaintiff negligently and carelessly failed to maintain his balance while going down said ladder and *negligently and carelessly failed to place his feet firmly upon the rungs of said ladder and negligently and carelessly caused said ladder to become unbalanced* and negligently and carelessly failed to maintain his weight in relation to the slant of the ladder so that the ladder would not slip or slide from the place where it rested on the floor and the plaintiff negligently and carelessly permitted his feet or one of his feet to slip off of the ladder and the plaintiff negligently and carelessly failed to maintain proper balance and the plaintiff negligently and carelessly fell or jumped from said ladder and as *a proximate result* of the aforesaid acts of negligence and carelessness on the part of the plaintiff he sustained injury."

Plea of Contributory Negligence Need Not Admit Negligence of Pleader

[2-4] During one period in the juridical history of California the foregoing pleading, since it ascribes plaintiff's injuries solely (and proximately) to his own negligence rather than to concurrently (and proximately) operating negligence of both plaintiff and defendant, might not have been regarded as sufficient to raise the defense of *contributory* negligence. (See 19 Cal.Jur. 682 and cases cited under note 5.) However, it is now definitely established that a plea of contributory negligence of the adversary need not admit negligence on the part of the pleader. (Sheets v. Southern Pacific Co. (1931), 212 Cal. 509, 515, 299 P. 71; Hoffman v. Southern Pacific Co. (1927), 84 Cal. App. 337, 354, 258 P. 397; Hughes v. Atchison, etc., Ry. Co. (1932), 121 Cal.App. 271, 278, 8 P.2d 853; Friddle v. Southern Pac. Co. (1932), 126 Cal.App. 388, 395, 14 P.2d 568; Biddlecomb v. Haydon (1935), 4 Cal.App.2d 361, 366, 40 P.2d 873; Soares v. Barson (1936), 12 Cal.App.2d 582, 584, 55 P.2d 1283.) Apparently, from the cases cited, it is now the rule that when negligence of the plaintiff is pleaded *as a separate and affirmative defense* (see Starck v. Pacific Electric Ry. Co. (1916), 172 Cal. 277, 285, 156 P. 51, L.R.A.1916E, 58) either as "*a*" (contributing) or "*the*" (sole) proximate cause of his injury, the same principles of law will be applied; i.e., if the negligence of plaintiff (however alleged within the limits above stated) contributes (operates) as "*a*" proximate cause of his injury he cannot recover. As was said in Friddle v. Southern Pac. Co. (1932), supra, 126 Cal.App. at page 395, 14 P.2d at page 571, "Here the appellant did plead specifically the facts going to show the negligence of deceased and whether it described this negligence as the sole cause of the accident or the contributing cause could make no difference in the effect of the proven facts." Under the circumstances we are bound to regard the issues of fact raised by the affirmative plea in this case as requiring application of the law of contributory negligence. The parties themselves have so viewed the case. Appellant's positive assertion in its opening brief that the answer pleaded "contributory negligence" is not challenged by respondent. Under the law of con-

tributory negligence "a plaintiff cannot recover for the negligence of the defendant, if his own want of care or negligence has in any degree [proximately] contributed to the result complained of * * *." (Needham v. San Francisco & S. J. R. Co. (1869), 37 Cal. 409, 419; Straten v. Spencer (1921), 52 Cal.App. 98, 106, 197 P. 540; Meredith v. Key System Transit Co. (1928), 91 Cal.App. 448, 454, 267 P. 164; Bickford v. Pacific Elec. Ry. Co. (1932), 120 Cal.App. 542, 556, 8 P.2d 186.)

Incomplete Findings, Conjunctive in Form, Will Not Support Judgment

[5, 6] The only attempt to resolve the issues raised by the above quoted affirmative defense charging contributory negligence (which is deemed denied) is a finding which is conjunctive in form, replete with negatives pregnant, and incomplete in substance. It is, in material part, as follows: "That it is true that the plaintiff had been upon the same premises on prior occasions. * * * It is not true that he had previously used the same ladder for the purpose of climbing up to said balcony *and for the purpose of climbing down* from the same [this negative pregnant is particularly significant in view of the fact that in his deposition, which is in evidence, plaintiff admitted *going up (but not down)* the ladder "once or two times" within the two preceding years], nor is it true that on the said 15th day of August, 1939 [whether the 1939 instead of 1938 is a typographical error or otherwise is immaterial as we place no significance upon this discrepancy in dates], the plaintiff negligently *and* carelessly failed to maintain *his* balance while going down said ladder, nor is it true that plaintiff negligently *and* carelessly failed to place his feet *firmly and upon* the rungs of said ladder [disregarding the improper conjunction of "negligently *and* carelessly" the use of the word "and" between the words "firmly" and "upon" renders that clause wholly impotent as a negation of the correlative allegation in the answer], nor is it true that plaintiff negligently *and* carelessly failed to maintain his weight in relation to the slant of the ladder so that the ladder would not slip or slide from the place where it rested on the floor, nor is it true that plaintiff negligently *and* carelessly permitted his feet or one of his feet to slip off the ladder, nor is it true that plaintiff negligently *and* carelessly failed to maintain proper balance, nor is it true that plaintiff negligently *and* carelessly fell or jumped from said ladder, nor is it true that plaintiff sustained injury as *the* proximate result of negligence or carelessness upon his part."

[7, 8] It will be noted that the foregoing finding wholly ignores the averment in the answer that plaintiff "negligently and carelessly caused said ladder to become unbalanced." The evidence discloses that *plaintiff was in sole control of the ladder* at the time it obviously did become unbalanced; his hands apparently were gripping such ladder at a point *higher* than where it rested against the edge of the balcony floor. At this point, although perhaps maintaining his own balance with respect to the ladder he could easily have caused the ladder to become unstable and unbalanced. The question as to whether he *negligently caused the ladder* to become unbalanced was pertinent and material. Whether or not the doctrine of *res ipsa loquitur* requires an explanation from plaintiff under such circumstances, as contended by defendant, the latter is certainly entitled to determinative findings on the pertinent and material issues of fact raised by the pleadings. The failure to find that the plaintiff did not negligently or carelessly cause the ladder to become unbalanced might not be fatal to the judgment if there were a definite and inclusive finding on the ultimate fact negating the existence of negligence on the part of plaintiff which contributed as "*a*" proximate cause of his injury. But there is no such finding. The clause in the heretofore quoted finding "nor is it true that plaintiff sustained injury as *the* proximate result of negligence or carelessness upon his part" amounts merely to a determination that plaintiff's injuries, if any, were not the *sole* proximate result of his negligence.

[9, 10] It should also be noted that the answer in charging the asserted negligence of plaintiff avers that each of the specified acts was done "negligently and carelessly" and that the finding in attempting, in part at least, to negate such allegations follows the conjunctive form "nor is it true that plaintiff negligently *and* carelessly" did the act. In accordance with the rule that findings should be construed, if possible, so as to support the judgment (Haight v. Haight (1907), 151 Cal. 90,

92, 90 P. 197; E. W. McLellan Co. v. East San Mateo L. Co. (1913), 166 Cal. 736, 738, 137 P. 1145; Anglo-California T. Co. v. Oakland Rys. (1924), 193 Cal. 451, 460, 461, 225 P. 452; Gin S. Chow v. City of Santa Barbara (1933), 217 Cal. 673, 680, 22 P.2d 5; Los Angeles Soap Co. v. Bossen (1932), 122 Cal.App. 237, 241, 9 P.2d 900) we have scrutinized the entire finding in its relationship to the averments it seeks to meet, with a view to sustaining the judgment if a reasonable and liberal construction of such finding would so admit. But in addition to the fact that certain issues are not met at all, as heretofore pointed out, we are confronted with the further fact that none of the issues is squarely and inclusively met. The words "carelessly" and "negligently" are not entirely synonymous. Webster's New International Dictionary (2d ed.), 1942, defines "careless" as "1. a. Free from care, anxiety, or solicitude. * * * b. Having no concern or interest; unconcerned; unmindful. * * * 2. Not taking ordinary or proper care; negligent; heedless, inattentive; regardless * * *," and gives as synonyms the words: "Inconsiderate, thoughtless, unthinking, remiss, inadvertent." The same dictionary gives the meaning of the word "negligence" as implying: "1. Quality or state of being negligent; lack of due diligence or care; omission of duty; neglect. 2. Law. Failure to exercise the care that the circumstances justly demand; omission of duty in doing or forbearing. When such failure results in injury to another the negligent person is liable for damages, and may be criminally liable. * * *" As the words obviously are not completely synonymous it must be presumed that the pleader used them as conveying different meanings else we would not be giving significance to each and would be convicting the pleader of tautology. Since those words are not synonymous the finding "nor is it true that the plaintiff negligently *and* carelessly" did the several specified acts, construed most favorably to plaintiff, implies both that the acts were done and that they were done *carelessly*. Even if we could construe the words as being synonymous the finding would only deny the adjectives and would still imply that the acts specified were done; i.e., that plaintiff failed to maintain his balance while going down the ladder; that he failed to place his feet firmly upon the rungs of the ladder; that he failed to maintain his weight in relation to the slant of the ladder so that the ladder would not slip or slide from the place where it rested on the floor; that he permitted his feet or one of his feet to slip off the ladder; that he failed to maintain proper balance; that he fell or jumped from the ladder. From such probative facts it would follow as a matter of law that plaintiff was guilty of negligence proximately contributing to his injury.

[11] Findings of the type portrayed in this case have been repeatedly condemned as inadequate and as implying the truth of affirmative allegations in the pleading. (See Tormey v. Anderson-Cottonwood I. Dist. (1921), 53 Cal.App. 559, 562, 200 P. 814; Wiles v. Hammer (1924), 66 Cal.App. 538, 539, 540, 226 P. 651; Huling v. Seccombe (1928), 88 Cal.App. 238, 244, 263 P. 362; Austin v. Harry E. Jones, Inc. (1939), 30 Cal.App.2d 362, 367, 86 P.2d 379; see, also, Fitch v. Bunch (1866), 30 Cal. 208, 211; Wise v. Rose (1895), 110 Cal. 159, 163, 42 P. 569; Janeway & Carpender v. Long Beach P. & P. Co. (1922), 190 Cal. 150, 153, 211 P. 6.)

[12] The inadequacies of the foregoing quoted finding are emphasized by the fact that the trial court held that defendant's negligence consisted specifically, and apparently exclusively, in the concurrence of the following items: its failure to fasten the ladder to the balcony or main floor, to provide it with cleats or other anchoring device, or *to warn the plaintiff of the condition of the said ladder*. Since plaintiff admittedly had used the ladder previously to go *up* and since, as the court found, "the *construction and condition* of said ladder would have been disclosed by an inspection * * * and tha*n* an investigation and inspection of the said ladder would have disclosed to any ordinarily prudent person that it was a very simple, ordinary, wooden ladder," and inasmuch as defendant's clerk, who was waiting on plaintiff had waited on him many times before over a period of seven or eight years and must have known that plaintiff had used the ladder and was familiar with it, the question becomes very close (and we do not now determine it, but see Borden v. Daisy Roller Mill Co. (1898), 98 Wis. 407, 74 N.W. 91, 92, 67 Am.St.Rep. 816, as to whether the evidence admits of a finding that defendant was negligent and that plaintiff did not negligently contribute to his own injury. Under the

circumstances depicted, the failure to make positive findings on the issues mentioned is prejudicial error.

Defendant has also appealed from an order denying its motion made pursuant to the provisions of sections 663 and 663a of the Code of Civil Procedure to vacate the judgment in favor of plaintiff and enter another and different judgment in favor of defendant. While the findings of fact do not support the judgment in favor of plaintiff they do not, on the other hand, when construed most favorably to plaintiff, require the conclusion that defendant is entitled to judgment. Their failure to support the judgment for plaintiff consists not in the affirmative determination of the issue of contributory negligence adversely to plaintiff, but in the lack of determination of such issue favorably to him. Hence, although the conclusion of law that plaintiff is entitled to a judgment is not supported by the findings, defendant is not upon such findings entitled to have judgment entered in its favor. The order denying the motion was properly made.

The order appealed from is affirmed; the judgment is reversed.

SHINN and PARKER WOOD, JJ., concurred.

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51 Cal.App.2d 712

PEOPLE v. NORTON.

Cr. 2211.

District Court of Appeal, First District, Division 2, California.

May 5, 1942.

Criminal law 🔑1158(1)

Whether defendant, who was convicted of burglary on plea of guilty, was entitled to have judgment set aside to permit him to withdraw plea and stand trial on plea of not guilty on grounds that defendant had a meritorious defense, and that guilty plea was induced by duress, fraud, and coercion was for the trier of facts under conflicting evidence.

Appeal from Superior Court, City and County of San Francisco; George W Schonfeld, Judge.

Jack Norton was convicted of burglary on his plea of guilty, and from an order denying his motion to set aside the judgment to permit him to withdraw his plea and stand trial on a plea of not guilty, he appeals.

Affirmed.

William I. O'Shaughnessy, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was sentenced to a term in the state penitentiary upon his plea of guilty of a charge of burglary. Following the sentence he moved to set aside the judgment to permit him to withdraw his plea and stand trial upon a plea of not guilty. He appeals from the order denying this motion.

The motion was based upon the grounds that appellant had a meritorious defense, and that his plea of guilty was induced by duress, fraud and coercion. The appellant was caught by the arresting officer in the flat he was charged to have burglarized, and some of the stolen goods were taken from his possession at the time of the arrest. On this motion he admitted the burglary, and has not indicated what meritorious defense he might have made.

The charged fraud and coercion rests upon the alleged promises of the arresting officers, and of his former attorney, that if he should plead guilty five other charges of burglary would be withdrawn and he would be given a county jail sentence. The evidence supporting the motion is found in the affidavits and testimony of the appellant and two women friends. It is explicitly denied by the two police officers and appellant's former attorney. This was supplemented by the showing that the appellant had been convicted of five prior offenses, of which two burglaries had been reduced to petty theft with sentences in the county jail, because of his youth. The trial judge who sentenced the appellant in this case testified that, with the record of these offenses before him, he informed appellant's counsel before sentence, and in the presence of appellant, that he would under no circumstances agree to give appellant a jail sentence, but that his past record demanded a sentence to the state penitentiary.

With the evidence in conflict, and preponderating so heavily in favor of the state, the order denying the motion must be affirmed. People v. Deutsch, 16 Cal.App.2d 121, 122, 60 P.2d 155; People v. Von Badenthal, 8 Cal.App.2d 404, 413, 48 P.2d 82.

The order is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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51 Cal.App.2d 615

PEOPLE v. SMITH.

Cr. 1793.

District Court of Appeal, Third District, California.

April 30, 1942.

Hearing Denied May 28, 1942.

1. Homicide 🔑250

Evidence sustained conviction for manslaughter.

2. Criminal law 🔑730(1, 14)

In homicide case, statements by district attorney in closing argument that decedent worked every day, whereas he had no steady job, and that accused constantly plied deceased's wife with liquor, and references to the law of other states concerning necessity for participant in a quarrel to give warning before starting shooting, and to the future economic condition of deceased's children, were not prejudicial "misconduct", where trial court instructed jury to pay no attention to such statements and evidence of accused's guilt was plain.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

3. Criminal law 🔑1171(1)

A judgment will not be reversed because of the misconduct of district attorney, except in clear cases, and unless the misconduct is flagrant and obviously prejudicial and unless, in the opinion of the appellate court from a review of the entire record, it results in a miscarriage of justice.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Henry Edgar Raymond Smith was convicted of manslaughter, and, from the judgment of conviction and order denying a new trial, he appeals.

Judgment and order affirmed.

George E. Foote, and E. R. Vaughn, both of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

TUTTLE, Justice.

Appellant was charged with the crime of murder, and thereafter was found guilty by a jury, of manslaughter. He now appeals from the judgment of conviction and order denying a new trial.

Appellant seeks to reverse the judgment upon two grounds, to wit: 1st: The insufficiency of the evidence to sustain the conviction; and 2d: Misconduct of the District Attorney in his closing argument which resulted in a miscarriage of justice by affecting the substantial rights of the defendant.

Taking up the first ground, we deem it necessary to give a brief summary of the facts proven before the jury. During the times herein mentioned, appellant lived with his elderly father in a small apartment in the city of Sacramento. The victim of the killing was one Albert Burke, who had lived with his wife Leona, for some eight years, but who was not married to her until about one year prior to the shooting. Leona had been married three times, and had two children by decedent, and one by each of her other two husbands. The Burkes and the Smiths had been friendly for a number of years, living in adjoining dwellings. On the night of October 25, 1941, or very early Sunday morning, decedent went to the Smith apartment and pounded loudly upon the door. Appellant opened the door, and according to his testimony, decedent struck him with his fist, knocking him back into the room. Appellant thereupon reached for a revolver which was concealed under some quilts. He shot the decedent several times, inflicting a wound which was fatal. The visit of decedent to the apartment of Smiths appears from the evidence to have been the result of a conspiracy between Leona and appellant. According to the statement made by the latter, and which appears in the record, on the night of the killing, appellant and Leona had a long talk concerning her husband. Leona knew that appellant had a gun on the premises. She therefore proceeded to impregnate his mind with the idea that it would be very good strategy for the two of them to get rid of the husband in some manner. We quote from the statement:

"Question: All right. And I took the two drinks of whiskey, and she says, 'Al hit me on the jaw.' Well, it was swollen a little. I says, 'The dirty cur,' like that. I says, 'A man who will hit a woman won't fight a man, and,' I says, 'he ain't much to do it.' And she says, 'I wish some kind of an accident would happen to him, either like he would get killed, or something like that.' 'Well,' I says, 'you don't want to think nothing like that because,' I says, 'we have been good friends all the way around and'—

"Question: Go ahead. And she says, 'well,' she says, 'he is nothing in the world but what you would call a brute, more than anything.' And she says, 'I just can't stand him much longer.' 'Well,' I says, 'that ain't none of my business.' And she says, 'Where do you keep your gun?' I says, 'I keep it on the dresser most of the time.' 'Well,' she says, 'why do you keep it on the dresser?' 'Well,' I says, 'so it won't be concealed; if anybody comes down there they can see it.' And she says, 'Why don't you keep it over there next to the suitcases where the quilts are?' She says, 'You can keep it underneath there.' And—'Well,' she says, 'that might be a pretty good idea;' like that. And she says, 'I am going to phone up Al,' and says, 'and have an understanding with him and bring him down to the house.' She says, 'but,' she says, 'he might come down mad and start a fight with you.' 'But,' she says, 'if you shoot a man in your house,' she says, 'it is —you can call for justifiable, or something like that.' Well, you know what I mean; self-defense. 'And',—'and it happened in your house.' And—'well,' I says, 'I tell you,' I says, 'I don't know; I don't know much about the law.' Just like that. And —well, she says, 'I am going to phone him up and bring him down after I have a talk with him, and,' she says, 'if anything happens,' she says, 'you can have my daughter and I will take your father.' Like that. 'Well,' I says, 'I don't want your daughter, and,' I says, 'if Dad ever took you,' I says, 'I would want to get away, because,' I says, 'I don't want neither one of you'."

The father of appellant testified that the revolver with which the shooting was done was loaded with shells sometime Saturday night. It also appears that the revolver had been taken from its usual location on the dresser and placed beneath the quilts above mentioned. It further appears that after Leona had told her husband that the Smiths had rented an apartment for her, the husband immediately became very angry and started for the Smith apartment. The wife testified that she followed him to the apartment, and she admitted that at no time did she warn him of the fact that appellant possessed a revolver. She was immediately behind her husband, and saw him knock at the door of the apartment; she heard the door open, and saw a burst of flame as the revolver was fired. The husband, after the shooting, fell immediately to the floor, and was conscious for a very short period. She testified that her husband said, before he elapsed into unconsciousness, "You got me Edgar" (meaning the appellant). Edgar said, "That is what you get for fooling around." The evidence further showed that decedent was unarmed. In all, three shots were fired.

[1] We think the evidence is sufficient to support the verdict. Both the appellant and the wife of decedent are fortunate that they were not found guilty of a more serious offense. The woman took the role of a modern "Lady McBeth," and planted in the mind of appellant, who was far younger than she, the idea that it would be best for both of them if the decedent was done away with. For this, we have the testimony of appellant himself. It is regrettable that the State did not see fit to bring the wife before the bar of justice. There is ample evidence from which the jury could have found premeditation, instead of finding that the killing was done in the heat of passion.

[2, 3] We find no merit in the contention that there was any prejudicial misconduct on the part of the District Attorney in his argument to the jury. In this connection it is urged that the District Attorney stated to the jury that the deceased worked every day, whereas in truth and in fact, he did not have a steady job; that the District Attorney stated that appellant furnished the wife with liquor and constantly

plied her with it; that the District Attorney referred to the law of some other states concerning the necessity for one in a quarrel to warn the other before he starts shooting; and finally, that the District Attorney made some reference to the future economic condition of the two children of decedent. We cannot say that the District Attorney went beyond the bounds of legitimate argument. Furthermore, the trial court admonished the jury to pay no attention to the foregoing statements. The evidence of guilt is so plain that we do not see how the jury could possibly have been influenced by the incidents mentioned. In 8 Cal.Jur. 621–622, § 602, it is stated: "A judgment will not be reversed because of the misconduct of the District Attorney except in clear and extreme cases, and unless the misconduct is flagrant and obviously prejudicial, and unless, in the opinion of the appellate court from a review of the entire record, it results in a miscarriage of justice." Certainly, there has been no miscarriage of justice here.

The judgment and order denying motion for a new trial are, and each of them is, hereby affirmed.

THOMPSON, Acting P. J., concurred.

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51 Cal.App.2d 619

SERPA v. DAVIDSON et al.

Civ. 11828.

District Court of Appeal, First District, Division 2, California.

May 1, 1942.

1. Courts 🔑116(1)

The superior court has control of its own records with inherent power to correct them to make them speak the truth.

2. Motions 🔑56(1)

The ministerial act mistakenly performed by clerk of superior court in purporting to enter an order never made by the superior court has no judicial force.

3. Courts 🔑116(3)

An order of November 26 expunging superior court clerk's minute entry of November 19 reciting that superior court had granted new trial was valid, and superior court committed no error in its order of November 27 denying motion to strike order of November 20 granting new trial, where order of November 20 was the only order actually made by court on new trial motion.

4. Appeal and error 🔑1015(1)

The credibility of plaintiff moving for new trial was for the trial court.

5. Appeal and error 🔑1015(1)

Where new trial is granted for insufficiency of evidence, inquiry of appellate court will go no further than to determine whether there is substantial evidence to support verdict in favor of moving party.

6. Appeal and error 🔑1015(1)

An order granting plaintiff, suing for injuries sustained in automobile collision, a new trial for insufficiency of evidence would not be disturbed, where, if trial judge believed version of action most favorable to plaintiff as testified to by plaintiff, such evidence was sufficient to support a verdict for plaintiff.

7. Appeal and error 🔑782

An appeal from a purported minute order which had since been expunged from the minutes would be dismissed.

Appeals from Superior Court of Santa Clara County; Charles W. Davison, Judge.

Action by Manuel R. Serpa against L. C. Davidson and others for personal injuries allegedly received in an automobile collision. From a minute order granting a new trial, an order granting a new trial, an order expunging the minute order from the record, and an order refusing to strike and vacate the order granting a new trial, the defendants appeal.

Appeal from minute order dismissed and the other orders affirmed.

Frank V. Campbell and Walter E. Rankin, both of San Jose, and Yale S. Kroloff, of Oakland, for appellants.

S. F. Holstein and Robert E. Cassin, both of San Jose, for respondent.

DOOLING, Justice pro tem.

Several appeals are here presented on one transcript: (1) An appeal from a purported minute order of November 19, 1940, granting plaintiff a new trial; (2) an appeal from an order of November 20, 1940, granting a new trial; (3) an appeal from an order of November 26, 1940, expunging from the record the minute order of November 19, 1940, first above mentioned, and (4) an appeal from an order of November 27, 1940, denying defendant's motion to strike and vacate the order of November 20, 1940.

The action was for personal injuries received by plaintiff in an automobile collision. The jury returned a verdict for defendant and plaintiff duly moved for a new trial.

On November 19, 1940, the clerk made an entry in the minutes reciting that "the Court now makes its Order that said motion for new trial be and it is hereby granted on the ground of error in instructions."

On November 20, 1940, an order signed by the trial judge was filed with the clerk in terms granting the motion for new trial on the following grounds: "1. The insufficiency of the evidence to justify the verdict; 2. That it is against law."

On November 20, 1940, the clerk made an entry in the minutes reading:

"The Court directs the clerk to enter the corrected minute order herein as follows: Motion for New Trial herein having been presented and submitted the Court now makes its Order that said motion for new trial herein be and it is hereby granted on the grounds of insufficiency of the evidence to justify the verdict and that it is against law."

On November 26, 1940, the trial judge, acting ex parte, signed and filed with the clerk an order herein quoted in full, as follows:

"It appearing that the Clerk through mistake and inadvertance and a misunderstanding that the Court had made an Order, which in fact said Court had not made, made an entry of a purported minute order granting a new trial in the above entitled action on the 19th day of November, 1940.

"That said mistake on the part of the Clerk was due to the fact that he misunderstood the Court to have made an order when in fact said Court was only discussing its intention of making its formal order on the following day, as counsel for the defendant had just cited a Supreme Court decision which the Court wished to consider before making its order either granting or denying the motion for New Trial.

"That the only true and correct order on the Motion for New Trial made in the above entitled action is for the order made and entered on the 20th day of November, 1940, and that the minute entry and purported minute order entered on the 19th day of November, 1940, is a clerical error inadvertently made without the Order of the Court by reason of the misunderstanding above recited.

"It is therefore ordered that the minute entry and purported minute order dated the 19th day of November, 1940, be and the same is hereby expunged from the record."

[1-3] It is too well settled to require extended citation of authority that the court has control of its own records with inherent power to correct them to make them speak the truth. The ministerial act mistakenly performed by the clerk in purporting to enter an order never made by the court can have no judicial force or effect. To hold otherwise would be to endow the clerk with judicial functions and to enable him to bind the court by his purely ministerial errors.

It will suffice to cite the case of Carpenter v. Pacific Mutual Life Insurance Co., 14 Cal.2d 704, 96 P.2d 796. In that case as in this the clerk made a minute entry reciting a purported order which the court had not in fact made, the purported order in that case reading: "Matter is dismissed without prejudice." The court later struck these words from the minutes by ex parte order. The Supreme Court said at page 707 of 14 Cal.2d, at page 798 of 96 P.2d: "It is the long-settled rule that courts of record in this state have inherent power to make a correction, nunc pro tunc or otherwise, of clerical errors and misprisions in their records, in order that such records conform to the facts and speak the truth. * * * Under this rule the corrections may be made at any time, either on motion of an interested party, or on the court's own motion. In the present proceeding it was not improper for the court to make the correction prior to hearing of the order to show cause. Since the correction was purely that of a clerical error, notice thereof to the appellants was unnecessary and they may not be deemed to have been prejudiced by the order made without notice."

On pages 708 and 709 of the same opinion in 14 Cal.2d, page 799 of 96 P.2d, appears the following quotation from Livesay

v. Deibert, 3 Cal.App.2d 140, 39 P.2d 466: "It was for the trial judge to determine whether the order was complete and all that he intended it to be or whether it was deficient. * * * The facts were completely and solely within his own knowledge. He alone knew whether a mistake had been made and how it had been made. He had a right to rely upon his own memory * * * and his determination of the fact is conclusive."

It follows that the order of November 26, 1940, expunging the minute entry of November 19, 1940, was valid and effective and the court committed no error in its order of November 27, 1940, denying appellant's motion to strike and vacate the order of November 20, 1940, since the order of November 20, was the only order actually made by the court on the motion for new trial.

[4-6] It remains only to determine whether the written order signed and filed by the judge on November 20, 1940, granting the motion for new trial on the ground of insufficiency of the evidence finds support in the record. Respondent was riding in an automobile driven by another which came into collision with the automobile driven by appellant. He testified that while the car in which he was riding was passing another car going in the same direction appellant drove his car into the middle lane of a three lane highway and the collision occurred there. Evidence was given of prior statements by respondent that he did not remember anything about the collision or how or where it took place, and appellant also points to conflicts and inconsistencies in respondent's testimony given at the trial and by deposition. The credibility of respondent was for the trial court to determine. If the trial judge believed the version of the accident most favorable to respondent as testified to by himself, such evidence was sufficient to support a plaintiff's verdict. Where the new trial is granted for insufficiency of the evidence the inquiry of an appellate court will go no further than to determine whether there is substantial evidence to support a verdict in favor of the moving party.

[7] The appeal from the purported order of November 19, 1940, since expunged from the minutes, is dismissed. On the other three appeals the orders are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

OWINGS v. LAUGHARN.*

Civ. 13278.

District Court of Appeal, Second District,
Division 3, California.
May 4, 1942.
Rehearing Granted June 2, 1942.

1. Pleading 🔑147

A cross-complaint is for many purposes regarded as beginning an entirely new action, and issues presented upon it are entirely separate and distinct from those upon the original complaint and answer.

2. Bankruptcy 🔑302(2)

In wife's action to quiet title against husband's trustee in bankruptcy, allegation in cross-complaint attacking husband's transfer of the land to wife, that "there are no assets of the bankrupt's estate other than" such property, must be deemed to speak as of the date the cross-complaint was filed.

3. Bankruptcy 🔑302(2)

In wife's action against husband's trustee in bankruptcy to quiet title, trustee's allegations that husband owed $1,800 when he transferred the realty to wife, and nine months later his estate in bankruptcy had no assets unless the transferred property could be recovered, were not enough to show that the transfer rendered him insolvent.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Ida M. Owings against Hubert F. Laugharn, as trustee in bankruptcy, to quiet title to real property, wherein defendant filed answer and cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Zuckerman & Stein, Edward K. Zuckerman, and Arthur Edmund Stein, all of Los Angeles, for appellant.

John C. Kleber, of Los Angeles, for respondent.

SHAW, Justice pro tem.

The defendant is the trustee in bankruptcy of the plaintiff's husband and as such trustee claims an interest in certain real property on the ground that a transfer thereof by the husband to the plaintiff is void as against defendant for various reasons. Plaintiff brought this action against defendant to quiet her title to the real property in question. Defendant filed an answer and a cross-complaint setting up his various claims of invalidity of the transfer to plaintiff. From a judgment against him he appeals.

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*For subsequent opinion see 128 P.2d 114.

[1-3] All of defendant's claims that the transfer made by plaintiff's husband to plaintiff is void as to him require, as an essential foundation, the fact that the husband was insolvent at the time he made the transfer. This fact was alleged in the cross-complaint, but it was denied in the answer thereto, and the court found against the defendant on the issue thus made. We find in the evidence no reference to this fact of insolvency. Examination of the pleadings discloses allegations of the cross-complaint, not denied and therefore to be taken as true, that at the time of the transfer, June 19, 1939, and long prior thereto, the husband owed more than $1,800 to his creditors (not saying how much more), that he has ever since been so indebted, and the claims against his estate exceed $1,800; that the petition in bankruptcy upon which he was adjudicated a bankrupt was filed July 11, 1939; and that "there are no assets of such bankrupt estate other than" the property so transferred. A cross-complaint is for many purposes regarded as the beginning of an entirely new action and the issues presented upon it are entirely separate and distinct from those upon the original complaint and answer (Pacific Finance Corp. v. Superior Court, 1933, 219 Cal. 179, 182, 25 P.2d 983, 90 A.L.R. 384); hence the allegation just quoted must be deemed to speak as of the date the cross-complaint was filed, March 20, 1940. These allegations show that when the transfer was made the husband owed $1,800 and that nine months later his estate in bankruptcy had no assets unless the transferred property could be recovered. This is not enough to show that the transfer rendered him insolvent. It does not exclude the possibility that he had $1,800 or more in other property at the time of the transfer which has since been expended or lost. It may be that the adjudication of bankruptcy should be regarded as establishing the husband's insolvency when the petition was filed, July 11, 1939; but if so, this does not show that such insolvency existed nearly a month earlier, when the transfer attacked was made. Many a man has become insolvent in a period of time even shorter than this. It is therefore unnecessary to consider any of the argument based on the assumption of insolvency.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

51 Cal.App.2d 707

PEOPLE v. SANTORA.

Cr. 2193.

District Court of Appeal, First District, Division 2, California.

May 5, 1942.

1. Criminal law 🔑**351(3)**

Evidence of flight after commission of crime is admissible, not as part of "res gestæ", but as circumstance to be considered with all other facts as tending to prove consciousness of guilt.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestæ".

2. Criminal law 🔑**351(3)**

Evidence of flight after arrest is admissible to show consciousness of guilt and may be considered with all of other circumstances to show guilty mind.

3. False pretenses 🔑**20**

In "larceny", owner of thing has no intention to part with his property therein to person taking it although he may intend to part with possession, while in "false pretenses" owner intends to part with his property in money or chattel but it is obtained from him by fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "False Pretense" and "Larceny".

4. Larceny 🔑**62(2)**

In grand theft prosecution, failure to require corroboration specified by statute relating to larceny by false pretenses was not error, where evidence established that victim did not intend to part with his property in money delivered to accused's accomplice but intended only to part with possession for short time, indicating that accused was guilty of "larceny by trick and device" which does not require corroboration as prerequisite for conviction. Pen.Code, § 1110.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny by Trick and Device".

5. Larceny ⚷65

Evidence sustained conviction of grand theft by trick and device.

6. Criminal law ⚷1159(2)

The appellate court will not interfere with verdict supported by substantial evidence unless evidence is obviously false or inherently improbable.

7. Criminal law ⚷742(1)

The credibility of complaining witness in grand theft prosecution was for jury.

8. Criminal law ⚷576(4)

Accused could not complain that cause was not brought to trial within 60 days after filing of indictment as required by statute, where all continuances beyond those caused by accused's escape were made at accused's request or with his consent, and other than a request for an "early date" no objections were made to any continuance. Pen. Code, § 1382.

9. Criminal law ⚷627½

The refusal to permit accused charged with grand theft to examine report made by police officer relating to conversation with victim was not error, where report was confidential, was not admissible in evidence and had not been used by witness to refresh his recollection and witness merely stated that such report had been prepared and that he had it in his possession.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Vincent Santora was convicted of grand theft, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, and Ralph D. Paonessa, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant appeals from a judgment entered upon the verdict convicting him of grand theft and from the order denying his motion for a new trial.

On the morning of June 11, 1940, the defendant stopped the complaining witness on the street and asked him for directions to a certain address. The witness replied that he knew of no such street. During the conversation defendant's accomplice, Sternberg, approached but upon questioning stated that he also knew of no such address. As the complainant proceeded along the street with the two strangers, defendant told him that he had collected $30,000 for the death of his brother which sum he desired to divide between a certain church and an orphanage. Defendant stated that he would give Sternberg and the complainant $1,000 apiece if they would take him to an attorney or notary who would aid him in disposing of the money, and if they would prove to him that they were honest. Sternberg thereupon entered a bank and returned with a large sum of money as proof of his honesty; he took the complainant aside and urged him to take advantage of the opportunity. The witness secured his bank book from his home and obtained $1,000 from his bank, signing a promissory note as security. When he showed the money to defendant the latter stated that he was convinced of the complainant's honesty.

About this time defendant complained of a headache, and Sternberg crossed the street to procure him some medicine from a drugstore after first giving the complainant his money to hold in order to prove that he trusted the witness. Sternberg returned with the wrong medicine and the complaining witness went to the store to exchange it. At defendant's suggestion he handed his $1,000 to Sternberg to hold until his return in order to prove that he trusted Sternberg. When the complainant came out of the store the defendant and his accomplice had disappeared. The two men were arrested on June 16, 1940, as they left a tavern; at this time Sternberg, in the presence of the defendant, sought to bribe the police officers in order to secure their freedom.

An indictment was filed against the defendant and Sternberg on June 24, 1940, jointly charging them with grand theft.

They were released on bail and fled the state. Defendant was apprehended in New York City and was brought back to San Francisco, but his accomplice is still at large. On March 4, 1941, the court denied the defendant's motion to dismiss the action under section 1382 of the Penal Code. At the conclusion of the trial the jury returned a verdict of guilty. Defendant's motions for new trial and probation were denied and a judgment was entered upon the verdict sentencing him to San Quentin prison.

[1, 2] The appellant contends that the court erred in admitting evidence of flight subsequent to his arrest and argues that evidence relative to flight is only admissible where the flight occurred immediately after the commission of the offense and prior to the arrest. The attempted distinction is without merit. It is well settled in this state that the flight of a person after the commission of a crime is a circumstance which may be considered with all of the other facts of the case as tending in some degree to prove a consciousness of guilt. Such evidence is admissible, therefore, not as a part of the res gestae, but as indicative of a guilty mind. People v. Lenahan, 38 Cal.App.2d 39, 41, 100 P.2d 515; People v. Ciani, 104 Cal.App. 596, 603, 286 P. 459; People v. Stanley, 47 Cal. 113, 118, 17 Am.Rep. 401; People v. Giancoli, 74 Cal. 642, 644, 16 P. 510; People v. Hall, 199 Cal. 451, 460, 249 P. 859; 8 Cal.Jur. 44. It is also established law that evidence of the flight of an accused after arrest is admissible to show a consciousness of guilt and may be considered with all of the other circumstances of the case to show a guilty mind. People v. Ellis, 188 Cal. 682, 693, 206 P. 753; People v. Welsh, 63 Cal. 167, 168; 8 Cal.Jur. 45 and 46.

[3, 4] The appellant further argues that the trial court erred in not requiring the corroboration specified by section 1110 of the Penal Code. The aforementioned code section requiring the testimony of two witnesses or of one witness and corroborating circumstances applies specifically to larceny by false pretenses. The distinction between false pretenses and larceny has been repeatedly enunciated by our courts to the effect that: "In larceny, the owner of the thing has no intention to part with his property therein *to the person taking it,* although he may intend to part with the possession. In false pretenses, the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." People v. Delbos, 146 Cal. 734, 736, 81 P. 131; People v. Edwards, 133 Cal.App. 335, 340, 24 P.2d 183. In the instant case the evidence establishes that the complainant did not intend to part with his property in the money but intended only to part with possession during the period of his errand. Appellant was therefore guilty of larceny by trick and device and such offense does not require the corroboration specified by section 1110 of the Penal Code before a conviction may be sustained. People v. Edwards, supra, 133 Cal.App. at page 341, 24 P.2d 183.

[5-7] Appellant argues that the evidence was insufficient to sustain the verdict. The record on appeal containing the testimony of the complainant, the testimony of the bank manager concerning the complainant's transaction with the bank, the testimony of the police officers relative to the attempted bribe, and the evidence concerning the flight of the appellant and his accomplice discloses sufficient support for the verdict and the conviction. The appellate court will not interfere with the verdict where there is substantial evidence to support it, unless the evidence is obviously false or inherently improbable. People v. Johnson, 46 Cal.App.2d 63, 66, 115 P.2d 605; People v. Moreno, 26 Cal.App.2d 334, 79 P.2d 390. Appellant's attack upon the truth of the testimony of the complaining witness is merely a question of credibility which was an issue for the determination of the jury. People v. DeCoe, 25 Cal. App.2d 522, 524, 77 P.2d 883; People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467.

[8] Complaint is made that the cause was not brought to trial within the time prescribed in section 1382 of the Penal Code. But all the continuances, beyond those caused by appellant's escape and absence from the jurisdiction, were made either at his request or with his consent, some to enable him to procure new counsel, others to accommodate his counsel. Other than a request for an "early date" no objections were made to any continuance.

[9] Finally it is argued that the court erred in refusing to permit appellant to examine a report made by a police officer relating to a conversation he had had with the complaining witness. The argument is based upon a misconception of the rec-

ord. The report was confidential, was not admissible in evidence, and had not been used by the witness to refresh his recollection. The witness merely stated that such a report had been prepared, and that he had it in his possession.

The judgment and the order are both affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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51 Cal.App.2d 672

WYNECOOP v. COATS et al.

Civ. 12101.

District Court of Appeal, First District, Division 2, California.

May 4, 1942.

1. Appeal and error ⇨612(2)

Where clerk's transcript on appeal from superior court order after judgment setting aside and vacating deficiency judgment entered by clerk, and abstract of judgment issued thereon, consisted of complaint, answer, and decree of foreclosure, and order appealed from and notice of appeal, appellant's motion on oral argument for orders to produce additional papers as part of transcript on appeal was denied, since documents included in transcript were the only ones which clerk had authority to certify. Code Civ.Proc. § 953a.

2. Appeal and error ⇨688(2)

The reviewing court would not consider an argument which was without basis in the record on appeal. Code Civ.Proc. § 726.

3. Appeal and error ⇨907(3)

In absence of contrary showing in record on appeal, reviewing court must assume any possible state of facts sufficient to support order appealed from.

4. Mortgages ⇨559(7, 10)

Where deficiency is not certified after mortgage foreclosure sale, ministerial act of clerk in entering so-called deficiency judgment is a nullity which the superior court can vacate at any time.

Appeal from Superior Court, Sutter County; Warren Steel, Judge assigned.

Foreclosure action by George Wynecoop against Arthur Coats and others. From an order of the superior court made after judgment, which order set aside and vacated a deficiency judgment entered by the clerk and an abstract of judgment issued thereon, George Wynecoop appeals.

Order affirmed.

King & King, of Gridley, for appellant.

Rich & Weis, of Marysville, for respondents.

DOOLING, Justice pro tem.

This is an appeal from an order of the superior court made after judgment, which order set aside and vacated a deficiency judgment entered by the clerk and an abstract of judgment issued thereor. In Wynecoop v. Superior Court, 17 Cal.2d 657, 111 P.2d 332, the Supreme Court refused to compel the trial judge to certify a transcript on this appeal under section 953a of the Code of Civil Procedure, and held that appellant was limited on his appeal to the clerk's transcript.

[1] The clerk's transcript before us consists of the complaint, answer and decree of foreclosure (constituting the judgment roll), the order appealed from and the notice of appeal. At the time of the oral argument appellant moved for an order to produce additional papers as a part of the transcript on appeal. This motion was denied since the documents included in the transcript are the only ones which the clerk has authority to certify. Bartholomew v. Cross, 42 Cal.App.2d 28, 108 P.2d 49; Sutliff v. Dempsey, 5 Cal.App.2d 246, 42 P.2d 677; Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748.

[2] Appellant argues the appeal on the assumption that the order appealed from was based on the theory that section 726 of the Code of Civil Procedure as amended in 1937 was applicable to the entry of a deficiency judgment on foreclosure of the mortgage executed in 1930. We cannot consider this argument because it finds no basis in the record on appeal.

The order appealed from contains the following recital: "That no money Judgment has ever been rendered in favor of Plaintiff and against Defendants, or either of them, in the above entitled action, and that no money judgment or judgment for deficiency exists against said Defendants; that the said acts of said Clerk in making said entries in said Judgment Docket and in issuing said Abstract of Judgment were and are without authority in law, void and of no force and effect."

[3, 4] In the absence of any contrary showing in the record on appeal we must assume any possible state of facts sufficient to support the order. Ward v. Ward, 15 Cal.2d 234, 100 P.2d 773. If there was in fact no deficiency certified after the sale, for example, the ministerial act of the clerk in entering the so-called deficiency judgment would be a nullity and the court could vacate it at any time. Baird v. Smith, 216 Cal. 408, 14 P.2d 749.

The order appealed from is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

MEDICO-DENTAL BLDG. CO. OF LOS ANGELES v. HORTON & CONVERSE.

Civ. 12749.

District Court of Appeal, Second District, Division 3, California.
March 31, 1942.

Dissenting opinion.

For majority opinion, see 124 P.2d 56.

PARKER WOOD, Justice (dissenting).

I dissent. In this action for rent, and for money expended for renovation and electricity, judgment was for defendant, except as to $2.97 for electricity (which was admitted in the answer), on the ground that plaintiff had breached a restrictive covenant in the lease.

Plaintiff appeals and asserts that the judgment is erroneous for the reasons: (1) Covenants in leases are independent and performance of a covenant by the landlord is not a condition precedent to an action for rent, (2) a covenant "not to lease" for a restricted purpose is breached only by actual leasing for the restricted purpose, or by acquiescence in conduct of the other lessee which is in violation of the restriction, neither of which appears in this case, (3) that if the covenants are dependent and if there was a breach of the covenant involved herein, the breach was not so substantial as to go to the whole of the consideration, and (4) that there was a waiver by respondent of the alleged violation.

In July, 1934, respondent Horton & Converse, as lessee, entered into a written lease covering the southwest corner of the ground floor of the Medico-Dental Building at 8th and Francisco Streets, Los Angeles, for a term of sixteen years and four months, at certain percentage rentals and a minimum monthly rental of $600 for the part of the term involved herein. Respondent was in possession at the time the lease was made, having occupied the premises since 1925 under a prior lease. The original lessor in the lease involved herein assigned it to appellant, Medico-Dental Building Company.

The lease provided that: "The premises hereby leased are to be used and occupied by lessee as a drug store and for no other business or purpose without the written consent of lessor."

The lease also provided: "Lessor agrees not to lease or sublease any part or portion of the Medico-Dental Building to any other person, firm, or corporation for the purpose of maintaining a drug store or selling drugs or ampoules, or for the purpose of maintaining a cafe, restaurant or lunch counter therein during the term of this lease."

On December 30, 1937, appellant entered into a written lease whereby it leased the ninth floor of the same building to Dr. Boonshaft, a physician, for a term of three years commencing April 15, 1938, which lease provided: "The premises demised hereby are to be used solely as offices for the practice of medicine and dentistry, and lessee agrees that he will not maintain therein or thereon, nor permit to be maintained therein or thereon, a drug store or drug dispensary, nor will lessee compound or dispense, or permit to be compounded or dispensed, drugs or ampoules, except in connection with the regular course of treatment of lessee's own patients. Lessee agrees not to display any sign or advertisement on the inside or outside of the demised premises, or the building of which the demised premises are a part embodying the words 'Pharmacy', 'Drug Store', 'Dispensary', or words of like import. Lessee understands that lessor has heretofore executed a lease to Horton & Converse granting to said Horton & Converse the exclusive privilege of conducting a drug store or business on the ground floor of said Medico-Dental Building, and lessee agrees that he will not do, or permit to be done, anything in connection with the premises demised hereby which would in any way conflict with or constitute a breach by the lessor therein of said Horton & Converse lease."

Dr. Boonshaft went into possession under his lease on April 15, 1938, and occupied the entire ninth floor of the building where he had from thirty-two to thirty-six treatment rooms and had eight to twelve doctors associated with him in an organization known as the Dr. Boonshaft Medical Group. The plan of operation of the medical group was to register groups of employees and lodge members and their families for medical treatment on the basis of paying a monthly sum per family; such payments entitled the patient to receive certain drugs, but additional charges were made for other drugs. He maintained a drug room in which drugs were sold and prescriptions filled for the patients of the group. He obtained a pharmacy license on May 8th. Until June 25th, he bought his drugs retail from respondent's store *in the building*. He objected to the sales tax charged by respondent and commenced buying wholesale from respondent's wholesale store *at another location* on June 25, 1938, and continued to buy his drugs from respondent wholesale to the time of trial.

The court found that during the month of May, 1938, a drug store in charge of a registered pharmacist was opened and maintained on the ninth floor of the Medico-Dental Building, which said drug store was registered as a pharmacy with the California State Board of Pharmacy; that drugs were sold in the drug store and prescriptions were compounded, filled, and a charge made for the prescriptions in the drug store, during the month of May, 1938; that on July 8, 1938, a sales tax permit was issued to Dr. Boonshaft; that during the last week of July, 1938, the defendant learned that a drug store in charge of a registered pharmacist was opened and maintained in the Medico-Dental Building, and that drugs were being sold in the drug store and prescriptions were being compounded, filled and charged for in the drug store; that defendant did on August 3, 1938, notify plaintiff in writing of said facts as to the drug store and that the lease was being breached (the letter demanded that the selling of drugs, compounding and filling of prescriptions be stopped immediately); that during the time between August 3, 1938, and August 31, 1938, a drug store was being maintained on the ninth floor of the building, and that drugs were being sold and prescriptions compounded and filled in said drug store and a charge made therefor; that agents of plaintiff had conferences relative to the objection by defendant to the drug store, and that such discussions were not communicated to defendant and defendant had no knowledge of plaintiff's disposition regarding its complaint except a conference had in defendant's office on August 8, 1938, at which time plaintiff advised defendant that it would take the matter up further and see what it could do about it and advise defendant; that defendant did not have any further communication from plaintiff concerning the objection to the drug store until August 19, 1938, at which time the attorney for plaintiff informed defendant that no arrangements could be made with Dr. Boonshaft and that plaintiff could not do anything with him; and on that occasion defendant, through its president, advised plaintiff that defendant was going to vacate the premises in order to avoid a waiver of its exclusive right to maintain a drug store and sell drugs in the building; (the testimony was that plaintiff then replied, "Well, use your own judgment as to that.") that plaintiff failed thereafter to take any further action; (The next day defendant closed the doors of its store and put signs on them stating it had moved the store to another location, and piled empty boxes at the entrance and on the main part of the floor for the purpose of impressing plaintiff that it intended to move.) that on August 24, 1938, defendant sent plaintiff a written notice of rescission and vacated the premises on August 31, 1938.

The court further found that appellant by executing the lease with Dr. Boonshaft did lease a part of the Medico-Dental Building to a tenant other than the respondent for the purpose of maintaining a drug store and selling drugs in the Medico-Dental Building, and that the making of the lease with Dr. Boonshaft was a breach of respondent's lease; and that the appellant in not taking immediate action to abate the drug store on the ninth floor of the building breached its lease with respondent; and that appellant breached its lease with respondent on August 19, 1938, when it advised respondent that appellant could make no arrangements with Dr. Boonshaft and could not do anything with him regarding the selling of drugs and maintaining the drug store; and that such breaches of the lease were in material respects, and were not waived by respondent.

The court further found that a material part of the consideration from plaintiff to defendant which induced defendant to execute said lease was the right to be protected against competition, and that a material part of the consideration failed in that plaintiff executed said lease with Dr. Boonshaft.

The court further found that it was not true that defendant or any person on behalf of defendant did assist or encourage the appellant or anyone to establish or maintain a drug store, or selling of drugs, in any part of the Medico-Dental Building other than the premises demised by plaintiff to defendant; that it was not true that Mr. Walsh informed the business manager of the Boonshaft group that it would be necessary to obtain a pharmacy license or a sales tax permit, or that he would assist in or outline a procedure for obtaining such license or permit.

The first question upon this appeal is whether the covenants "not to lease" and "to pay rent" are independent of or dependent upon each other.

The agreement by the lessor "not to lease" any other part of the building to any other person for a drug store, and the agreement by the lessee "to pay rent" appear in a rider attached to and made a part of the lease. The lessee was limited by the terms of the lease to maintaining a drug store, and the lessor was prohibited from leasing any other part of the building to any other person for a drug store.

Appellant's position is that a lease is a conveyance and not a contract and that any covenant on the part of the lessor is independent of lessee's promise to pay rent, and that each has his remedy for breach of covenant in an action for damages. While it is true that a lease is primarily a conveyance in that it transfers an estate to the lessee, it was held in Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann.Cas.1916E, 830, that "a lease has a dual character—it presents the aspect of a contract and also that of a conveyance. * * * 'Consequently the lease has two sets of rights and obligations—one comprising those growing out of the relation of landlord and tenant, and said to be based on the "privity of estate," and the other comprising those growing out of the express stipulations of the lease.'"

In 32 American Jurisprudence, section 144 (1941), it is stated that according to some authorities, covenants in leases are generally mutually independent and are not subject to the rule in contracts generally, and that the lessee's promise *to pay rent is ordinarily* independent of the lessor's promise *to repair or improve.* It is there further stated that "according to other authorities, however, covenants and stipulations on the part of the lessee and lessor are to be construed to be dependent upon each other or independent of each other, according to the intention of the parties and the good sense of the case, and technical words should give way to such intention * * *."

The lease itself recites that all the terms and covenants of the lease are conditions. In the lease involved herein there is a provision (paragraph 25) as follows: "Time is of the essence of this lease and all of the terms and covenants hereof are conditions, and upon the breach by lessee of any of the same lessor may, at lessor's option, terminate this lease * * *." This provision is an indication of an intention of the parties to make the covenant "not to lease" a dependent covenant.

The restrictive covenant in respondent's lease was vital to the protection of its business under the circumstances which prevailed in this case. Respondent's business was different from the ordinary drug store in that it catered principally to doctors and dentists for reference of prescription work, did not maintain the usual line of merchandise found in the ordinary drug store, and did not depend upon transient trade. Respondent was and had been operating a chain of exclusive prescription pharmacies in Los Angeles for eighteen years. It was attracted to this building in the first place because the building was occupied mainly by practitioners of the medical and dental professions. It had occupied the same premises since 1925, and depended upon the tenants of the building and their patients for the major part of its business. Appellant knew as stated in its letter to respondent (Ex. 6), that the "chief source" of respondent's business on the premises was the tenants in the building.

It is apparent from such circumstances that it was the intention of the parties to the lease, in attaching the special rider embodying the restrictive covenant in favor of respondent, to constitute the provisions relative to competitive business one of the vital provisions of the lease. Respondent contracted for the exclusive right to engage in a particular business in a particular building. It is a reasonable inference from the fact that an entire floor was leased "as offices for the practice of medicine and dentistry" that a substantial amount of business would be created by the several doctors occupying the several offices on that floor. The covenant on the part of the lessor went to the whole of the consideration and was not subordinate or incidental to the main purposes of the lease. A consideration of the provisions of the lease and of the facts and circumstances requires the conclusion that the restrictive covenant is a dependent covenant. The covenants "not to lease" and "to pay rent" being dependent upon each other, the respondent was entitled upon a breach of the covenant by the lessor to vacate the premises without further liability for payment of rent.

In the case of University Club v. Deakin, 1914, 265 Ill. 257, 106 N.E. 790, 791, L.R.A.1915C, 854, the action was to recover rent for a store room. The lease provided that the lessee should use the room for a jewelry and art shop and for no other purpose and "Lessor hereby agrees during the term of this lease not to rent any other store in said University Club building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls." Thereafter the lessor leased another room in the building to another person, and provided in the second lease that the lessee would not make a specialty in the leased premises of the sale of pearls. Thereafter the first lessee sought a cancellation of his lease on the ground that his lease had been violated by making the second lease and permitting the lessee to display and sell pearls. The lessor refused to cancel the lease and the first lessee vacated the premises. The court said: "By the terms of its contract with plaintiff in error it agreed that no other portion of its premises should be leased to anyone engaged in the prohibited line of business, and, if it failed to prevent any subsequent tenant from engaging in the business of making a specialty of the sale of pearls, it did so at the risk of plaintiff in error terminating his lease and surrendering possession of the premises." And the court further said: "It is idle to say that an action for damages for a breach of contract would afford him ample remedy. He contracted with defendant in error for the sole right to engage in this specialty in its building, and, if defendant in error say fit to ignore that provision of the contract and suffer a breach of the same, plaintiff in error had the right to terminate his lease, surrender possession of the premises, and refuse to further perform on his part the provisions of the contract."

In the case of Hiatt Investment Co. v. Buehler, 1929, 225 Mo.App. 151, 16 S.W.2d 219, 221, defendant leased a drug store from the plaintiff. A rider was attached to the lease which provided: "It is expressly understood that there is to be no other drug store in the holdings of the Hiatt Investment Company." Soon after the lease was made the lessor sold one of its lots, which was across the street from lessee's drug store, and the purchaser of the lot erected a storeroom thereon and leased it to a competing drug store. Defendant sold his stock of drugs and vacated the premises. Plaintiff sued for the balance of the rent due under the lease and defendant counterclaimed for damages for breach of the restrictive covenant in the lease. Judgment was rendered against the plaintiff and for the defendant for damages for breach of the covenant. The Missouri Court of Appeal affirmed that judgment holding that plaintiff having breached the covenant defendant was entitled to vacate the premises without any further liability for rent. The court stated: "The covenant in the case at bar goes to the whole consideration; it was not merely incidental to the main purposes of the lease and defendant elected to surrender the lease. The evidence shows that the lease would not have been executed if it had not been for the insertion of the restrictive covenant in it; that it was vital to the protection of defendant's business."

Appellant asserts that in the California courts it is well established that covenants in leases are independent. In support of such contention it relies upon the cases of Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423, Ann.Cas.1916D, 370, and Exchange Securities Company v. Rossini, 44 Cal. App. 583, 186 P. 828.

The case of Arnold v. Krigbaum, supra [169 Cal. 143, 146 P. 424, Ann.Cas.1916D, 370], presents a factual situation quite different from that presented here. That was an action in *unlawful detainer* and defendants set up a counterclaim and cross-complaint alleging a violation by lessor of a covenant to make repairs. The court ruled that neither a counterclaim or a cross-complaint of any kind is permissible in unlawful detainer and sustained the trial court in striking them out. The court then stated: "A covenant to repair on the part of the lessor and a covenant to pay rent on the part of the lessee are usually considered as independent covenants, and unless the covenant to repair is expressly or impliedly made a condition precedent to the covenant to pay rent, the breach of the former does not justify the refusal on the part of the lessee to perform the latter." It thus appears that the statement relative to covenants was not material to the decision for the reason the decision was based upon the principle that in an unlawful detainer action neither a counterclaim or a cross-complaint of any kind is permissible, and therefore, it was immaterial whether the covenant mentioned therein was independent or dependent. If, however, it were a material statement, it does not support appellant's contention that "covenants in leases are independent." It refers only to a covenant *to repair* and a covenant *to pay rent* and states that they are *usually* considered as independent covenants. That statement indicates that there may be circumstances in which a particular covenant, even a covenant to repair, may be dependent without an express stipulation in the lease to that effect.

The case of Exchange Securities Co. v. Rossini, supra [44 Cal.App. 583, 186 P. 829], also is quite different from the present case. In that case the covenant in the lease was that the lessor would give the lessees an option to purchase the property before selling it. The lessor sold the property without any notice to lessees, in violation of the covenant to give the lessees an opportunity to purchase. Lessees vacated the premises and the lessor sued for rent accrued after lessees left. The sole point in controversy was whether the covenant to give the option to purchase warranted the lessees in terminating the lease. It was there stated that the breach of an independent covenant by the landlord will not warrant the tenant in terminating the lease in the absence of a stipulation in the lease to that effect. Since such a stipulation was not in the lease, it only remained for the court to determine whether the covenant to give an option to purchase was independent or dependent. The court stated: "Our conclusion is that the covenant in question on the part of the lessor was *in its nature independent,* and not a condition precedent to the payment of rent by the lessees * * *." (Emphasis added.) It is clear that the enjoyment of the premises by the tenant was not affected in any way by the refusal by the landlord to give the tenant an opportunity to purchase the premises. The covenant *in its nature* was clearly collateral to and independent of the main agreement to convey a leasehold.

It thus appears that the cases so relied upon by the appellant do not sustain the contention that it is established in this state that covenants in leases are independent. There is no rule that all covenants in leases are independent.

Covenants in leases are independent or dependent according to the nature of the covenants, their relation to each other, the intention of the parties as shown by the provisions of the particular leases, and the facts and circumstances of each particular case. University Club v. Deakin, supra; Hiatt Investment Co. v. Buehler, supra; Exchange Securities Co. v. Rossini, supra; 32 Amer.Jur., § 144 supra.

The second question is whether the restrictive covenant was breached by leasing for the restricted purpose, or by acquiescence by the lessor in conduct of the other lessee which was in violation of the restriction.

As to the first part of this question, relative to leasing for the restricted purpose, the trial court found that appellant did lease to Dr. Boonshaft for the purpose of maintaining a drug store and selling drugs; that appellant by executing said lease breached its lease with defendant; and that appellant by virtue of one of the provisions of the lease intended to and did give Dr. Boonshaft the right and privilege of maintaining a drug store, selling drugs and compounding prescriptions on the premises, and by so doing failed to protect defendant against competition.

This finding, as to the purpose of appellant in making the lease, was based undoubtedly upon inferences drawn from the provisions of the lease with Dr. Boonshaft; inferences that appellant knew at the time of making the lease that the kind of medical business to be conducted by the Boonshaft group would require a large volume of drugs, and that a drug store would be maintained; that the right to maintain a drug store for his own patients was one of the main considerations to Dr. Boonshaft in making the lease; and inferences drawn from the conduct of Dr. Boonshaft and appellant after possession was taken.

One of the provisions in the lease with Dr. Boonshaft was in part, "The premises—are to be used solely * * * for the practice of medicine and dentistry and lessee agrees that he will not maintain therein * * * a drug store or drug dispensary, nor will lessee compound or dispense * * * drugs or ampules except in connection with the regular course of treatment of lessee's own patients."

This provision has been so written that it presents an ambiguity in that a question arises whether the exception relative to treating lessee's own patients applies only to compounding or dispensing drugs, or applies also to maintaining a drug store. That is, with reference to the words "drug store," the sentence may be read "* * * lessee agrees that he will not maintain therein * * * a drug store * * * except in connection with the regular course of treatment of lessee's own patients."

From this provision an inference may be drawn properly that it was intended that a drug store would be maintained but it would be in connection with the treatment of lessee's own patients. That such an inference is proper is indicated further by the provision of the lease which follows the one last mentioned, which is, "Lessee agrees not to display any sign or advertisement on the inside or outside of the demised premises or the building * * * embodying the words 'Pharmacy,' 'Drug Store,' 'Dispensary,' or words of like import." It seems improbable that any provision prohibiting signs indicating a drug store would have been included if it had not been contemplated that a drug store of some kind would be maintained, even though it be one limited to the lessee's patients.

From this last mentioned provision of the lease it is a reasonable inference that appellant employed such detailed language, relative to a sign, in an effort to prearrange an alleged defense that the drug shop was not a pharmacy because it did not have such a sign on it. In this connection it should be noted that the Business and Professions Code, section 4035, St.1937, p. 1301, states, "* * * pharmacy means and includes every store or shop where drugs * * * are dispensed or sold at retail * * * or where prescriptions are compounded, which has upon it or in it as a sign, the words * * * 'pharmacy,' 'drug store' * * * or any of these words." It is thus apparent, from the use of the Code language in the lease, that appellant considered that a drug shop which did not come within the specific definition of drug store as stated in that Code would not be a drug store within the meaning of its agreement to protect Horton & Converse against competition.

It is not a sufficient answer to say that it was not leased for the purpose of maintaining a drug store because he agreed not to display any such sign and never did display one. The question here is not whether he maintained a pharmacy in violation of a statute, but whether he violated the contractual right of respondent to have the exclusive privilege of maintaining a pharmacy in the building. Insofar as respondent's contractual rights are concerned, it is immaterial whether Boonshaft had a sign on his drug store designating it what it really was, or falsely designating it, or no sign at all. A drug store does not lose its character as such merely because it is not labeled a drug store.

It was reasonable for the trial court to infer from such provisions of the lease, from the fact that an entire floor was leased, and from the circumstances of making the lease, that appellant knew the type of medical business which was to be conducted by Dr. Boonshaft; and it was reasonable to infer further that appellant understood that under the Boonshaft plan of including certain drugs for the monthly fee charged his patients, and under his agreement with his patients to furnish other drugs and prescriptions "at low cost," that a large volume of drugs would be required and that Dr. Boonshaft would maintain a drug store; it was also a reasonable inference that appellant and Dr. Boonshaft considered at the time of making the lease that a drug store maintained on the *ninth* floor "in connection with the regular course of treatment of lessee's own patients" and without a sign on it would not be in violation of the lease with Horton & Converse.

The purpose of appellant in making the lease is indicated also by the testimony of Mr. Wilder, the property manager of appellant, when he testified that he did not know that a drug store was being operated on the ninth floor in any other way than that prescribed by the lease, and as to the meaning of his statement to that effect he testified, "I mean that in the Boonshaft lease it specifically states that they cannot conduct a drug store or a pharmacy except to compound prescriptions for their own doctors. That is the substance of the lease, and that is what I mean by that, 'provided for as in the lease.'" Tr. 190.

It is to be noted that the representation in the lease by appellant to Dr. Boonshaft relative to the exclusive right of respondent to conduct a drug store was that the exclusive right was limited to the *ground* floor. That provision was in part, "* * * lessee * * * has heretofore executed a lease * * * granting to Horton & Converse the exclusive privilege of conducting a drug store business on the ground floor of the Medico-Dental Building. * * *"

This misrepresentation as to the extent of the exclusive right may be the basis for the position taken by Boonshaft at the conference on August 8th when he said, "I am doing only what my lease gives me the privilege to do." He did not say he was not maintaining a drug store.

By reason of the provision in the lease that he would not maintain a drug store or sell drugs or compound prescriptions, except in connection with his own patients; the provision that he would not display a sign; the provision that the exclusive privilege of Horton & Converse was limited to the ground floor; and the type of his medical business; it is obviously a required and reasonable inference that at the time the lease was executed, it was the purpose of Dr. Boonshaft to maintain a drug store, sell drugs, and compound prescriptions. Likewise it is reasonable to infer that at the time of executing the lease, appellant knew the said purpose of Dr. Boonshaft and leased to him for such purpose, upon the assumption that such leasing would not be in violation of the contract with Horton & Converse, for the reason, that Dr. Boonshaft as a physician would be entitled under the Business and Professions Code to operate a drug store in connection with his own patients.

That Code provides (§ 4030) that, "* * * it is unlawful for any person to * * * compound, sell or dispense any drug * * * or * * * compound any prescription of a medical practitioner, unless he is a registered pharmacist * * *" and section 4031 provides that, "This * * * does not apply to * * * one, who holds a physician's and surgeon's certificate and who is duly registered * * * with supplying his own patients with such remedies as he may desire if he acts as their physician * * * and if he does not keep a pharmacy, open shop or drug store, advertised or otherwise, for the retailing of medicines * * *."

Dr. Boonshaft did have the legal right as a physician to supply his own patients with medicines, provided he did not keep a pharmacy, open shop or drug store for retailing medicines. Although he kept a drug store he did not violate the Business and Professions Code for the reason that he employed a pharmacist as was required by that Code.

Persons other than physicians have the right by law to maintain a drug store by employing a pharmacist and otherwise complying with the law, but such a right and compliance with legal requirements are not justification for making a lease to such a person in violation of a contract to protect against competition. The fact that Dr. Boonshaft may be entitled legally to maintain a drug store by employing a pharmacist does not meet the contractual obligation of appellant to protect respondent against competition in the building. A drug store maintained by a physician with a pharmacist in charge to supply, sell drugs and compound prescriptions, not only to patients personally treated by the physician, but for patients personally treated by eight, twelve or thirty doctors associated with him, would be as much competition as if the drug store were maintained by a pharmacist or anyone not a physician.

The drug shop was a drug store in every common acceptation of the word. The finding of the court that it was a drug store is supported fully by testimony as follows:

Two inspectors of the State Board of Pharmacy, who had been so employed nine years, testified they visited the ninth floor between May, 1938, and August 31, 1938, and that they saw a separate room stocked with drugs, medicines, pharmacist's scales, mortars, graduates, usual tools used in compounding drugs, and two licentiate certificates displayed.

An inspector of the Board of Pharmacy, who had been so employed twenty-five years, and had been a registered pharmacist for twenty-five years, testified he visited the ninth floor on August 15, 1938, and he saw a prescription case, pharmacist's scales, tools, mortars, spatulas, pharmacy licenses and permits, prescription file, and shelves around the walls with drugs on most of them.

A registered pharmacist, of thirty-five years' experience, testified he had been employed by Dr. Boonshaft from June, 1938, into September, 1938, and was in charge of the pharmacy room, that he worked there steadily during August receiving and compounding prescriptions, and setting and collecting the charges therefor, and that his duties were no different from his duties in the prescription room in other drug stores where he had worked.

Appellant asserts that respondent's conduct in vacating the premises was motivated by a desire to be relieved of the burden of the lease, and that respondent's claim that its lease was breached was a pretext to terminate its lease.

It is more reasonable to infer, as perhaps the trial court did, since the Medico-Dental Building had been involved in bankruptcy and there were several vacancies in the building, that appellant's conduct in leasing to Dr. Boonshaft was motivated by the desire to be relieved of a vacant floor and to grasp the opportunity which presented itself to lease an entire floor at one time to one person, even though such leasing for the purpose required would involve a question as to a violation of the exclusive privilege agreement with respondent. All of the surrounding facts, including the motive and anxiety of appellant to lease, the ambiguity in the lease, the representation that the exclusive privilege was limited to the ground floor, and the claim that a physician had a statutory right to supply medicines to patients not treated personally by him but by his associates, indicates that appellant was willing to take a chance that respondent, its long time tenant, would not object if it made such a lease.

The determination by the trial court as to the purpose in making the lease with Boonshaft was based upon a consideration of facts and an interpretation of an ambiguous contract. Various elements were considered as above indicated. Under such circumstances where an instrument is subject to different interpretations, the one adopted by the trial court should, if it is consistent with the intent of the parties, and not the result of an abuse of discretion, be followed by the reviewing court. City of Manhattan Beach v. Cortelyou, 10 Cal.2d 653, 660, 76 P.2d 483; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 582, 300 P. 34; Neff v. Mutual Life Ins. Co., 48 Cal.App.2d 110, 119 P.2d 404; Coviello v. Moco Fruit Co., 42 Cal.App.2d 637, 640, 109 P.2d 765. The findings of the trial court as to this point are supported amply by the evidence.

As to the second part of the second question, whether the restrictive covenant was breached by acquiescence of appellant in conduct of Dr. Boonshaft which was in violation of the restriction, the court found that the appellant in not taking immediate action to abate the drug store on the ninth floor, and in informing respondent it could not do anything with Dr. Boonshaft, breached its lease.

The drug store on the ninth floor was opened in May, 1938. Respondent learned during the last week in July, 1938, that the drug store was there and on August 3, 1938, wrote a letter to appellant objecting to the drug store and demanding that the practice be stopped immediately. All of the parties concerned held a conference five days later in respondent's office with the result the appellant would see what could be done and advise respondent. Communications were had between appellant and Dr. Boonshaft, but no further communications were had with respondent until August 19, 1938, when appellant informed respondent that it could not do anything with Dr. Boonshaft, and appellant upon being notified at that time that respondent intended to vacate the premises, stated: "Use your own judgment about that."

It thus appears that respondent did not vacate the premises abruptly upon learning in the last week in July that the drug store was being maintained, but proceeded in a deliberate and reasonable manner to give appellant an opportunity to adjust the matter by gradual processes. Mr. Wilder, the property manager for appellant, testified that at the conference he said, "Well, the meeting opened by my bringing to Dr. Boonshaft's attention the fact that he was definitely violating his lease." He also testified that he said further to Dr. Boonshaft, "You most certainly are violating the terms of the lease, as Horton & Converse have the exclusive privilege of selling drugs and medicines in the building." Relying upon appellant's admission that Boonshaft was violating his lease and that appellant would see what it could do about it, respondent cooperated further by waiting about two weeks more. Then appellant informed respondent in positive and emphatic language to the effect that negotiations were ended, nothing could be done with Boonshaft, and use its own judgment about moving out. Respondent having received such a blunt, plain, and final answer to its letter (after appellant had admitted respondent's charge of violation of the covenant), was bound to conclude that negotiations were over, that a continuation of cooperation would be futile and would involve a waiver of the violation, and that appellant was acquiescing in the violation by Boonshaft.

In opposition to the claim of acquiescence, appellant stated in argument that it should be noted that appellant did not say it would not do anything about Boonshaft. It appears, therefore, to be the contention that respondent should not have considered such statements, "could not do anything with him" and "use your own judgment," according to the plain meaning of the words, but should have understood such language to mean that appellant would do something about it sometime. Further in opposition to the claim of acquiescence it is contended that appellant did not have sufficient time to do anything with Boonshaft, and that respondent acted abruptly. Appellant had more than two weeks to decide what the answer to the letter should be. The answer certainly was not susceptible even of a remote inference that more time was required. It was definitely final. Under such circumstances, respondent was compelled to elect whether it would continue under the lease after the next rent payment day and waive the violation, or vacate before the end of the month. It elected to rescind, and did so on August 24th, stating it would vacate before the end of the month. Although respondent piled empty boxes in the store to impress appellant that it intended to move, and put signs on the doors, it did not move until about ten days later. However, appellant did not communicate with respondent before it moved on August 31st.

The findings of the court relative to acquiescence are supported amply by the evidence, and the conclusion is required that appellant acquiesced in the conduct of Boonshaft in operating the drug store.

The third point, that if there was a breach of the covenant, it was not so substantial as to go to the whole of the consideration, was discussed herein in the consideration of the first point concerning covenants. It was there shown by reason of various special circumstances such as the exclusive nature of respondent's business, the limited source of its patronage, and the many years of its occupancy of the building, that the breach did go to the whole of the consideration. If, as appellant contends, the breach did not go to the whole of the consideration, the appellant could execute similar leases on each floor of the building and thus practically destroy the essential source of respondent's patronage. Respondent was, and for many years had been, paying for the exclusive right to engage in a particular business in a particular building.

As a fourth point, appellant contends there was a waiver of the alleged violation of the restrictive covenant, and in support thereof refers to evidence in behalf of appellant to the effect: That Dr. Boonshaft obtained a pharmacy license on May 28, 1938, and that Mr. Walsh, vice-president of Horton & Converse, and a member of the State Board of Pharmacy, assisted Boonshaft in obtaining the pharmacy license, and signed the license as a member of the pharmacy board; that Boonshaft purchased all his drugs wholesale from respondent from June 25, 1938, to the time of trial; that when Boonshaft objected to paying the sales tax, that Walsh told him the tax would be charged unless he bought wholesale; that when Walsh saw the "drug room" in April or May that it was stocked with drugs; that although Walsh was aware of the facts, no notice was given to appellant for three months; and that Mr. Horton knew that a drug store "was reputed to be operated" three or four months prior to August, 1938.

However, as to the evidence above referred to relative to an alleged waiver, the court found upon the controverted issues of fact, concerning which there was very substantial evidence in support of respondent, that the facts were contrary to contention of appellant, and that there was no waiver. The finding of the court hereinabove specifically set forth, shows that Mr. Walsh did not assist or encourage Boonshaft in maintaining the drug store, obtaining the pharmacy license, or the sales tax permit. Appellant states that Mr. Walsh, a member of the pharmacy board, "signed Boonshaft's license," and refers to the name of Mr. Walsh on the license as his "signature" *attached* to the pharmacy license. Apparently this was done to create an inference that Mr. Walsh knew by reason of his personal contact with the license in signing it that the drug store was there at the time the license was issued, and that a waiver results. The fact is, as shown by the evidence, that the name of Mr. Walsh was on the pharmacy license *in facsimile* and that he had no personal contact with it. Horton & Converse had been engaged eighteen years in operating a chain of many exclusive prescription pharmacies in Los Angeles, and sold retail and wholesale. Mr. Walsh was not located in their store in the Medico-Dental Building and was there only occasionally. The wholesale department was not there. From the time Boonshaft started to buy wholesale, on June 25th, until respondent learned of the drug store during the last week of July only a month elapsed. Respondent had many wholesale customers and it is not reasonable to infer because Boonshaft bought wholesale that Mr. Walsh or any other officer of respondent knew where the drugs were being delivered to him or that he was operating a drug store. Mr. Horton, the president of Horton & Converse, and Mr. Walsh, the vice-president, testified that they learned about the drug store during the last week in July. That was substantial testimony and the court found it to be true. Respondent acted promptly upon ascertaining the facts by sending the letter of objection within a few days thereafter, August 3d. There was no waiver.

The function of an appellate court in considering the point herein relative the purpose and interpretation of the lease has heretofore been discussed. As to the other points, in the second, third, and fourth questions which relate to acquiescence, whether the restrictive covenant goes to the whole of the consideration, and waiver, it must be recognized that the trial court had the benefit of personal observation of the witnesses and that the appellate function is to consider not relative weight of conflicting evidence, but only legal sufficiency to support the findings. Showalter v. Western Pac. Ry. R. Co., 16 Cal.2d 460, 106 P.2d 895; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660. Even though different inferences might be drawn from the evidence the inference adopted by the trial court in the absence of an abuse of discretion is conclusive on the appeal. Hamilton v. Pacific Electric R. Co., 12 Cal.2d 598, 86 P.2d 829. The findings of the trial court as to these questions were supported amply by the evidence and should be sustained.

The combination of all the circumstances presented compels the affirmance of the judgment, especially in the light of the rule as to the function of an appellate court in considering findings of the trial court.

The judgment should be affirmed.

51 Cal.App.2d 592

BOAS et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 11734.

District Court of Appeal, First District, Division 1, California.

April 30, 1942.

Rehearing Denied May 29, 1942.

1. Compromise and settlement 🔑23(3)

Evidence sustained findings that during negotiations preliminary to execution of agreement compromising judgment debt, husband debtor misrepresented financial condition of wife debtor and that judgment creditor relied on such misrepresentations, and justified conclusion that agreement was void because of the fraud.

2. Appeal and error 🔑931(1)

On appeal the evidence must be viewed in its aspect most favorable to the prevailing party and all conflicts resolved in such manner as to sustain the general conclusions found as facts by the trial court.

3. Compositions with creditors 🔑11

In effecting a composition agreement the law demands the utmost "good faith" on part of debtor, and it will not permit him by pretending to be insolvent to induce his creditors to accept a small portion of the debt in lieu of the whole, when in fact his property is amply able to pay the creditors in full.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Faith".

4. Compositions with creditors 🔑11

"Good faith" requires of a debtor, before he shall be permitted to profit by a composition agreement, to make a full and fair disclosure of his effects and no concealment, deception or fraud should be practiced.

5. Specific performance 🔑53, 89

Where in a suit for specific performance it appears that the plaintiff's conduct in obtaining the agreement or acting under it has been unconscientious, inequitable or characterized by bad faith, equity court will refuse him relief.

6. Fraud 🔑17

Even though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiry, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated, and if he speaks at all, he must make a full and fair disclosure.

7. Compromise and settlement 🔑20(2)

Where debtor wife had sufficient assets to pay judgment but debtor husband induced judgment creditor to enter into compromise agreement by misrepresenting wife's financial condition, and judgment creditor, which had terminated the compromise agreement because of debtors' failure to comply therewith, refused to reinstate the compromise agreement on discovering true facts regarding wife's financial condition, the debtors were not entitled to judicial interference in their behalf.

8. Compromise and settlement 🔑8(3)

Where court determined that agreement compromising judgment debt was void because of husband debtor's false representations regarding wife debtor's financial condition which representations were known by husband to be false, judgment declaring the compromise agreement void was authorized, notwithstanding absence of specific finding that misrepresentations were made with intent to deceive.

9. Fraud 🔑4

Where one makes false representations knowing them to be false, the law implies fraudulent intent, and he will not be protected from his fraudulent conduct by the fact that he did not intend to deceive the other party.

10. Appeal and error 🔑931(1)

On appeal, a reviewing court is entitled to draw necessary inferences from the trial court's express findings in order to support judgment.

11. Appeal and error 🔑1071(6)

Where from the facts found and the judgment ordered it is evident in the light of the entire record that if more complete findings had been made they would have been adverse to the contention of appellants, it would be deemed that such inference has been drawn by trial court and in those circumstances the failure so to find is not a ground for reversal of judgment.

12. Appeal and error 🔑931(1)

Where issue of fraud constituted one of the principal issues trial court was called upon to decide, and great deal of evidence was introduced on that issue, and court found that party making false representations knew they were false, appellate court was required to assume that if trial court did not believe that the false representations were made with intent to deceive, it would have so found

13. Trial ⚷404(5)

Findings of fact must be taken as embodying conclusions of trial court on all questions of fact submitted to it for decision, and no antecedent expressions of trial judge can restrict his power to declare his final conclusion in the only manner authorized by law, that is, by filing his decision containing his findings of fact and conclusions of law. Code Civ.Proc. §§ 632, 633.

14. Appeal and error ⚷1122(2)

Where a trial by jury is not a matter of right, appellate court may make additional finding, providing there is evidence to support it. Code Civ.Proc. § 956a.

15. Appeal and error ⚷1122(3)

Where trial court determined that agreement compromising judgment debt was void because of husband debtor's false representations regarding wife's financial condition made with knowledge that they were false, appellate court made further finding that the false representations were made with intent to deceive, in view of fact that trial by jury was not a matter of right. Code Civ.Proc. § 956a.

16. Compromise and settlement ⚷23(3)

Where trial court determined that agreement compromising judgment debt was void because of husband debtor's false representations regarding wife's financial condition, evidence sustained finding that the judgment creditor believed and relied upon the false representations.

17. Compromise and settlement ⚷19(3)

Where bank entered into agreement compromising judgment debt in reliance on husband debtor's false representations regarding financial condition of wife debtor, failure of the bank to rescind until more than two years after wife had pledged corporate stock as security for another loan did not constitute "laches" barring defense of fraud in debtors' suit to establish rights under compromise agreement, in view of fact that compromise agreement was made with main office and the subsequent loan was procured under a different Christian name from a branch office of bank.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

18. Compromise and settlement ⚷23(3)

Evidence sustained determination that agreement compromising judgment debt was void because unsupported by consideration. Civ.Code, § 1614.

19. Compromise and settlement ⚷18(2)

Judgment creditor upon discovering that agreement compromising judgment debt was secured by false representations was not "estopped" from asserting that the agreement was unsupported by a valid consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

20. Compromise and settlement ⚷18(2)

Where agreement compromising judgment debt was procured by fraud and was not supported by consideration, judgment creditor was not "estopped" from asserting defense of want of consideration because of acceptance of periodic payments under the compromise agreement for approximately 2½ years, since the creditor was required to apply the money theretofore received in reduction of the judgment debt.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Benjamin Boas and wife against Bank of America National Trust & Savings Association and others for a judicial determination of rights under a written contract, and to restrain sale of pledged corporate securities. From an adverse judgment, the plaintiffs appeal.

Affirmed.

Norman A. Eisner, of San Francisco, for appellants.

Louis Ferrari, G. D. Schilling, and D. Bianco, all of San Francisco, for respondents.

KNIGHT, Justice.

The appellants, Benjamin Boas and Larie K. Boas, husband and wife, appeal from a judgment entered in an action brought by them against respondents for the purpose of securing a judicial determination of the rights of the parties under a written agreement; in particular to have it decreed that appellants' rights thereunder had been illegally terminated by respondents; also to restrain the sale of pledged corporate securities.

Respondents pleaded three separate defenses, each of which was sustained by the trial court. Its conclusions of law were that said agreement was void because its execution by respondents had been procured by false representations; that it was void because it was unsupported by any consideration; and that it had been breached by appellants and terminated by respondents. The main points urged for reversal constitute an attack on the trial trial court's legal conclusions, its findings of fact, and the sufficiency of the evidence to support said findings. Appellants urge also that even though the agreement was breached by them and terminated by respondents they were entitled to relief under section 3275 of the Civil Code. We are of the opinion that no ground for reversal has been established.

The respondent H. H. Bechtel is the assignee and agent of the respondent bank. As such, and on May 25, 1936, he obtained a judgment against appellants in the sum of $6,871.76 based on a deficiency due after sale of real property under power of sale conferred by a deed of trust; and shortly after the foreclosure sale negotiations were initiated for a settlement of the judgment debt. The negotiations were conducted by Boas in behalf of himself and wife, and on the part of the bank by W. J. Kirkpatrick, an assistant cashier thereof, whose place of employment was at its main office, No. 1 Powell Street, San Francisco; and on August 12, 1936, the parties entered into the agreement in question which they denominated "Stipulation for Compromise Settlement of Judgment." It provided that if appellants paid to respondents $2,500 in the manner and at the times specified therein respondents would deliver to appellants a full satisfaction of said judgment; that appellants would pay the $2,500 as follows: $100 cash at the time of the execution of said agreement, $25 a month for three years, commencing October 1, 1936, with 3 per cent interest on deferred payments, and the balance of $1,500 at the end of the three-year period; that if appellants defaulted for 30 days in making any of the payments or the interest respondents were entitled to terminate the agreement, in which event the payments theretofore made would be applied in reduction of the judgment debt; that meanwhile the execution of the judgment would be stayed; and that time was of the essence of the agreement. The judgment for the deficiency was entered against Boas and his wife (the latter being sued therein as Sadie K. Boas, a name sometimes used by her); and both were made parties to the agreement of August 12, 1936, but it was signed only by Boas. On March 1, 1939, appellants were in arrears in the monthly payments to the extent of $300, and on March 25, 1939, the bank mailed them a letter stating that the agreement had been terminated for failure to comply with its terms and that further consideration would be given to a compromise of the judgment debt only upon receiving a financial statement executed by both judgment debtors. On April 19, 1939, a statement was furnished as to the financial condition of Mrs. Boas, and its contents led to the discovery by Kirkpatrick that at the time the agreement of August 12, 1936, was entered into Mrs. Boas was the owner, free and clear of all encumbrances, of 100 shares of the capital stock of E. I. du Pont de Nemours & Company of the value of $16,400. At the same time he discovered also that approximately 7 months subsequent to the execution of said agreement and on March 4, 1937, Mrs. Boas (her husband being present) obtained a loan of $10,000 from the California-Montgomery branch of the respondent bank, and pursuant to a written agreement had pledged said stock as security for the payment of said loan and for the payment of any other indebtedness, past, present or future, due the bank. Upon making these discoveries the bank refused to give further consideration to the reinstatement of the compromise agreement. The refusal was based upon the ground that during said negotiations and at the time of the execution of said agreement Boas had represented that Mrs. Boas "had nothing"—that she "was not possessed of assets"; and that if the bank had known the truth it would not have entered into said agreement. Thereafter and on May 9, 1939, the bank notified appellants that under the terms of the pledge agreement it was holding said stock as security for the payment of the $10,000 loan and the judgment debt. Soon thereafter appellants brought this suit.

[1,2] With respect to the making of the false representations the trial court found, and its findings are supported by Kirkpatrick's testimony, that during the negotiations preliminary to the execution of the agreement and at the time it was executed Boas in response to questions propounded to him as to whether Mrs. Boas had any assets, stated and represented that she had nothing—that she was not possessed of any assets; and that when Boas returned the instrument to the bank for execution by the bank he was asked why his wife had not signed it, and in response thereto he stated and represented that she was ill and that he did not like to bother her with the matter, that she "did not have anything anyway." The trial court further found upon evidence legally sufficient to sustain its findings that said representations were false; that respondents believed and relied upon said representations; that they were deceived thereby and would not have entered into said agreement had they known the truth. The representations as to Mrs. Boas' financial condition were shown to be false by the admitted fact of the ownership of said stock; and Boas admitted, as a witness, that at the time he returned the instrument to the bank his wife was not ill—that she was out of town; and the two latter findings are supported by the testimony of Kirkpatrick. Furthermore, the trial court found that it was not until the delivery of the financial statement on April 19, 1939, that the falsity of the representations was discovered, and that thereupon respondents promptly rescinded. As a witness, Boas admitted that at no time prior to nor at the time of the execution of the agreement was any disclosure ever made to the bank by him or his wife of the ownership of said stock. His explanation for the failure so to do was that he was never asked about it. He denied having made the representations attributed to him; but on appeal the evidence must, of course, under well settled rules, be viewed in its aspect most favorable to the prevailing party and all conflicts resolved in such manner as to sustain the general conclusions found as facts by the trial court.

[3-7] As contended by respondents, in effecting a composition agreement the law demands the utmost good faith on the part of the debtor and it will not permit him by pretending to be insolvent to induce his creditor to accept a small portion of the debt in lieu of the whole when in fact his property is amply able to pay the creditor in full; that good faith requires of the debtor, before he shall be permitted to profit by a composition agreement, to make a full and fair disclosure of his effects, and that no concealment, deception or fraud should be practiced. Hefter v. Cahn, 73 Ill. 296; Dolsen v. Arnold, 10 How.Pr., N.Y., 528; Stafford v. Bacon, 1 Hill, N.Y., 532, 37 Am. Dec. 366. Furthermore, where in a suit for specific performance it appears that the plaintiff's conduct in obtaining the agreement or acting under it has been unconscientious, inequitable or characterized by bad faith, the court of equity will refuse him relief (Pomeroy's Equity Jurisprudence, 4th ed., § 400); and in dealing with the question of false representations it is held generally that even though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiry, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a full and fair disclosure. Pohl v. Mills, 218 Cal. 641, 24 P.2d 476; Sullivan v. Helbing, 66 Cal.App. 478, 226 P. 803. Under the legal principles stated, the trial court was justified in holding that the factual situation presented was not such as entitled appellants to judicial interference in their behalf.

[8-11] They contend, however, that since there is no specific finding that appellants made said representations with intent to deceive, one of the elements of fraud is lacking, and therefore that the judgment declaring the agreement null and void cannot be sustained on the ground of fraud. There is no merit in the contention. Where one makes false representations knowing them to be false, the law supplies the fraudulent intent (Benner v. Hooper, 112 Cal.App. 53, 296 P. 660, citing 12 Cal. Jur. 826), and he will not be protected from his fraudulent conduct by the fact that he did not intend to deceive the other party. Having actually deceived such other party and profited by the deceit, the law will not permit him to say that he acted without intent to deceive. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Pohl v. Mills, supra. On appeal a reviewing court is entitled to

draw necessary inferences from the trial court's express findings in order to support a judgment (Hulen v. Stuart, 191 Cal. 562, 217 P. 750; Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10, 18, L.R.A., N.S., 1106; Hamilton v. French, 78 Cal. App. 289, 248 P. 281); that is to say, where from the facts found and the judgment ordered it is evident in the light of the entire record that if more complete findings had been made they would have been adverse to the contention of the appellant, it will be deemed that such inference has been drawn by a trial court, and in those circumstances the failure so to find is not a ground for the reversal of the judgment. Hulen v. Stuart, supra; Krasky v. Wollpert, 134 Cal. 338, 66 P. 309; Benner v. Hooper, supra. Here fraud was charged; one of the legal grounds upon which the trial court founded its judgment that the agreement was void was that it was obtained by false pretenses; and the evidence shows and the trial court expressly found that the false representations were at all times known to the plaintiff to be false. It follows necessarily that if the trial court had made a finding covering the element of intent to deceive the finding would have been adverse to appellants. Therefore, the absence of a specific finding to that effect does not serve as grounds for reversal.

[12, 13] In support of their contention appellants cite Hoffman v. Kirby, 136 Cal. 26, 68 P. 321, and Estate of Benton, 131 Cal. 472, 63 P. 775; but unlike the present case, there was lacking in each of those cases the basic finding that the party making the false representations knew they were false; hence there was no express finding from which it could be inferred that the representations were made with a fraudulent intent. In their brief appellants assert that at the time of the settlement of the findings the trial judge refused to find that the false representations were made with intent to deceive. But in the absence of anything in the record so showing, it cannot be so held on appeal. The issue of fraud constituted one of the principal issues the trial court was called upon to decide, and a great deal of evidence was introduced on that issue. It must be assumed, therefore, that if the trial court did not believe that appellants made the false representations with intent to deceive it would have so found. As said in Phillips v. Hooper, 43 Cal.App.2d 467, 111 P.2d 22, the findings of fact must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision; and no antecedent expressions of the trial judge can in any way restrict his power to declare his final conclusion in the only manner authorized by law, that is, by filing his decision containing his findings of fact and conclusions of law as provided in sections 632 and 633 of the Code of Civil Procedure (citing several cases).

[14, 15] In any event, this being a case where a trial by jury was not a matter of right, this court under the provisions of section 956a of the Code of Civil Procedure may make the additional finding providing there is evidence to support it, and in our opinion there is. Therefore, pursuant to the authority granted by said Code section this court finds that said false representations, having been made with knowledge that they were false, were made with intent to deceive.

[16] Nor does the record sustain appellants' attack upon finding No. XII. While there was no direct testimony that the bank would not have entered into the agreement if it had not believed and relied upon the false representations, it is entirely clear from all the evidence and from the facts found that it would not have done so. Among other things it appears therefrom that at the time the agreement was made Boas was insolvent; and it is wholly unreasonable to suppose that if Kirkpatrick had then known, as he afterwards discovered, that Mrs. Boas was the owner of corporate securities of the clear value of $16,400, he would have agreed in behalf of the bank to accept $2,500 in monthly installments extending over a period of three years with interest at 3 per cent in full satisfaction of a valid final judgment against Mrs. Boas for $6,871.76, bearing interest at the legal rate of 7 per cent.

[17] Appellants contend also that the defense of fraud was barred by laches. The contention is based upon the premise that the corporate stock was pledged with the California-Montgomery branch of the bank on March 4, 1937; that at that time Mrs. Boas signed a promissory note for $10,000 which was thereafter renewed every 90 days, and that respondents did not rescind until April 19, 1939. The evidence shows, however, that all of the transactions relat-

ing to the obtaining of the judgment for the deficiency and to the execution of the agreement were conducted through and that the periodic payments made thereon were paid at the main offices of the bank at No. 1 Powell Street, where Kirkpatrick was employed; that Mrs. Boas was known to Kirkpatrick as Sadie K. Boas; that the deficiency judgment was obtained and entered against her in that name; that such was the name used in the negotiations leading up to the execution of said agreement and that she was named therein as such; whereas she carried on the transactions with the California-Montgomery branch of the bank under the name Larie K. Boas. The pledged certificate of stock was issued to her in that name, and such was the name used by her in signing the promissory notes and the pledge agreement; and it was not until April 19, 1939, that the bank officials at the main offices discovered that Sadie K. Boas with whom they were dealing and Larie K. Boas with whom the branch bank was dealing were one and the same person. Thereupon the bank promptly rescinded. In view of the above facts there could be no justification foı holding as a matter of law, contrary to the implied finding of the trial court, that respondents were guilty of laches.

[18-20] Summarized, the points made by appellants relating to the matter of consideration are that the finding thereon is but a conclusion of law and must be disregarded; that irrespective of the absence of a specific finding the conclusion reached by the trial court on that issue cannot be upheld for the following reasons: (1) that having accepted periodic payments on said agreement for approximately two and a half years, respondents were estopped from asserting the defense of want of consideration; (2) that since the agreement was in writing it is presumptive of a consideration (citing § 1614, Civ.Code); (3) that the settlement was made with an insolvent debtor and therefore required no consideration; (4) that the settlement was based on a judgment of disputed validity and finality; (5) that there was a "surrender by the debtors of the legal right to pay the judgment except in the manner set forth in the agreement," which constituted a valid consideration. There is no merit in any of the foregoing points. The last three relate to evidentiary matters and find no support in the record. The answer to the third point is that Mrs. Boas was not an insolvent debtor, for admittedly at the time the agreement was negotiated and signed she was the owner of securities of the clear market value of over $16,000. As to the fourth point, appellants concede that they did not contest the action resulting in the entry of the judgment for the deficiency; that it was entered on May 25, 1936, more than two and a half months prior to the execution of the agreement and that no appeal was taken therefrom. Regarding the fifth point, there could have been no "surrender" of any of appellants' "rights" under the judgment because it is a plain judgment against them calling for the payment of money, and contained no conditions or qualifications; and by the very terms of the agreement the judgment remained in full force and effect during the life of the agreement and until appellants had fully complied with the provisions thereof. The disputable presumption set forth in section 1614 of the Civil Code was here controverted; upon discovering that the agreement was procured by false representations, respondents were not estopped from asserting that it was unsupported by a valid consideration; and since respondents must apply the money theretofore paid under said agreement in reduction of the judgment debt, appellants are not in a position to complain. Even construing as a conclusion of law the trial court's finding that the agreement is unsupported by a consideration, clearly such conclusion may be drawn from the contents of the instrument itself and from the other facts found.

The contentions urged by appellants against the soundness of the trial court's conclusion that the agreement was breached by appellants and terminated by respondents are based largely upon evidentiary matters. In this regard they claim that prior to the exercise by respondents of their option to terminate the agreement appellants tendered the full amount of the delinquencies. Such seems to be the major contention stressed in appellants' brief. It is unnecessary, however, to consider or determine the numerous points urged in this behalf for the reason that the ultimate conclusion we have reached on the issue of fraud in any event and independent of the other issues raised disposes of the appeal and demands an affirmance of the trial court's judgment. Even though the points so urged were found to be meritorious, the result would be the same; and if found to be without merit, a discussion thereof and rulings thereon would add nothing of value to the decision. The decision on the issue of fraud disposes also of appellants' claim that they were entitled to relief provided for in section 3275 of the Civil Code.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

51 Cal.App.2d 623

DORSWITT et al. v. WILSON et al.

Civ. 11940.

District Court of Appeal, First District, Division 2, California.

May 1, 1942.

Hearing Denied June 29, 1942.

1. Landlord and tenant ⇨164(7)

Under the rule that a landlord is liable for injury to a tenant caused by a latent or hidden defect known to the landlord at time of letting but concealed by him from the tenant, it is not the dangerous condition but the concealment which renders the landlord liable, and concealment is no longer a factor once the dangerous condition is discovered by the tenant.

2. Landlord and tenant ⇨168(1)

Where tenant called landlord's attention to crack in ceiling, and subsequently plaster fell on tenant as she lay in bed which could have been placed anywhere in apartment, tenant "assumed the risk" of a dangerous condition fully known to her, and concealment of a hidden defect by landlord was no part of "proximate cause" of injury, making landlord liable to tenant.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumed the Risk" and "Proximate Cause".

3. Landlord and tenant ⇨164(2)

The mere failure to make repairs after notice or a promise to do so imposes no tort liability on a landlord to an injured tenant.

4. Landlord and tenant ⇨169(4)

Where tenant called landlord's attention to crack in ceiling, and subsequently plaster fell on tenant as she lay in bed which could have been placed anywhere in apartment, the doctrine of "res ipsa loquitur" was not applicable in tenant's action against landlord for injuries.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

5. Negligence ⇨121(2)

The doctrine of "res ipsa loquitur" is a rule of evidence raising an inference of negligence from proved facts, and is not an independent ground of liability.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action for personal injuries by Clara Dorswitt and another against G. H. Wilson and others. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellants.

Cooley, Crowley & Supple, of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an appeal from a judgment of nonsuit entered at the close of plaintiffs' case. Plaintiff rented a furnished apartment from defendant on August 21, 1935. At that time a portion of the plaster on the ceiling of the living room was cracked and looked like it was going to fall. Defendant had been notified of this condition by the manager of the apartment house but plaintiff at the time of renting was not informed of it. About August 23 plaintiff noticed the crack in the ceiling. On August 28 the crack seemed to have gotten larger and a little corner of the crack was sagging. On August 29 plaintiff notified the defendant and he came to the apartment and inspected the ceiling. Plaintiff said: "I will show it to you Mr. Wilson before anything happens; my daughter didn't see you yesterday to tell you about it so I was kind of worried about it. * * * I thought I would let you know in case anything happened. * * * Mr. Wilson, this looks very bad; I wouldn't want anything to happen, we are just here on a vacation, it would be a terrible thing." Defendant said, "this looks terribly bad," and promised to send a man up the next day to fix it. The ceiling was not repaired on August 30. Plaintiff and her daughter slept in a roll-away bed which could be placed anywhere in the apartment. Instead of moving the bed to another portion of the living room it was placed under the cracked part of the ceiling on the night of August 30, and early in the morning of August 31 the plaster from the ceiling fell on plaintiff as she lay in bed.

[1, 2] Plaintiff relies upon the rule of law that where a tenant is injured by a latent or hidden defect known to the landlord at the time of letting, but concealed by him from the tenant, the landlord is liable. Stanley v. Lander, 3 Cal.App.2d 284, 39 P.2d 225. In seeking to apply it to this case plaintiff is straining the rule beyond its reason. It is not the dangerous condition which renders the landlord liable but its concealment, and the concealment is no longer a factor in the injury to the tenant once the dangerous condition is discovered by him. The conversation of August 29 above quoted makes it clear that plaintiff was as fully aware of the danger as defendant. Passing the question of her contributory negligence, which might possibly be a question of fact, the plaintiff was injured by a condition of which she was as cognizant as the defendant and concealment was no part of its proximate cause. In the language of some of the cases she must be held to have assumed the risk of a dangerous condition fully known to her. Colburn v. Shuravlev, 24 Cal.App.2d 298, 74 P.2d 1060; Priver v. Young, 62 Cal.App. 405, 216 P. 966.

[3] Plaintiff also seeks to bring the case within the doctrine that where the landlord undertakes to make repairs he is liable for his negligence in making them. Janofsky v. Garland, 42 Cal.App.2d 655, 109 P.2d 750. The cited case furnishes its own answer to appellant's claim. At page 657 of 42 Cal.App., at page 751 of 109 P.2d of the Janofsky case the court says, quoting from a New York decision, Marks v. Nambil Realty Co., 245 N.Y. 256, 157 N.E. 129: "The distinction in such cases is the old one between nonfeasance and misfeasance." To labor the point, the landlord in failing to make the promised repairs was guilty of nonfeasance. Only if he had made them and done so negligently would he have been guilty of misfeasance and thus brought himself within the rule of the Janofsky case. Shearman and Redfield on Negligence, Rev.Ed. vol. 4, § 785, p. 1804. The mere failure to make repairs after notice or a promise to do so imposes no tort liability on a landlord. Priver v. Young, supra; Grazer v. Flanagan, 35 Cal.App. 724, 170 P. 1076; Sieber v. Blanc, 76 Cal. 173, 18 P. 260; Tiffany on Real Property, 3d Ed., vol. 1, § 106, p. 160; Shearman and Redfield on Negligence, Rev.Ed., vol. 4, § 786, p. 1805.

[4, 5] There is no room in this case for the application of the res ipsa loquitur doctrine. That is only a rule of evidence raising an inference of negligence from proved facts and not an independent ground of liability. The rules of law applicable to the landlord-tenant relation, above discussed, leave no place for application of the res ipsa loquitur doctrine to the facts of this case.

Judgment affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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52 Cal.App.2d 10

MILLER v. LEE et al.

Civ. 13401.

District Court of Appeal, Second District, Division 1, California.

May 8, 1942.

Hearing Denied July 6, 1942.

1. Judgment ⟹397

An order granting plaintiff's motion, accompanied by supporting affidavits of merit, to vacate judgment for defendants on the pleadings and grant leave to file second amended complaint, was not void, since such motion must be treated as application for relief under statute authorizing court to relieve party from judgment, taken against him through his mistake, inadvertence, surprise, or excusable neglect, on application accompanied by copy of proposed pleading. Code Civ.Proc. § 473.

2. Judgment ⟹364

The statute authorizing court to relieve party from judgment taken against him through his "mistake" may be invoked to obtain relief from judgment entered by reason of party's mistake of law when proper showing therefor is made. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake".

3. Judgment ⚷363

The power, vested in trial court by statute, to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, should be freely exercised in order to dispose of case according to its substantial merits, rather than on mere technical matters of procedure. Code Civ.Proc. § 473.

4. Appeal and error ⚷982(1)
Judgment ⚷363

Whether party should be relieved from judgment on ground of mistake, inadvertence, surprise or excusable neglect rests almost entirely in trial court's discretion, with exercise of which appellate tribunals will rarely interfere and never unless plain abuse of discretion clearly appears. Code Civ.Proc. § 473.

5. Appeal and error ⚷982(2)

A trial court's order, denying plaintiff's motion to vacate judgment for defendants on the pleadings because of mistake or surprise, will not be reversed on appeal, unless record clearly shows that such court abused its discretion. Code Civ.Proc. § 473.

6. Judgment ⚷370

Where Supreme Court decision, rendered after trial court granted defendants' motion for judgment on pleadings in action for malicious prosecution, established that amended complaint stated cause of action because it sufficiently alleged that particular criminal proceeding against plaintiff for embezzlement was terminated by final judgment of dismissal after trial, trial court did not abuse its discretion in granting plaintiff's motion to vacate judgment on ground of "surprise". Code Civ.Proc. § 473; Pen. Code, § 504a.

See Words and Phrases, Permanent Edition, for all other definitions of "Surprise".

7. Judgment ⚷370

The "surprise", because of which court may relieve party from judgment against him under statute, is some condition or situation, wherein a party to cause is unexpectedly placed to his injury without default or negligence of his own, which ordinary prudence could not have guarded against. Code Civ.Proc. § 473.

8. Judgment ⚷338

A plaintiff, against whom judgment on pleadings was taken through surprise, was not restricted to motion for new trial or appeal as a remedy, as such remedies are not exclusive, but cumulative, and do not displace statutory remedy by application to vacate judgment. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by A. W. Miller against Maurice Lee and others for malicious prosecution. From an order granting plaintiff's motion to vacate a judgment for defendants on the pleadings and an order denying defendants' motion to vacate such previous order, defendants appeal.

Affirmed.

William F. Barta and R. F. George, both of Los Angeles, for appellants.

Wendell W. McCanles, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff commenced this action against defendants to recover damages for an alleged malicious prosecution of him by and through a criminal complaint allegedly filed against plaintiff at the instigation of defendants, in which complaint plaintiff was accused in count one thereof of violating section 504a of the Penal Code, while a second count charged the offense of grand theft. After alleging that the procurement and issuance of such criminal complaint by defendants was actuated by malice on their part, it was set forth that plaintiff was arrested and imprisoned for a period of nine days; that following a preliminary examination the magistrate dismissed the grand theft charge contained in count two, but held plaintiff to answer to the superior court on the charge set forth in count one. Following the filing of an information against plaintiff in the superior court, and when the criminal cause was called for trial, the amended complaint herein alleged that by stipulation of the prosecution and defense the matter of plaintiff's guilt or innocence was submitted to the trial judge on the testimony adduced at the preliminary examination, as reflected by the transcript of such proceeding. Plaintiff's amended complaint herein then alleged that "after due and careful consideration and being fully advised in the premises on the 30th of April, 1940, the cause was dismissed by Judge Thomas L. Ambrose of the Superior Court as aforesaid, on account of the insufficiency of the evidence to show that the plaintiff A. W. Miller was guilty of the crime charged; that the proceedings in said criminal action was thereupon terminated in favor of the plaintiff."

Following the joining of issue through the filing of an answer by defendants in the civil action with which we are here concerned, the cause came on for trial before the court, at which time a jury was impaneled to try the issues, but prior to the introduction of any evidence, defendants moved the court for judgment on the pleadings. As indicated by the clerk's transcript, such motion was predicated upon the ground and for the reason that "it affirmatively appears on the face of the complaint that there was probable cause for the prosecution of the action out of which this suit arose and that is, to-wit: That it appears from said amended complaint that the plaintiff was given a preliminary hearing before Judge Frank Carrell, Justice of the Peace, Inglewood Township, Los Angeles County, California, and upon the evidence was held to answer to the Superior Court thereon to the issue. * * *" The motion for judgment on the pleadings was granted. At the time of the ruling thereon the trial court stated:

"In view of the motion which has been made for judgment on the pleadings, it is my opinion that under the holding in South v. French, 40 Cal.App. 28, 180 P. 357 and Wilson v. Troy, 19 Cal.App.2d 156, 64 P.2d 1141 and Randleman v. Boeres, 93 Cal.App. 745, 270 P. 374, that the motion must be sustained. My thought is this: That the complaint, as it stands, does not adequately allege by facts, the termination of the proceedings as required in the Troy case, and secondly, that as the complaint itself alleges there was a binding over by the Justice's Court to the Superior Court, that the allegation that the Superior Court, dismissed the action for want of evidence may be taken, if at all, in view of the Troy case, as a termination of the proceedings, but in view of 93 Cal.App. 745, 270 P. 374, it may not be considered on the question of probable cause, and therefore, the complaint showing probable cause, as it now stands, the motion will have to be sustained. * * *"

Following the granting of the motion for judgment on the pleadings, plaintiff immediately moved for permission to file a second amended complaint, which motion was denied. Five days thereafter, on April 5, 1941, plaintiff filed his "intention to move for a new trial" and "motion to vacate judgment," with affidavits of merit and a proposed second amended complaint. When these motions came on for hearing, the court, on July 17, made its order granting plaintiff's motion to vacate the judgment, with permission to file his second complaint. Thereafter defendants moved to vacate the order granting plaintiff's motion to vacate the judgment, which said motion on the part of defendants was denied. From both the order granting plaintiff's "motion to vacate judgment" and the order denying defendants' motion to vacate the last mentioned order, defendants prosecute this appeal.

In passing upon defendants' motion to set aside the order vacating the judgment on the pleadings, the court filed a memorandum ruling, which we herewith set forth because of its relevancy to subsequent discussion by us herein of the legality of the order made by the court vacating the order granting judgment on the pleadings and the jurisdiction of the court to make such order. Said memorandum is as follows:

"When the above entitled case was called for trial before a jury, the defendants, before the jury was sworn, made a motion for judgment on the pleadings. The case having been fully argued I announced that the motion for judgment on the pleadings would have to be sustained on the authority of Wilson v. Troy, 19 Cal.App.2d 156, 64 P.2d 1141. Thereupon, before any formal entry was made in the minutes or otherwise, counsel for plaintiff requested permission to file an amended complaint. I announced that the motion for judgment on the pleadings having been made I felt his motion to amend came too late and that I was not authorized under the cases to consider his motion. I stated that if he was entitled to the ruling he requested it was my opinion he would have to file a formal motion in the Law and Motion Department of the Court (Dept. 35). I also stated that if I had the authority to permit plaintiff to amend, after the motion for judgment on the pleadings had been filed and I had announced my ruling thereon, I would grant the motion to amend on condition that the costs which had been incurred be paid by the plaintiff. Thereupon the minute order was made of the action of the Court and subsequently, in April, the judgment was signed.

"Incidentally, I should add that I gave a twenty day stay of execution at the time I ruled on the motion for judgment on the pleadings, so that counsel for plaintiff could check on the authorities and ascertain the proper procedure. The judgment presented to me was signed by me on April 4th. On April 5, 1941, a notice of an intention to move for new trial was filed and likewise on the same day a motion to vacate the judgment was filed. Thereafter, on June 21, 1941, the Supreme Court in Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775, stated that Wilson v. Troy was not and never had been the law in this State. Accordingly, after argument, I, on July 14, 1941, granted the motion to vacate the judgment and granted permission to plaintiff to file his second amended complaint.

"Under date of August 15th, the defendants filed herein a motion entitled as follows: 'Motion to Vacate and Set Aside Order Vacating Judgment.'

"This motion came on for hearing today and is this day denied."

[1, 2] It is first contended by appellants that the order granting plaintiff's motion to vacate the judgment is void. In this claim appellants cannot be sustained, because coming as it did after the granting of the motion for judgment on the pleadings, and accompanied as it was by supporting affidavits of merit, the application to vacate such judgment and for leave to file a second amended complaint must be treated as an application for relief under the provisions of section 473 of the Code of Civil Procedure. Irvine v. J. F. Shea Co., Inc., 41 Cal.App.2d 458, 460, 107 P.2d 80; Janson v. Bryant, 52 Cal.App. 505, 506, 199 P. 542. It is equally well established in this state that the provisions of section 473 may be invoked to obtain relief from a judgment entered by reason of a party's mistake of law, when a proper showing therefor is made. Waite v. Southern Pacific Co., 192 Cal. 467, 471, 221 P. 204.

[3-5] In the exercise of discretion by the trial court in proceedings under the provisions of section 473 of the Code of Civil Procedure, two propositions of law seem to be definitely settled. First, that the power vested in trial courts by section 473 of the Code of Civil Procedure should be freely and liberally exercised to the end that cases shall be disposed of according to their substantial merits rather than upon mere technical matters of procedure, and secondly, that in matters of this sort the proper decision of the case rests almost entirely in the discretion of the court below, and appellate tribunals will rarely interfere, and never unless it clearly appears that there has been a plain abuse of discretion. Therefore, unless the record clearly shows that the trial court has abused its discretion in denying the motion for relief herein, its order will not be reversed on appeal.

[6-8] While it is true, as contended by appellants, that the mistake of an attorney justifying relief must be other than that arising from mere ignorance of the law, we are here confronted with a case wherein, by and through a decision of the Supreme Court of this state (Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335, 341, 135 A.L.R. 775), rendered subsequent to the order herein granting judgment on the pleadings and prior to the determination of plaintiff's application for relief under section 473, it was established that plaintiff's amended complaint which was before the court on motion of defendants for judgment on the pleadings in fact stated a cause of action. In the last cited case our Supreme Court, speaking through Mr. Chief Justice Gibson, said: "* * * In other words, whether the proceeding is dropped by the magistrate or in the superior court, it is sufficient that the particular proceeding is terminated. It is immaterial whether the termination is a bar to any further prosecution for the same offense, or whether the accused may be charged and tried anew. * * *"

From the averments contained in plaintiff's amended complaint which we have hereinbefore narrated, it is at once apparent that such pleading not only sufficiently alleged that the particular proceeding was terminated, but also set forth facts indicative of a trial in the superior court, coupled with a final judgment of dismissal, all of which showed jeopardy and a consequent inhibition against further prosecution upon the charge contained in count one of the criminal complaint filed against plaintiff, while the dismissal by the magistrate of count two sufficiently met the requirements of Jaffe v. Stone, supra, concerning termination of that particular proceeding.

The "surprise" mentioned in section 473 of the Code of Civil Procedure, from the effect of which it is within the power of the courts upon satisfactory showing to relieve a party, is sometimes defined to be some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against. Manifestly, respondent in the case at bar was placed in a situation to his injury, and the condition was not brought about by either negligence or ignorance of such party's counsel, because the decision in Jaffe v. Stone, supra, clearly established the sufficiency of the allegations contained in plaintiff's amended complaint to state a cause of action, and consequently, the motion for judgment on the pleadings should have been denied. Nor was the plaintiff restricted to making a motion for new trial or to an appeal. The provisions governing motions for new trial and appeal cannot be regarded as exclusive methods under the facts here stated. They are cumulative remedies and do not displace the remedy afforded by section 473 of the Code of Civil Procedure, when application thereunder is duly made within the statutory time. It would indeed be a sad commentary upon the asserted zeal of the law to guarantee every litigant his day in court and to try causes not upon technical matters of procedure but upon their substantial merits, were we to hold that the trial court abused its discretion in granting the motion herein, appropriately made pursuant to section 473 of the Code of Civil Procedure, in the face of a situation such as is presented to us in the instant proceeding. The record before us showing as it does the right of respondent to proceed under the provisions of the last named code section, and such record clearly showing no abuse of discretion on the part of the trial court, under the law we have but one thing to do, and that is to affirm both the order granting plaintiff's motion to vacate the judgment on the pleadings and the second order refusing to vacate the former.

The orders appealed from are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.

PROPP v. STATE BAR OF CALIFORNIA.

L. A. 18229.

Supreme Court of California.

May 22, 1942.

As Modified on Denial of Rehearing

June 18, 1942.

Attorney and client 🔑53(2)

Evidence sustained finding that representation of attorney to client that judgment had been entered in action was false and was known by attorney to be false and record disclosed course of conduct sufficient to support recommendation for discipline of attorney who was suspended from practice of law for six months. St.1939, p. 357, §§ 6103, 6106.

In Bank.

Proceeding by Mac Arthur Propp against the State Bar of California to review recommendation of the Board of Governors of the state bar that the petitioner be suspended for a period of six months.

Petitioner suspended from practice of law for a period of six months.

William Roy Ives, of Los Angeles, for appellant.

Preston B. Plumb, Jr., and Arthur L. Syvertson, both of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the Board of Governors of the State Bar that the petitioner be suspended for a period of six months.

The petitioner was charged with the violation of his oath and duty as an attorney at law within the meaning of section 6103, State Bar Act, St.1939, p. 357, and with the commission of acts involving moral turpitude within the meaning of section 6106.

The record shows that in September, 1938, the complaining witness, Mrs. Banks, was served with summons and complaint in a suit on a promissory note brought against her by the Universal Discount Company. She went to the petitioner for advice. It appeared that she had executed the note in favor of Dr. Smulson, a dentist, in payment for dental work which she claimed had been unsatisfactory. The dentist transferred the note to the Universal Discount Company. The petitioner advised her to settle the action on the note and to file a separate suit for malpractice against Dr. Smulson. She agreed to this procedure. The petitioner settled the claim on the note and filed an action against Dr. Smulson for general damages in the sum of $1,500 and special damages in the sum of $175. An agreement was made between the petitioner and Mrs. Banks whereby the petitioner was to be paid a fee contingent on a successful outcome and on the basis of 50 per cent of any amount collected. Mrs. Banks advanced the court costs.

The malpractice action was filed in November, 1938. Dr. Smulson failed to appear and his default was entered on December 16, 1938. The petitioner informed Mrs. Banks that it would be necessary that some dentist testify as an expert on her behalf to establish her damages. She failed to obtain the services of an expert witness. In March, 1939, R. E. Matteson, chief advisory counsel of Kerrs Legal Research Bureau, discussed with the petitioner the possibility of obtaining a default judgment without the necessity of proving damages. The petitioner entered into an agreement with Matteson, who was not licensed to practice law in this state, a fact known to the petitioner, whereby Matteson agreed to take the necessary legal steps to obtain a judgment and to have execution levied. The petitioner orally agreed that Matteson should receive for his services an interest in the judgment to the extent of $700.

In March, 1939, Matteson presented to the petitioner a memorandum of authorities to substantiate his theory. The petitioner did not examine the authorities but prepared a judgment and mailed it to the clerk of the court. In April, 1939, Matteson informed the petitioner that the clerk had refused to file the judgment. Matteson then suggested that they file the judgment with an affidavit of assignment prepared and sworn to by Matteson together with an unsigned writ of execution, and a check for $1 in payment of the clerk's fees for issuing the writ. Matteson was named and was acting in the capacity of assignee of the judgment. He took the papers for the purpose of filing them and of obtaining the issuance of the writ of execution. The papers were filed with the clerk but the filing did not constitute the entry of a judgment and execution was never issued thereon. Early in 1940 Matteson reported to the petitioner that he was having difficulty with the sheriff who refused to issue the writ of execution. They discussed the possibility of applying for the writ of mandate to compel the sheriff to issue the writ. The petitioner didn't see Matteson again until the latter part of 1940 when Matteson told him he had been ill and unable to work on the case. The petitioner did not attempt to locate Matteson again until February, 1941. Even then he did not see him and made no further attempts to have judgment entered in the action.

In the meantime Mrs. Banks had become anxious about her lawsuit. She tried many times to see the petitioner. On two occasions he informed her that he was attempting to have default judgment entered without producing evidence of damages. He told her that if his efforts did not succeed she would be required to furnish proof of the damages alleged in her complaint. Mrs. Banks had also received a letter from the petitioner stating that a judgment had been entered in the action. The petitioner testified that he did not dictate or sign the letter, but admitted that the letter came from his office.

The local committee and the board of governors found that the representation of the petitioner to Mrs. Banks that a judgment had been entered in the action was false and was known by the petitioner to be false. The petitioner testified that he instructed his stenographer to write Mrs. Banks and tell her that default had been entered. He claims to be corroborated in his version of the incident by the fact that no initials appear at the bottom of the letter to indicate that he dictated it and that it was customary in his office for the stenographer to place appropriate initials on dictated letters. He therefore contends that the finding is not supported by the evidence.

An examination of the record discloses a course of conduct on the part of the petitioner which would justify this and other findings of the committee and the board. These findings are sufficient to support a recommendation for discipline and the petitioner has not met the burden of showing that the conclusion based thereon is unlawful or erroneous. The impropriety of following Matteson's advice needs no comment.

It is ordered that petitioner be suspended from the practice of law for a period of six months commencing thirty days after the filing of this order.

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20 Cal.2d 382

RAPS v. RAPS.

S. F. 16314.

Supreme Court of California.

May 11, 1942.

1. Divorce 🔑81

Where husband moved to set aside decree of divorce in favor of deceased wife, the appearance in court of the attorney in behalf of the executrix for the purpose of challenging the jurisdiction of the court to entertain the motion on the ground that court had no jurisdiction over the subject matter constituted a "general appearance" by the executrix notwithstanding that attorney also interposed an objection to jurisdiction of person of the executrix.

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance".

2. Divorce 🔑81

On motion by husband to set aside final decree of divorce for extrinsic fraud made after death of both wife and her attorney where attorney for wife's executrix appeared pursuant to notice served on attorney and objected to jurisdiction of court over subject matter of motion, lack of formal substitution of attorney and executrix was "waived". Code Civ.Proc. §§ 286, 385.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Divorce 🔑81

On motion by divorced husband after death of both wife and her attorney to set aside final decree of divorce for extrinsic fraud, the general appearance by the attorney in behalf of the wife's executrix cured any defect in the service of husband's notice of motion required by statute to be made upon the party or attorney of record. Code Civ.Proc. § 1010.

4. Divorce 🔑165(1)

Where wife, by means of extrinsic fraud, as found by trial court, practiced upon husband and the court, secured entry of interlocutory and final decrees of divorce after there had been a reconciliation between the spouses, trial court had jurisdiction to vacate such decrees.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Suit for divorce by Rose Raps against Elias Raps wherein a final decree of divorce was granted. From an order granting defendants motion to vacate final decree of divorce, Fanny Abrahamson, executrix of the estate of Rose Raps, deceased, appeals.

Affirmed.

For prior opinion, see 119 P.2d 187.

Stella Donovan, of San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland and H. A. Leland, all of San Francisco, for respondent.

PER CURIAM.

This is an appeal from an order vacating a final decree of divorce. Proceedings were brought in the superior court in June, 1939, by Elias Raps to set aside the interlocutory and the final decrees of divorce entered about twelve years before in favor of his wife.

Rose and Elias Raps were married in 1912. On March 1, 1926, Rose was granted an interlocutory decree of divorce on the ground of wilful neglect. The final decree was entered on motion of plaintiff's attorney on March 4, 1927. The record shows that the parties had become reconciled and were living together at the times of entry of both decrees. Rose died in 1938 and her sister, Fanny Abrahamson, was appointed executrix of her will. The will recited that Rose and her husband were divorced. Shortly before her death Elias was stricken with partial paralysis, hyper-pituitarism caused by the removal of a tumor on the brain, and secondary anemia. He was placed in a hospital and suffered the deprivation of normal mental and physical faculties for some time. He did not learn of his wife's death or the recitation in her will that they were divorced until after partial recovery. Thereupon, and within three months, he moved to vacate the divorce decrees on the ground that they were procured by extrinsic fraud on the part of the plaintiff in concealing the fact of reconciliation and were therefore void.

In the meantime Mr. More, who was the attorney of record for Rose Raps in the divorce proceeding, the judge who tried the case, and the then clerk of the court had passed away.

The plaintiff's motion was made without formal substitution of the executrix of Rose Raps, deceased, as a party to the divorce action, and without formal substitution of an attorney in the place of Mr. More. It does not appear that a notice of motion or any other process was served upon the executrix, Fanny Abrahamson, who was in Maryland when the proceeding on the motion was commenced. However, it does appear that a notice of motion, addressed to Fanny Abrahamson, was served on Stella Donovan, her attorney in the matter of the probate of the will of Rose Raps.

The motion to vacate came on for hearing on June 27, 1939, and the attorney for the executrix appeared in court and asked for a continuance. A continuance was granted until June 29, 1939, and the hearing was held on that day. The transcript of the record at the hearing is shown by the following:

"Mrs. Donovan: I want to raise a preliminary point of law, that the court has no jurisdiction to hear this motion to set aside the interlocutory and final decrees after twelve years.

"(Discussion between counsel.)

"The Court: Objection overruled, proceed.

"Mr. Leland: I will read the affidavits and the notice of motion. (Mr. Leland reads to the court the Notice of Motion to Vacate Interlocutory and Final Decrees of Divorce; Affidavit of Elias Raps; Affidavit of Mae Weiner, and Affidavit of M. G. Meisel.)

"Mr. Leland: The defendant was the husband. The plaintiff was the wife. She is dead. The executrix of her will is represented in court by counsel, Mrs. Donovan. I think the record should so show, Mr. Clerk.

"Mrs. Donovan: I take the position that the court has no jurisdiction to set aside the interlocutory decree or the final decree after one year.

"(Discussion between Court and counsel.)

"The Court: Motion granted."

The executrix has appealed from the order granting the motion on the ground that the court did not have jurisdiction of the subject matter of the action because of the lapse of more than twelve years between the entry of the final decree and the making of the motion to set it aside, and on the additional ground, apparently not urged on the hearing in the trial court, that the court did not have jurisdiction of the plaintiff's representative because no proper substitution or service of notice had been made.

[1] The appearance in court of the attorney in behalf of the executrix for the purpose of challenging the jurisdiction of

the court to entertain the motion on the ground that the court had no jurisdiction over the subject matter, constituted a general appearance by the executrix. This is so even though it be assumed, in the absence of a record showing the fact, that the attorney also interposed an objection to the jurisdiction of the person of the executrix. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Security Loan & Trust Co. of So. Cal. v. Boston & S. R. Fruit Co., 126 Cal. 418, 58 P. 941, 59 P. 296; Burrows v. Burrows, 10 Cal.App.2d 749, 52 P.2d 606; Morte v. Justice's Court, 139 Cal.App. 605, 34 P.2d 748; Roberts v. Superior Court, 30 Cal.App. 714, 159 P. 465. In Olcese v. Justice's Court, supra [156 Cal. 82, 103 P. 318], where the petitioner appeared for the purpose of objecting to the jurisdiction of his person and of the subject matter, the court said:

"Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement, and find no especial favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. It is purely a dilatory plea; and, when a defendant seeks to avail himself of it, he must, for very obvious reasons, stand upon his naked legal right and seek nothing further from the court than the enforcement of that right. He will not be heard to ask of the court anything further than an adjudication upon his plea, and if he does ask anything further, then, by logic of the fact, he must necessarily have waived the irregularity of his summons before the court. Here is one reason for the well-settled rule that, if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. Another reason, equally valid, is that if such defendant shall ask for any relief other than that addressed to his plea, he is seeking to gain an unconscionable advantage over his adversary, whereby, if the determination of the court be in his favor, he may avail himself of it, while, if it be against him, he may fall back upon his plea of lack of jurisdiction of the person. So it is well settled that, if a defendant, under such circumstances, raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons."

[2] The executrix urges that she was not properly substituted in the action in the place of Rose Raps, deceased, under the provisions of section 385 of the Code of Civil Procedure, which provides in part as follows: "In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. * * *" She also contends that there had been no proper proceeding to substitute an attorney for the deceased attorney of record for Rose Raps in the divorce action, under section 286 of the Code of Civil Procedure. That section provides that when an attorney dies the party he represented "must, before any further proceedings are had against him" be required to appoint another attorney. These objections do not appear to have been made on the hearing of the motion. Admittedly there was a failure formally to substitute the executrix and her attorney. This defect, however, does not compel a reversal of the trial court's order in a case where a general appearance had been made by the attorney in behalf of the executrix. Mooney v. Superior Court, 183 Cal. 705, 192 P. 542; Tolle v. Doak, 12 Cal.App.2d 195, 55 P.2d 542. The attorney for the executrix appeared pursuant to the notice served upon her and objected to the jurisdiction of the court over the subject matter of the motion. Thus by making a general appearance in behalf of the executrix she waived the lack of formal substitution. In Mooney v. Superior Court, supra [183 Cal. 705, 192 P. 543], it was said:

"But, assuming that there should have been a substitution, notice of the motion for dismissal having in fact been served upon his duly qualified personal representative, she appeared and contested the motion upon its merits, thus practically making herself, in her official capacity as executrix of the will of contestant, a party to the proceeding in his place. She was in fact fully authorized to be substituted in his place; she did proceed therein, and was recognized as proceeding therein, as if formally substituted, and at most all that was lacking was the entry of a formal order of substitution. This at best was a mere irregularity in procedure, not affecting any substantial right, which, in view of the circumstances, would hardly warrant a reversal of the judgment of dismissal on appeal."

[3] The general appearance by the attorney in behalf of the executrix also cured any defects in the service of the notice on the party or attorney of record as contemplated by section 1010 of the Code of Civil Procedure. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15; Martin v. Howe, 190 Cal. 187, 211 P. 453; Olcese v. Justice's Court, supra; Johnson v. Tyson, 45 Cal. 257.

[4] The affidavits presented by Elias Raps on the hearing of the motion alleged facts sufficient to establish that the plaintiff Rose Raps had surreptitiously secured the entry of the divorce decrees after there had been a reconciliation between the spouses. In granting the motion the court necessarily determined that the decrees were obtained by means of extrinsic fraud practiced upon the husband and the court and that they should be vacated. The order was within the jurisdiction of the court on the facts presented. Britton v. Bryson, 216 Cal. 362, 14 P.2d 502; McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110.

The order is affirmed.

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52 Cal.App.2d 66

BELL v. BANK OF PERRIS et al.

Civ. 2484.

District Court of Appeal, Fourth District, California.

May 11, 1942.

Rehearing Denied June 10, 1942.

Hearing Denied July 6, 1942.

1. Fixtures 🔑1

The law relating to fixtures recognizes that under certain circumstances personalty becomes a part of the "realty" and thereafter assumes the status of realty. Civ. Code, §§ 657, 658, 660, 663.

See Words and Phrases, Permanent Edition, for all other definitions of "Realty".

2. Fixtures 🔑35(3)

Whether an article annexed to the realty is a "fixture" is a "question of fact" to be determined under evidence in the particular case, and the question is determined not only by manner in which the article is affixed to the realty, but also by the relationship between the parties to the controversy. Civ.Code, §§ 657, 658, 660, 663.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixture".

3. Fixtures 🔑1

In determining whether an article is a "fixture", it is necessary to consider the manner of its annexation, its adaptability to the use and purpose for which the realty is used, and the intention of the parties making the annexation. Civ.Code, §§ 657, 658, 660, 663.

4. Fixtures 🔑4

As between private parties such as those bearing relationship to each as buyer and seller under conditional sales contracts, their mutual intention as to whether article is a "fixture" and part of "realty" or is "personalty" is controlling, but as to third persons who are not parties to any such private agreement, the intent which controls is not a secret, hidden intent, but that manifested by the physical facts, giving due consideration to the status of party by whom the article has been installed. Civ.Code, §§ 657, 658, 660, 663.

See Words and Phrases, Permanent Edition, for all other definitions of "Personalty".

5. Fixtures 🔑4

In determining whether an article becomes a "fixture", the test of intention of the parties is to be given a broad signification, and does not merely imply a secret action of mind of owner of property, nor need it be expressed in words, but is to be inferred from nature of article affixed, relation and situation of party making annexation, structure and mode of annexation, and purpose or use for which annexation has been made. Civ.Code, §§ 657, 658, 660, 663.

6. Fixtures 🔑18(5)

Where intention of owners to make centrifugal pumps a permanent part of irrigation system on ranch was disclosed by manner of installation of the pumps which were placed on concrete foundations, and were enclosed in specially constructed pump houses, and the pumps became an integral part of an interconnected irrigation system without which the ranch could not be operated, the pumps were "fixtures" and were covered by mortgage on the realty, so that title to the pumps passed to the mortgagee who purchased realty at foreclosure sale. Civ.Code, §§ 657, 658, 660, 663.

7. Fixtures ⚷18(5)

Where centrifugal pumps which were placed on realty and became an integral part of an irrigation system were purchased under conditional sales contracts containing provisions that the pumps should not become part of the realty, such provisions were inoperative after the pumps were paid for, and did not preclude them from becoming "fixtures" which were covered by mortgage on the realty. Civ.Code, §§ 657, 658, 660, 663.

8. Fixtures ⚷22

Although an article annexed to the realty may retain its character as a "chattel" by reason of agreement contained in conditional sales contract under which article is sold to owner of realty, it loses such character as soon as the interest of the conditional seller is extinguished. Civ.Code, §§ 657, 658, 660, 663.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel".

9. Fixtures ⚷18(5)

Where centrifugal pumps were installed in manner evidencing intention that they should become fixtures, that pumps were removed on one occasion for purpose of being overhauled and then put back in place, did not establish an intention that installation of the pumps was not to be permanent, and did not preclude finding that the pumps were "fixtures" which were covered by mortgage on the realty. Civ.Code, §§ 657, 658, 660, 663.

◆

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Louise F. Bell against the Bank of Perris and others for removal of three deep well centrifugal pumps from a ranch during the period of redemption in a mortgage foreclosure action. From an adverse judgment, the plaintiff appeals.

Affirmed in part, and reversed in part.

Oliver P. Ensley, of Hemet, and Henry O. Wackerbarth, of Los Angeles, for appellant.

William A. Wood, of Riverside, for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment rendered in favor of respondents in an action for the removal of three deep well centrifugal pumps from a ranch property during the period of redemption in a mortgage foreclosure action. The trial court found that the pumps had not become affixed to the real property so as to pass title to the appellant, who was the mortgagee and also the purchaser at the foreclosure sale. The sole question to be decided upon this appeal is whether or not the trial court erred in concluding that the pumps in question were not fixtures.

On October 14, 1928, Horace R. Moses and wife, the predecessors in interest of respondents Long, borrowed $21,500 from appellant and executed a mortgage securing said sum on 215 acres of land near Perris, in Riverside County. An action to foreclose said mortgage was commenced on October 8, 1935, and on June 1, 1936, a commissioner's certificate of sale of the mortgaged property was issued to appellant. No redemption occurring, a commissioner's deed was issued on July 31, 1937.

In order to understand the factual background, it is necessary to set forth a few facts in addition to those set forth in the findings hereinafter set forth. Respondents Long acquired an interest in said ranch in 1920, and became the sole owners in 1931. The ranch was used for growing alfalfa and the irrigation water was pumped from deep wells. At the time of the execution of the mortgage there were two wells on the property equipped with pumps, one of which was replaced in 1929 by one of the pumps herein involved. A third well was drilled in 1930 and equipped with a Johnston turbine pump. All of the pumps here involved were purchased on conditional sales contracts but were fully paid for in 1930 or prior thereto.

The trial court found that said land was in a semi-arid region and required irrigation in order to be farmed advantageously, and that the only practicable means of obtaining irrigation for said land is by drilling wells and the installation of adequate pumping machinery and equipment; that said land had for more than 15 years been used chiefly for growing alfalfa and had been graded and leveled and equipped with concrete pipe lines, two-thirds of said land having been so prepared prior to the execution of the mortgage and one-third thereafter, and that the water for the irrigation of said land was obtained from wells which had been drilled thereon.

The findings of the court then proceed:

"II.

"That it is true that on or about October 8, 1935, and ever since then, water for irrigation of said land was obtained and only obtainable from three wells on said land, drilled to depths varying from 255 to 300 feet, and equipped with steel casing; that each well was equipped with a verticle centrifugal turbine pump; that each pump was assembled, but not specifically designed to meet the conditions of each well wherein placed; that each pump had about 195 feet of steel column of about 7 or 8 inches diameter, with steel bowls at lower end to raise water and with shafting in tubing attached to bowls.

"III.

"That it is true that there was attached to the upper end of each of said columns, a pump head of appropriate size and with oil lines, bearings and other usual accessories, all comprising such pump, appropriate for such use and weighing about 5990 pounds.

"IV.

"That it is true that each of said columns hung freely in said wells from said pump heads, without any braces, bolts or attachments of any sort, and that each of said pump heads rested upon a concrete foundation imbedded in the soil. That it is not true that any of said pump heads were sustained in place by said foundations in the sense that they adhered or were attached thereto, or were imbedded therein, or were fixtures thereof or of said real property. That the pump head of each pump rested on a concrete foundation imbedded in the ground, constructed for the particular purpose of providing a firm, strong, steady and accurate resting place for the pump, and sustaining its entire weight of approximately fifty-nine hundred ninety pounds (5990).

"V.

"That it is true that each pump and accessories thereof, was constructed and installed to raise subterranean water above the ground and to discharge it into a concrete weir for use on said real property; that each of said weirs was imbedded in the soil and a part of the water distribution system of said real property.

"VI.

"That it is not true that any of said pumps was affixed or attached to a or imbedded in any of said weirs by steel pipes or bolts. That it is true that each pump was connected to a weir by means of two pipes. That said two pipes were connected with each other by means of a Dayton coupling. That the pipe which was fastened firmly into a weir was separate and distinct from the pump head to which the other pipe was fastened firmly. That the two pipes were sufficiently fastened to each other by said Dayton coupling to enable water to be raised in said weirs to a height of from 8 to 12 feet and resist pressure without leakage.

"VII.

"That it is not true that any of said pumps was attached or affixed by iron pipes or otherwise, with a vat imbedded in the soil or with said real property.

"VIII.

"That it is true that each pump was enclosed in a pump house, but was removable therefrom; that said pump houses were readily removable.

"IX.

"That it is not true that any of said pumps, or accessories, or equipment, were intended to be or were installed, or attached, or affixed to said premises, at any time, or at all.

"That the parts of the Dayton Couplings used on the pumps included a steel sleeve between twelve and eighteen inches in length, having an inside diameter sufficient to allow the steel sleeve to slip over the outer ends of the discharge pipe and of the pipe running into the weir, each end of the sleeve being fitted into a flange, with the periphery of both flanges bored with six eyes spaced in each flange to correspond with the eyes of the opposite flange, the inner circumference of both flanges being grooved to fit over a gasket around the circumference of the pipe end over which the Dayton Coupling flange was to be set, and the Dayton Couplings being provided with steel bolts headed and threaded and inserted into the corresponding eyes of the flanges so the bolts would run parallel with the axis of the steel sleeve.

"X.

"That it is true that on or about March 1, 1937, defendant bank, without the consent or knowledge of plaintiff, entered said land, removed a portion of each pump house, and withdrew and removed each of said pumps and equipment from the wells, respectively. That it is also true that defendants, Leon C. Long and Louise Davis Long, consented to and had knowledge of each of said acts of said defendant bank, but did not connive with defendant bank in such acts."

It appears from the record without contradiction that there were three reservoirs on the land into which the water pumped from the wells could be pumped, and that the concrete pipe lines were interconnected and attached to and could be used with each of the pumps, and that after the water left the pumps it went into a concrete weir box which was imbedded in the soil and connected to the pipe lines by a Dayton coupling which joined the pipe to the pump, and the pipe to the weir box. The findings and the photograph of said Dayton coupling, introduced as an exhibit, shows said connection to be a substantial and firm connection between the pump and the remainder of the irrigation system. The respondent Bank of Perris removed the pumps from the property on March 1, 1937, after having received a chattel mortgage on the pumps and a bill of sale thereof from the respondent Long. In order to remove said pumps it was necessary to remove the roof and part of the sides of each pump house and to lift the pump out with a block and tackle.

A witness called by respondents explained how he had installed all three of the pumps as follows:

"Q. In the beginning, just explain to the court in your own way just how you installed and put these water boxes in the top part of the casing? A. Well, we put the pump in, the column and bowls and the column, and when we came down to make up the length on the head, then we have to take measurements to be sure that it is all right. Then we put that make-up connection on, to which the head is attached to the water box. Then we pick the whole thing up and let it down to within, oh, I always plan on setting it down within an inch of the foundation. Then I take some soft wood blocks approximately an inch thick, and I put them under different points of the pump, under the flange of the water box, and then I equalize the whole thing up so that the pump itself hangs plumb in the well; and when I get that done, I leave it hang right there, and put the cement under it, make up a grout, taking about half and half sand and cement, just make it damp, and poke it under there like you would grout anything; and with these soft wood blocks in there, after we do that, we take the weight off the line and let it set there; and then as the cement hardens around the soft wood blocks, the weight of the pump draws down, and it equalizes and takes the weight and becomes solid and plumb in the well."

Section 657 of the Civil Code defines property to be either: "1. Real or immovable; or, 2. Personal or movable."

Real or movable property consists of: "1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land; 4. That which is immovable by law * * *." Civ.Code, § 658.

Personal property is defined as "Every kind of property that is not real * * *." Civ.Code, § 663.

[1] The law relating to fixtures recognizes that under certain circumstances personal property becomes a part and parcel of real property and thereafter assumes the status of real property. Section 660 of the Civil Code reads as follows: "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; except * * *."

[2] With reference to section 660 of the Civil Code our Supreme Court has stated: "This section of the Code is simply a rule for general guidance, concerning itself more with ultimate than with probative facts." Gosliner v. Briones, 187 Cal. 557, 204 P. 19, 20. The relationship between the parties to the controversy must be taken into consideration in determining whether an article of personal property has become affixed to the real property. Personal property which would assume the status of real property, if affixed thereto by the owner or mortgagor, would not assume the status of real property if affixed thereto by a tenant. This rule is clearly stated by our Supreme Court in the case of R. Barcroft & Sons Co. v. Cullen, 217 Cal. 708, pages 711, 712, 20 P.2d 665, pages 666, 667, where it is said: "Whether or not an article annexed to the real property is a fixture is a question of fact to be determined upon the evidence in the particular case. Gosliner v. Briones, 187 Cal. 557, 204 P. 19; Bianchi v. Hughes, 124 Cal. 24, 56 P. 610.

The question is determined not only by the manner in which the article is annexed to the realty, but also by the relationship between the parties to the controversy. 12 Cal. Jur. 569, § 8. * * * there can be no doubt that if the action were between a vendor and vendee, or between a mortgagor and mortgagee, the service and comfort stations erected by appellant would be held to be fixtures. * * * There can be no doubt that as between landlord and tenant, in the absence of agreement, such buildings as are here involved would be deemed to be trade fixtures and removable by the tenant."

In the same case the court said: "Thus, as between vendor and vendee, or mortgagor and mortgagee, the rule in reference to fixtures is construed most strongly in favor of the vendee or mortgagee."

[3, 4] In the case of San Diego Trust & Savings Bank v. San Diego County, 16 Cal. 2d 142, 105 P.2d 94, 97, 133 A.L.R. 416, a very recent case on the question of fixtures, decided since the judgment in the instant case was entered, the court stated the test to be applied as follows:

"* * * the three tests which have often been used by this court in determining whether or not an article is a fixture—namely: (1) the manner of its annexation; (2) its adaptability to the use and purpose for which the realty is used; and (3) the intention of the party making the annexation. Lavenson v. Standard Soap Co., 80 Cal. 245, 250, 22 P. 184, 13 Am. St.Rep. 147; Hendy v. Dinkerhoff, supra, [57 Cal. 3, 40 Am.Rep. 107]; Western Union Tel. Co. v. Modesto Irr. Co., supra [149 Cal. 662, 87 P. 190, 9 Ann.Cas. 1190]; Gosliner v. Briones, 187 Cal. 557, 204 P. 19; Jahnke v. Jahnke, 81 Cal.App. 387, 391, 253 P. 752; County of Los Angeles v. Signal Realty Co., 86 Cal.App. 704, 711, 261 P. 536. * * *

"As between private parties such as those bearing the relationship to each other of landlord and tenant, or vendor and vendee under a conditional sales contract, their mutual intention as to whether an article is a fixture and part of the realty or is personalty is the controlling factor. As to third persons who are not parties to any such private agreements, however, the intent which controls is not a secret hidden intent but that manifested by the physical facts, giving due consideration to the status of the party by whom the articles have been installed. Southern California Tel. Co. v. State Board [of Equalization], supra [12 Cal.2d 127, 132, 82 P.2d 422]; M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, 37, 63 P.2d 818; City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826, 90 A.L.R. 148; Gosliner v. Briones, supra; Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 P. 524; Lavenson v. Standard Soap Co., supra."

In the case of Southern California Telephone Co. v. State Board of Equalization, 12 Cal.2d 127, at page 134, 82 P.2d 422, at page 426, the court stated:

"It is settled that in disputes between private persons the intention of the parties is controlling in determining whether an article is a fixture and part of the realty or is personalty. In M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, 37, 63 P.2d 818, 821, the rule is thus expressed: 'This court has recognized the test of intention to make the article a permanent addition to the realty as manifested by the physical facts, and has accepted the character of the annexation and the use for which the article is designed as subsidiary elements employed for the purpose of testing the intention of permanency. City of Los Angeles v. Klinker, supra (219 Cal. 198, 25 P.2d 826, 90 A.L.R. 148); Gosliner v. Briones, 187 Cal. 557, 204 P. 19; Oakland Bank of Savings v. California Pressed Brick Co., supra (183 Cal. 295, 191 P. 524); Lavenson v. Standard Soap Co., 80 Cal. 245, 22 P. 184, 13 Am.St. Rep. 147. Thus whether an article is or was physically affixed to the building is only one of the criteria in determining whether there was an intention to make it a permanent accession to the real property.'

"By definition in section 660, Civil Code, a thing becomes a fixture when it is 'permanently attached' to the realty, and permanence has reference to intent. By virtue of the importance of intent, a lessee may be permitted to remove an article installed by him and constituting a trade fixture."

In the case of M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, at pages 37 and 38, 63 P.2d 818, at page 821, it is said:

"We find a growing tendency in the decisions to modify the common-law test of technical affixation to the structure. In one direction the modification as noted in the text cited and as illustrated by the decision in City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826, 90 A.L.R. 148, tends to include as fixtures articles such as machinery whose permanent annexation is not manifested by the use of bolts, screws, and the like, but which are of such weight and nature that the mere retention in place by gravity is sufficient to give them the character of permanency and therefore affixation to the realty. * * *

"Annexation by weight and gravity, therefore, is not always alone a sufficient indication of an intent to make the article a permanent fixture and part of the realty. It must also appear from the nature of the chattel that if used for the purpose for which it was designed it would naturally and necessarily be annexed to and become a permanent and integral part of some realty; in other words, that it would become essential to the ordinary and convenient use of the property to which it was annexed."

In the case of Broadway Improvement & Investment Co. v. Tumansky, 2 Cal.2d 465, 41 P.2d 553, 554, the trial court found that the gas steam radiators in an apartment house were not attached to the floors except that each radiator was connected by means of a "slip joint threaded union and flange" to a gas pipe in each room and the lobby, and could not be removed except by unscrewing it with a wrench, and held that said radiators were not fixtures. Upon appeal the Supreme Court reversed the judgment upon that phase of the case, saying on page 469 of the opinion in 2 Cal.2d, page 554 of 41 P.2d: "It is equally obvious that the finding with respect to the gas steam radiators is sufficient to compel us to declare that they were also attached to the building in such a way as to become fixtures and a part of the realty. In the case of Dauch v. Ginsburg, supra [214 Cal. 540, 6 P.2d 952], the heating fixtures were 'attached to the rough plumbing by means of slip joint threaded unions and flanges,' and this court determined that they had become fixtures and that their removal would substantially damage and injure the property. It further said: 'The plumbing and heating fixtures are permanent in character, and absolutely essential to the purpose for which the building was constructed. The hotel building would not be a hotel building without those fixtures.' The same conclusion was reached in the other case, also involving gas steam radiators, and the trial court's judgment was reversed."

In 26 Corpus Juris, p. 661, § 10, it is stated: "Retention in Place by Gravity. Retention in place by gravity, without any fastening, has been not infrequently held to be insufficient, but the later cases usually regard this as sufficient, provided the intention to make the article part of the realty plainly appears and the article or structure is so heavy that it is as effectively kept in place by gravity as if it were fastened."

Applying the legal principles hereinbefore set forth to the facts of the instant case, as shown by the findings and the undisputed evidence, we believe that the trial court erred in holding that the three pumps involved in this action were not fixtures.

As we view the matter there can be no doubt that it was the intention of respondents Long to make said pumps a permanent part of said irrigation system and said alfalfa ranch. This is clearly shown by the manner of their installation—(1) the placing of each pump-head upon a concrete foundation imbedded in the ground, which foundation was, according to the findings of the court, "constructed for the particular purpose of providing a firm, steady, and accurate resting place for the pump and sustaining its entire weight of approximately 5990 pounds"; (2) the cement or cement grouting filled in and around the pump-head where it rested upon the concrete block; (3) the joining together of the pipe from the pump-head to the pipe extending from the weir box by a Dayton coupling consisting of certain pieces of steel joined together by bolts, the weir box being a large concrete box from the bottom of which concrete pipe lines run out through various parts of the ranch, these pipes being used to carry water from the weir boxes to one or more of the reservoirs or to irrigate the alfalfa directly from the pipe lines; (4) the enclosing of each pump in a specially constructed pump-house from which it could only be taken by removing part of the sides and the roof; (5) and the fact that it at once became and was an integral part of an inter-connected irrigation system without which the alfalfa ranch could not be operated. There is not a word of testimony from respondents Long or anyone else that there was any other intention.

[5] As was said in 11 R.C.L., p. 1062, § 6: "* * * But the test of intention is to be given a broad and comprehensive signification. It does not merely imply the secret action of the mind of the owner of the property, nor need it be expressed in words, but is to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation,

and the purpose or use for which the annexation has been made; which, obviously, suggests that the other tests are really part of this comprehensive test of intention, and that they derive their chief value as conspicuous evidence of such intention."

[6] Furthermore, the manner of the installation of the pumps and the manner in which they were used, as hereinbefore set forth, clearly shows that they meet the test of fixtures as to annexation and adaptability, as required by the authorities hereinbefore referred to.

[7] Respondents seek to avoid the force of the authorities cited by arguing that the pumps were purchased under conditional sales contracts, and that when installed they had on each of them a plate which stated that the "title to this machinery is vested in the Johnston Pump Co. until fully paid for in money, and under the sales contracts thereon the said machinery cannot nor shall it become a part of the real estate or property wherever it is located." Respondents argue that such clauses in the conditional sales contracts and on the plates on the pumps, show that it was not the intention of the pump company nor of respondents Long that said pumps be affixed to the land. In the instant case all three pumps were paid for within a short time after they were installed and seven years before they were removed by the respondent bank.

[8] It is true that by such a reservation a conditional sales vendor would have the right to remove the pumps if the purchase price were not paid, and that the authorities recognize such right. But the general rule is, as stated in 26 Corpus Juris, p. 678, § 39: "Conceding that the article annexed retains its chattel character by reason of the agreement, it loses such character as soon as the separate interest of the beneficiary under the agreement is extinguished, as by his transfer of the article to the landowner, his relinquishment of his claim or the acquisition by one person of both the land and chattel."

In the leading case of Planter's Bank v. Lummus Cotton Gin Co., 132 S.C. 16, 128 S.E. 876, 881, 41 A.L.R. 592, the supreme court of South Carolina, in stating the general rule, said:

"It is contended by the defendant that the machinery cannot be considered fixtures, for the reasons that in the contract of purchase the vendee Clinkscales agreed that the machinery would not be 'a fixture to any realty,' and that after it had been installed the vendee executed a chattel mortgage upon it in favor of the defendant.

"It is not uncommon for the seller of machinery, under a reservation of title contract, to insist upon an agreement by the buyer that it shall not be deemed a fixture and such stipulations are generally valid; the machinery retaining its character as personal property. But it is universally and logically held that such a stipulation is for the benefit of the seller, and that when the buyer's obligation to him has been discharged, it is no longer operative."

[9] Respondents point to the fact that the pumps were removed on one occasion for the purpose of being overhauled and then put back in place, the manner of removal being accomplished by substantially the same means as when the pumps were removed by respondent bank, and respondents contend that this is some evidence that the installation of the pumps was not intended to be permanent.

This contention is fully answered by the following language from the case of San Diego Trust & Savings Bank v. San Diego, supra:

"As appears hereinabove, vault doors are attached to vaults by means of screwing the 'rear' flange into place, hanging the door, then attaching the whole securely to the vault by means of cement.

"The mere fact that said doors can be removed without material damage to the vaults by chipping away with a chisel, jack hammer, or compressed air hammer, the cement grouting which attaches them to the vaults, does not alone establish their character as articles of personalty. A door or window in an ordinary dwelling house can be removed with very little damage to the realty. It also may be replaced by one of different design or by a new one if the former should become broken or defective, but no one would contend that either was not a part of the realty by reason of these facts alone.

"The existence or period of use of a vault door is measured by the life of the building to which it is annexed unless it becomes obsolete or mechanically defective. In order to make an article a permanent accession to the land its annexation need not be perpetual. It is sufficient if the article shall appear to be intended to remain where fastened until worn out, until the purpose to which the realty is devoted has been accomplished or until the article is superseded by another article more suitable for the purpose. 26 C.J. 657, § 6."

Other points discussed in the briefs do not in our opinion require discussion.

It follows from the foregoing that the trial court erred in holding that the three pumps in controversy were not fixtures.

Under the allegations of the complaint and those findings supported by the evidence it does not seem possible for plaintiff to recover judgment against Mr. and Mrs. Long. If there was a conversion of the property it was by the bank and not by the individual defendants.

The portion of the judgment in favor of Leon G. Long, also known as Leon C. Long, and Louise Davis Long is affirmed. The portion of the judgment in favor of Bank of Perris is reversed.

BARNARD, P. J., and MARKS, J., concurred.

20 Cal.2d 390

BECHTEL v. AXELROD et al. (AXELROD, Intervenor).

S. F. 16369.

Supreme Court of California.

May 22, 1942.

1. Parties 🔑40(2)

The "interest", mentioned in statute authorizing any person who has an interest in the matter in litigation to intervene any time before trial, must be of such a direct and immediate character that intervener will either gain or lose by direct legal operation and effect of the judgment. Code Civ.Proc. § 387.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest".

2. Attachment 🔑291

A third party whose property has been levied upon in an action against another has such an "interest" in the subject matter as entitles him to intervene for purpose of establishing his rights and removing cloud cast on his property by the attachment. Code Civ.Proc. § 387.

3. Parties 🔑40(2)

Wife did not have an "interest" legally sufficient to sustain her intervention in an action against husband for purpose of adjudicating his liability as accommodation maker upon a note, where it appeared that wife would neither gain nor lose by direct legal operation of a money judgment rendered against husband, and it further appeared that the community property which wife sought to protect by intervening had not been endangered. Code Civ.Proc. § 387.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by H. H. Bechtel against Albert A. Axelrod and another for deficiency judgment on promissory note after foreclosure of trust deed, wherein Lucille Axelrod intervened. From an adverse judgment, the intervener appeals.

Affirmed.

Prior opinion, 119 P.2d 424.

Eugene H. O'Donnell, Julien R. Bauer, and Albert A. Axelrod, in pro. per., all of San Francisco, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiae on behalf of California Bankers Ass'n.

C. H. White, Keyes & Erskine, Herbert W. Erskine, and Leslie L. Roos, all of San Francisco, for respondent.

CURTIS, Justice.

Having foreclosed a deed of trust given as security for a promissory note, the plaintiff commenced this action against the defendants Axelrod and Rosenthal to obtain a deficiency judgment. The defendant Axelrod had executed the note as an accommodation maker for the benefit of the defendant Rosenthal. The wife of the defendant Axelrod intervened seeking a declaration that their community property could not be subjected to payment of the obligation since it had been incurred by her husband solely as an accommodation maker and without her knowledge and consent. The trial court found that no evidence was offered as to whether the intervenor and her husband owned any community property, and that no evidence was introduced as to whether the plaintiff intended or threatened to levy execution upon any community property to satisfy the judgment against the defendant Axelrod. For these reasons the trial court concluded that the intervenor had no interest in the proceedings. From the judgment entered in favor of the plaintiff on the issue of intervention, the intervenor brought this appeal upon the judgment roll.

Assuming for the purposes of this discussion that under the allegations of the intervention pleadings, it may be accepted as a fact that the intervenor and her husband the defendant Axelrod, owned community property and that the plaintiff intended to satisfy his judgment out of it, the determinative question is whether the wife in these circumstances has such "an interest in the matter in litigation" as to entitle her to interject her claim in this action under the terms of section 387 of the Code of Civil Procedure. That section provides in part as follows: "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." The import of this language has been the subject of frequent comment in numerous decisions of the appellate courts of this state.

[1, 2] In Elliott v. Superior Court, 168 Cal. 727, at page 734, 145 P. 101, at page 105, it was declared: "The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." In Isaacs v. Jones, 121 Cal. 257, at page 261, 53 P. 793, at page 794, 1101, it was said that the "interest" specified in the above-mentioned section of the Code "must be direct, and not consequential, and it must be an interest which is proper to be determined in the action in which the intervention is sought." To the same effect were the decisions in La Mesa, etc., Irr. Dist. v. Halley, 195 Cal. 739, 741, 235 P. 999; Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 661, 663, 91 P.2d 599; Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co., 111 Cal.App. 707, 710, 296 P. 942. "And the Code does not attempt to specify what or how great that interest shall be, in order to give a right to intervene. Any interest is sufficient. The fact that the intervenor may or may not protect that interest in some other way is not material. If he 'has an interest in the matter in litigation, or in the success of either of the parties,' he has a right to intervene." Coffey v. Greenfield, 55 Cal. 382, 383; Dennis v. Kolm, 131 Cal. 91, 93, 63 P. 141. Accordingly, it has been uniformly held in this state that a third party whose property has been levied upon in an action against another has such an interest in the subject matter as entitles him to intervene for the purpose of establishing his right and removing the cloud cast on his property by the attachment. Dennis v. Kolm, supra; Bonfiglio v. Bonfiglio, 203 Cal. 409, 264 P. 747; Berghauser v. Golden State Orchards, 208 Cal. 550, 282 P. 950.

[3] Application of these principles to the present case compels the conclusion that the intervenor did not possess an interest legally sufficient to sustain her intervention in the suit which was instituted against her husband for the purpose of adjudicating his liability as the accommodation maker upon the promissory note. The wife would neither gain nor lose by the direct legal operation and effect of a money judgment rendered against her husband, the defendant Axelrod. Admittedly, the community property which she sought to protect by intervening in this action had not been endangered by an actual seizure or in any other manner. No seizure of the community property has as yet even been threatened. Granting that it was the plaintiff's intention, in the event of his recovery, to attempt to satisfy his judgment from the community property, it is entirely conceivable that the defendant Axelrod might decide to discharge the indebtedness by payment from his separate funds or that the plaintiff might not in fact initiate proceedings to enforce collection. From these observations it is manifest that the intervenor's interest in the instant action was remote and contingent and was not of the direct and immediate character required by law to support her intervention. Elliott v. Superior Court, supra.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

52 Cal.App.2d 172

WARNER v. MARCHETTI.

Civ. 13552.

District Court of Appeal, Second District, Division 1, California.

May 21, 1942.

Hearing Denied July 16, 1942.

1. Contracts ⚷350(1)

Conflicting evidence sustained findings that licensed theatrical employment agent had agreed to pay talent scout one-half of commissions received as agent for prospective movie actors introduced to him by talent scout, and that talent scout was entitled to one-half the commissions received by him as agent for an actress.

2. Master and servant ⚷14½

Under agreement whereby licensed theatrical employment agent agreed to give talent scout one-half of the commissions received by him as agent for any prospective movie actor introduced to him by scout, talent scout was not "financially interested as a partner, associate or profit sharer" in the operation of agent's business within meaning of Labor Code provision requiring that the name of anyone thus interested in the operation of an employment agency be reported to labor commissioner so as to render such agreement unenforceable by talent scout on account of agent's failure to comply with such requirement. St.1937, p. 232, § 1582.

See Words and Phrases, Permanent Edition, for all other definitions of "Financially Interested As a Partner, Associate or Profit Sharer".

3. Master and servant ⚷14½

In action by talent scout to recover her share of commissions received by licensed theatrical employment agent, equity would not permit agent to take advantage of his own wrong by claiming that agreement with talent scout for splitting commission was unenforceable because of agent's failure to comply with provisions of Labor Code relating to operation of employment agency and thus avoid the payment of commission, the retention of which would amount to an "unjust enrichment". St.1937, pp. 232, 234, 239, §§ 1582, 1595, 1642.

See Words and Phrases, Permanent Edition, for all other definitions of "Unjust Enrichment".

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Rita Stanwood Warner against Milo M. Marchetti, to recover 50 per cent. of commissions received by defendant, a licensed theatrical employment agent, for services rendered by the latter as agent for a motion picture actress introduced to defendant by plaintiff. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Harry G. Bodkin and Peter J. Youngdahl, both of Los Angeles, for appellant.

Goodspeed, McGuire, Harris & Pfaff, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment in favor of plaintiff, a so-called talent scout for the moving picture industry, for the sum of $767.66, being 50 per cent of commissions received by defendant, a licensed theatrical employment agent, for services rendered by the latter as agent for Susanna Foster, a moving picture actress, said judgment providing procedure for an accounting of future commissions received by said defendant as agent for said actress.

The complaint alleges and it was found by the court, among other things, as follows:

"III. That shortly after April 22, 1938, plaintiff and defendant entered into a contract whereby defendant agreed to pay plaintiff one-half of all commissions at any time received by defendant resulting from his presentation and placing of stage, screen and radio personalities located by plaintiff and introduced by her to defendant.

"IV. That thereafter and on or about May 23, 1938, plaintiff located a prospective screen personality, one Suzanne Larson, now known professionally as Susanna Foster, and on or about June 4, 1938, introduced said Susanna Foster to defendant.

"V. That on or about June 6, 1938, defendant signed an employment agency contract with said Susanna Foster and her mother Adelaide F. Larson, for an agent's commission of ten (10%) per cent of the earnings of said Susanna Foster, which contract was also signed by her father, L. L. Larson, a few days thereafter. That defendant at all times thereafter acted and is still acting as employment agent for said Susanna Foster.

"VI. That thereafter on or about the month of May, 1939, while defendant was her agent, said Susanna Foster obtained employment as a motion picture actress, and has ever since been and is now so employed under contract, with Paramount Pictures, Inc.; and defendant has ever since then and is now receiving commissions as employment agent for said Susanna Foster at the rate of ten (10%) per cent of the professional earnings of said Susanna Foster."

It is here maintained that the findings and judgment are (a) against the law, and (b) against the evidence.

The evidence adduced at the trial of this cause reveals that appellant is a licensed motion picture agent with offices in the city of Los Angeles; that respondent is a talent scout and as such locates potential moving picture personalities which she introduces to agents, who in turn find employment for said talent with the moving picture industry for which said agents receive a commission of 10 per cent of the earnings of said actors or actresses.

On or about April 22, 1938, appellant called respondent on the telephone in connection with a certain case involving an actress known as Deanna Durbin, who had been discovered by respondent, in the course of which appellant stated: "If you get any more Deanna Durbins bring them to me * * * and I will give you half of my commission on anybody you bring into my place to introduce to me." At a meeting between the parties in appellant's office at a later date he said: "Don't forget, Rita, you are going to have a lot of publicity after this is over, and any business you can get to bring to my office I will give you half of my commission."

On or about May 22 or 23, 1938, respondent received a letter from Mrs. Larson, the mother of Suzanne Larson, professionally known as Susanna Foster, saying she would like respondent to hear her daughter sing. Respondent immediately telephoned appellant and told him: "I would like to come down and see you; I think I have found another good find." Respondent went to appellant's office a day or two thereafter and said: "I have got an engagement to hear this little girl sing next Sunday. Would you like to come down to hear her sing?" to which appellant replied: "No, you go ahead, Rita, and use your own judgment." Respondent returned and told appellant she had heard the child sing and thought she was fine, and appellant said: "Bring her in here as quick as you can. * * * I will give you half of the commission on anything you bring into this office." On June 6, 1938, the child and her mother were introduced to appellant by respondent, at which time appellant stated that respondent was to receive one-half of his commission for representing Susanna Foster. Mrs. Larson testified that her recollection of the conversation was: "So I read the contract over and I noticed there was nothing said about Mrs. Warner in the contract, her name didn't appear in the contract at all, and she is the one whom I wished to have get the credit for the discovery of Suzanne if she proved to be any good. So I said, 'What is Mrs. Warner going to get out of it?' 'Oh,' he said, '50-50, we are 50-50.' * * * I said, 'What do you mean, 50-50'? I said, 'Your agency commission is 10 per cent, isn't it?' 'Oh,' he said 'we will split it.' Then I said that myself, 'You will each get just 5 per cent?' He said, 'That's it.'"

Mrs. Evelyn Byrd Christian testified with respect to a conversation she had with appellant in the early part of July, 1938, as follows: "I went to Mr. Marchetti's office to talk to him about going in the theatrical agency business; and in that conversation with Mr. Marchetti, in talking over about going into this theatrical agency, he asked me, wouldn't I like to work out the same kind of a thing he had worked out with Mrs. Rita Warner, that any one she brought to his office or introduced to him he would give her 50 per cent of any moneys that were made off of her. And he pointed out to me that she had brought this little girl, Suzanne Larson, now known as Susanna Foster; and I said, 'No, Mr. Marchetti, I would rather pay you monthly rent and work out something like that, because I want to learn the agency business.' And I had my attorney draw up a contract and I paid Mr. Marchetti $30 a month and I had to give him a third of everything—any one that was signed up from his office; and we have a regular contract drawn up."

Appellant testified that in the latter part of May, 1938, he had a conversation with respondent at which time he promised to split his fee of 10 per cent with her on contracts he secured for Susanna Foster, but that such promise was conditional upon respondent becoming an associate of his in charge of the juvenile department of his agency. He further testified that respondent was with him for two months leaving of her own accord; that it was during that time that respondent brought Susanna Foster to his office; that he represented Miss Foster on and after June, 1938, except for the period from October 22, 1938, until February 6, 1939, when Miss Foster was studying music with his (appellant's) sister.

There is evidence in the record that on another occasion in May or June of 1938, appellant and respondent had a conversation with respect to executing a contract under which respondent would become associated with appellant's agency for the purpose of managing the juvenile department, but this discussion occurred after appellant had agreed to divide his commissions with respondent if she was successful in locating talent and brought them to his office so he could represent them. A tentative agreement to this effect was drawn up in writing by respondent's attorney, but it was neither approved nor executed by either appellant or respondent.

Appellant secured employment for Miss Foster with Paramount Pictures, Inc., in May of 1939, and when respondent made demand upon appellant in October of 1939, appellant refused to pay her the agreed commission.

[1] From what has been said it is obvious that there is ample evidence to support the findings and judgment.

In connection with his point that the findings and judgment are against law, appellant contends that the contract found to have existed between him and respondent was void and unenforceable because of his dereliction to comply with certain sections of the Labor Code, to wit: Subdivision (e) of section 1582, St.1937, p. 232, which requires that there shall be reported to the Labor Commissioner the names and addresses of all persons financially interested, either as partners, associates or profit sharers, in the operation of an employment agency, together with the amount of their respective interests; section 1595 which announces that the license of an employment agent shall be forfeited if he fails to secure the written consent of the Labor Commissioner to the sale, transfer or giving away of "any interest in or the right to participate in the profits of the employment agency." And section 1642 which prohibits an employment agency from dividing fees "with an employer, an agent or other employee of an employer or person to whom help is furnished."

[2] There is nothing in the record herein which would substantiate the claim that respondent was financially interested as a partner, associate or profit sharer in the operation of appellant's business. As a talent scout, respondent was an independent contractor whose task was completed when she discovered a potential artist and introduced such artist to appellant or to any other agent in the field. She has no contractual relations with the prospect and has no control over the business transactions by which the agent seeks to procure employment for such prospect. Her only interest is in the payment to her of the commission agreed upon in the event she produces and introduces to the agent a potential moving picture personality.

[3] Under the circumstances presented by the record herein, equity will not permit appellant to take advantage of his own wrong by the claim that he operated his agency in an unlawful manner and thus avoid the payment of a commission the retention of which would amount to an unjust enrichment.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

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52 Cal.App.2d 86

YOUNG v. BATES VALVE BAG CORPORATION et al.

Civ. 11819.

District Court of Appeal, First District, Division 1, California.

May 13, 1942.

Hearing Denied July 10, 1942.

1. Negligence 🔑32(2)

Whether a person entering the premises of another is an invitee or a bare licensee depends on the nature of the business which brings him on the premises, and before he can be given the legal status of an "invitee" it must appear that he entered at the express or implied invitation of the owner or occupant of the premises.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

2. Negligence 🔑32(2)

Where a person enters premises of another for a purpose of mutual benefit to owner or occupant and himself or in connection with former's business, an invitation is implied; but, if he stands in no contractual relationship with owner or occupant and he is there for purposes purely of his own or of a third party, having no relation to business of owner or occupant, the person is a bare "licensee".

See Words and Phrases, Permanent Edition, for all other definitions of "Licensee".

3. Electricity 🔑14(1)

On question of corporate defendant's liability to gas company's employee for injuries from electric shock sustained by employee while on defendant's premises for purpose of relighting gas heaters, defendant by its application for service agreed to be bound by rules on file with Railroad Commission, and those rules became part of contract between company and defendant.

4. Electricity 🔑15(1)

Where gas company had right of ingress to and egress from defendants' premises for purpose of suspending service temporarily and had contractual right to shut off gas, company had a legal duty to turn it on as soon as possible, but it had no legal duty to relight or adjust gas heaters, and hence company's employee who was injured by electric shock while on defendants' premises for purpose of relighting heaters was there as an "invitee".

5. Electricity 🔑19(6)

In action by gas company's employee for injuries resulting from electric shock sustained while employee was relighting gas heater on defendants' premises, whether employee in supporting himself on tram rail to which an electric conducting bar was attached used rail for a reasonable purpose was a fact question for jury in determining whether employee was a mere licensee instead of an invitee at time of accident.

6. Electricity 🔑19(5)

In invitee's action for injuries sustained when invitee received an electric shock and fell from ladder while relighting gas heater on defendants' premises, evidence was sufficient for jury to find that defendants were guilty of negligence proximately causing injuries, either in failing to warn of a hidden danger or in failing to have warning signs or guard rails.

7. Electricity 🔑15(1)

Where reasonable grounds exist to apprehend that invitees may come into contact with electricity in pursuit of their calling, reasonable care requires that they be warned or that the wires be guarded.

8. Electricity 🔑19(12)

In invitee's action for injuries sustained when invitee received an electric shock and fell from ladder while relighting gas heater on defendants' premises, whether invitee used reasonable care or was guilty of negligence proximately contributing to his injuries was for the jury under the evidence.

9. Evidence 🔑555

Where an expert witness bases his opinion entirely on incompetent matter, or it is shown that incompetent matter is the chief element on which opinion is predicated, opinion should be rejected altogether.

10. Evidence 🔑555

In personal injury action, mere fact that electrical engineer's opinion concerning necessity of guards to protect persons working near electric conducting bar was partially based on inadmissible rules of Industrial Accident Commission did not affect admissibility of engineer's opinion, where testimony given by engineer disclosed that standard testified to by him was one adopted by electrical engineers independently of those rules. St.1937, p. 307, § 6313.

11. Evidence 🔑555

An expert's testimony, though based on knowledge gained from inadmissible sources, is entitled to credit where it has the added sanction of expert's general experience.

12. Evidence 🔑512

In invitee's action for injuries resulting from electric shock sustained in defendants' industrial plant, testimony of an expert was admissible as an aid to jury on question of approved standard of maintaining electric conduits in industrial plants, since that is not a matter of common knowledge.

13. Electricity 🔑19(13)

In action by gas company's employee for injuries from electric shock sustained while relighting gas heater on defendants' premises, instruction that company's rules and corporate defendant's application for service offered in evidence did not, standing alone, place employee in any more favorable status than that of a licensee, was properly refused.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action for personal injuries by J. A. Young against Bates Valve Bag Corporation and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Weinmann, Quayle & Berry, of Oakland, and Herbert Chamberlin, of San Francisco, for appellants.

Nichols & Richard and Leonard J. Dieden, all of Oakland, for respondent.

PETERS, Presiding Justice.

Defendants appeal from a judgment entered after a jury verdict in favor of plaintiff in the sum of $7,000 in an action brought by plaintiff to recover for personal injuries. The defendants are the Bates Valve Bag Corporation, on whose premises the injury occurred, R. G. Swain, superintendent of the company, and Harold M. Compton, an employee.

The facts are as follows: On March 31, 1931, George Cullom, then manager of the Bates Valve Bag Corporation, signed an application on behalf of the corporation for gas service to be supplied to the corporation by the Pacific Gas & Electric Company. By the terms of this application the Bates Valve Bag Corporation agreed "to conform to and abide by your rules and regulations in force relating to the purchase and sale of the said service as filed with the Railroad Commission of California." Rule 25 then on file with the commission provides that: "The Company [P. G. & E.] will at all times have the right of ingress to and egress from the consumer's premises at all reasonable hours for any purpose reasonably connected with the furnishing of gas, and the exercise of any and all rights secured to it by law, or these Rules and Regulations." Rule 23, also then in effect, provides that: "The Company [P. G. & E.], whenever it shall find it necessary for the purpose of making repairs or improvements to its system, will have the right to suspend temporarily the delivery of gas, but in all such cases, as reasonable notice thereof as circumstances will permit, will be given to the consumers, and the making of such repairs or improvements will be prosecuted as rapidly as may be practicable, and, if practicable, at such times as will cause the least inconvenience to the consumers." Pursuant to this contract, gas has been furnished by the Pacific Gas & Electric Company to the Bates Valve Bag Corporation from 1931 to and including December 8, 1939, the date of the accident upon which this action is predicated.

On December 8, 1939, the Pacific Gas & Electric Company was installing a new gas connection to a plant located near to, but unconnected with, the Bates Valve Bag Corporation. In order to make this connection it was necessary temporarily to cut off the gas service to the Bates Valve Bag Corporation. A representative of the Pacific Gas & Electric Company called at the Bates Valve Bag Corporation and told Swain, the superintendent, that it was necessary to shut off the gas to the plant in order to make the connection. The Bates Valve Bag Corporation used gas for heating purposes, and at first Swain objected to turning off the gas because it was a cold day. According to the testimony most favorable to plaintiff, Swain finally consented to shutting off the gas while the new connection was being made, and requested that the Pacific Gas & Electric Company send someone down to relight the heaters because he did not have time to do it himself. The gas company representative telephoned his office and received assurance that the Pacific Gas & Electric Company would send out an employee to relight the heaters. This assurance was communicated to Swain, and the gas was turned off at the meter. This was about 3 o'clock in the afternoon.

Shortly before 5 o'clock in the afternoon of the same day the plaintiff, J. A. Young, employed by the Pacific Gas & Electric Company to make adjustments on gas appliances, arrived at the Bates Valve Bag Corporation plant after having received instructions from the dispatcher of his employer to go to the plant and adjust the appliances. Young first talked with Swain and informed him of his mission. Swain pointed out two gas heaters that were located in the office, told Young they should be lighted, and told him that there were other heaters located in the factory that should be lighted. He conducted Young into the factory and called Compton, an employee of the Bates Valve Bag Corporation, and instructed him to assist Young in lighting the heaters.

The two office heaters are located on the floor. In the factory there are four heaters, one in each corner of the large factory room which is 100 by 150 feet in area. These four heaters are suspended 12 feet 6 inches above the floor. Above the factory floor there are steel girders that support the roof running east and west, and immediately underneath these girders are several steel tram rails 8 inches high, running north and south. On the floor of the factory is located various heavy machinery used in the manufacturing process. The tram rails are so-called "I" beams. Along the bottom lip of these "I" beams, rollers for electric hoists are operated. Just under the upper lip of the "I" beam, and attached thereto by porcelain insulators on each tram rail, is an electric conducting bar from which the hoists receive electric energy. These conducting bars are charged with 220 volts of electricity. They are unguarded. Except for the fact that the "I" beams are perforated there is little to distinguish them from the steel beams that support the roof, in fact, plaintiff testified that they all looked like steel girders to him. He also testified that the tram rails looked like girders with a little pipe running along them—that it might have been a water pipe or another little gas line.

As already mentioned, the gas heaters are located in each corner of the factory room and are suspended above the floor. The heater in the southwest portion of the plant is so located that the bottom of the heater is but five and one-half inches above the top of the tram rail, and the west side of the heater is within a few inches of the conducting bar.

Compton, who had been directed by Swain to assist plaintiff, directed plaintiff to a twenty-foot ladder, and throughout the operations about to be described assisted plaintiff in placing the ladder. There were no signs indicating that the conducting bar was energized and neither Swain nor Compton warned plaintiff of that fact. Compton testified that he thought of warning plaintiff but failed to do so. Young first turned off the gas at each appliance. This necessitated placing the ladder near each heater in the factory, climbing the ladder and turning off the gas valve located outside the heater. Young then turned on the gas at the meter, lit the pilot light in the two office heaters, and, in the company of Compton, returned to the factory. He ascended the ladder and lit the pilot light in the heater in the southeast portion of the building. He and Compton then proceeded to the southwest heater, and the two of them placed the ladder so that Young could make the adjustments on that heater. Young ascended the ladder and turned on the gas valve on the east side of the heater. On the west side of the heater, which was the side closest to the conductor bar, is a little door about an inch in diameter leading to the pilot light which is inside the heater. Young opened the door, and applied a lighted match to the pilot. The door leading to the pilot is so small that it was necessary for Young to lean over to see if the pilot had been lit. In doing so, in order to support himself, he placed his left hand on the gas pipe of the heater and his right hand on the tram rail. This hand came in contact with the energized conductor bar, resulting in Young receiving a severe electric shock. Compton, observing what had occurred, after a short delay, turned off the current and Young dropped from the ladder to the floor, sustaining a fractured skull and spinal injuries. It was for the injuries so received that the present action was brought. Defendants' motions for a nonsuit, directed verdict, judgment notwithstanding the verdict, and for a new trial were denied.

On this appeal it is urged that there is no evidence that defendants were negligent; that as a matter of law the evidence established that plaintiff was guilty of negligence; that the trial court erred in admitting evidence; and that error was committed in refusing an instruction offered by defendants.

Appellants argue that respondent was a mere licensee, and that therefore the only duty owed to him was to abstain from wilful or wanton injury, or active negligence. Powers v. Raymond, 197 Cal. 126, 239 P. 1069; Yamauchi v. O'Neill, 38 Cal.App.2d 703, 102 P.2d 365. It is also urged that if it be held that respondent was an invitee, in which event appellants were under the duty of using reasonable care to keep the premises in a reasonably safe condition, and to give warning of latent or concealed perils (Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801), there was no evidence to show a violation of that duty.

[1, 2] The rules by which it is determined whether a particular person is an invitee or licensee have frequently been

discussed. In Aguilar v. Riverdale C. C. Ass'n, 104 Cal.App. 263, 266, 285 P. 889, 891, the rules are summarized as follows: "Whether a person entering the premises of another bears the legal status of an invitee or of a bare licensee depends upon the nature of the business which brings him on the premises, and before such person can be given the legal standing of an invitee it must appear that he entered the premises at the express or implied invitation of the owner or occupant thereof. If it be shown that his purpose in so entering was one of common interest or mutual benefit to the owner or occupant and himself, or was in connection with the former's business which was there being carried on, an invitation is implied. But if it be shown that he stood in no contractual relationship with the owner or occupant, and that he was there for purposes purely of his own or of a third party which had no relation whatever to the business of the owner or occupant, and in which the latter had no interest, beneficial or otherwise, he is deemed in law to be a bare licensee."

[3, 4] After reading the record, and keeping in mind the tests above enumerated, it seems clear to us that respondent was an invitee as a matter of law, or, if the question were a debatable one, that the implied finding of the jury that he was an invitee is amply supported by the record. Appellants argue that respondent was merely given permission to enter the premises because his employer had been extended the courtesy by the Bates Valve Bag Corporation, much to its inconvenience, of shutting off the gas for the purpose of making a gas connection for another firm; that the benefit of the interruption inured to the Pacific Gas & Electric Company; that the mere courtesy extended to the Pacific Gas & Electric Company contemplated that the gas company would restore the service as soon as possible; that respondent was on the premises for the purposes of his employer and not for the benefit of appellant company. The basic premise upon which these arguments is predicated is unsound. The Pacific Gas & Electric Company had the contractual right to temporarily shut off the gas from appellant company's plant. By its application for service, appellant company agreed to be bound by rules on file with the Railroad Commission. These rules became part of the contract between the Pacific Gas & Electric Company and the appellant corporation. Pacific Brick Co. v. Southern California Edison Co., 46 Cal. App.2d 538, 116 P.2d 131; Riaboff v. Pacific T. & T. Co., 39 Cal.App.2d Supp. 775, 102 P.2d 465. By such rules, above referred to, the Pacific Gas & Electric Company had the right to suspend service temporarily while making improvements to its system, and for this purpose it was given the right of ingress to and egress from the consumer's premises. There can be no doubt, therefore, that the Pacific Gas & Electric Company had the contractual right to shut off the gas from appellant company's plant even though that company objected. The Pacific Gas & Electric Company had a legal duty to turn the gas on as soon as possible (which duty it performed), but it was under no legal duty to relight or adjust the heaters. When the Pacific Gas & Electric Company promised to relight the heaters it was merely agreeing to perform a courtesy service for appellant company. It follows, therefore, that respondent was not on the premises solely for his own or his employer's purposes. To say the least, his purpose was one of common interest and mutual benefit to the occupant and his employer. Under such circumstances, respondent was an invitee.

[5] Appellants next urge that even if it be held that respondent entered the premises as an invitee, at the time of the accident he was a mere licensee, for the alleged reason that he exceeded the scope of the invitation in using the tram rail and the conductor bar for support. In this connection, appellants rely on the rule that where one uses appliances on the premises not intended for the use of visitors, or puts appliances to a use not intended, no liability exists. Scott v. George A. Fuller Co., 41 Cal.App.2d 501, 107 P.2d 55; Clyde v. Mitchell, 14 Cal.App.2d 365, 58 P.2d 205. That rule can have no application to this case for obvious reasons. Respondent was using the tram rail as a support in furtherance of his employment. Whether he used the rail for a reasonable purpose was a question of fact for the jury. In Christy v. Ulrich, 113 Cal.App. 338, 298 P. 135, the contention was made that the plaintiff, a state employee whose duty it was to inspect the construction of a state highway bridge, had exceeded the scope of his invitation, because at the time he was injured he was voluntarily carrying a tool to a workman over the main runway. His proper duties required the use of the runway. The court

held that the plaintiff was an invitee and that the fact that at the moment of the accident he was carrying a tool to a workman did not change his status because this was in aid of his duties. See, also, Skoglund v. Moore Dry-Dock Co., 11 Cal.App.2d 287, 53 P.2d 1001.

[6, 7] Once it is determined that respondent was an invitee, the jury was justified in finding that appellants were guilty of negligence proximately causing the injury. The jury could have found that the location of the heater in such close proximity to the tram rail and the conductor bar constituted a hidden danger known to appellants but not known to respondent, and that, under the circumstances, they were under a duty to warn respondent. Dobbie v. Pacific Gas & Electric Co., 95 Cal.App. 781, 273 P. 630; Martin v. Fox W. C. Theatres Corp., 41 Cal.App.2d 925, 108 P.2d 29. The jury could have found that, under the circumstances, appellants were negligent in failing to have warning signs or guard rails to protect persons in the position of respondent from being injured. The law is clear that where there is reasonable grounds to apprehend that invitees may come into contact with electricity in pursuit of their calling, reasonable care requires that they be warned or the wires guarded. Stanley v. Lander, 3 Cal.App.2d 284, 39 P.2d 225; Anderson v. Southern California Edison Co., 77 Cal.App. 328, 246 P. 559; Monroe v. San Joaquin L. & P. Corp., 42 Cal.App., 2d 641, 109 P.2d 720. Either theory supports the judgment.

[8] Appellants argue at length that the evidence shows that respondent, as a matter of law, was guilty of contributory negligence that proximately contributed to his injury. From the testimony above recited, it seems clear to us that these were questions of fact for the jury. Appellants point to respondent's testimony that he knew he was upon the premises of a busy manufacturing plant; that he had previously been in plants where there was overhead electric equipment; that he knew what electrical insulators and hoists were; that, although he looked around after he had ascended the ladder, he did see the insulators or the electric hoist; that the insulators used to attach the conductor bar to the tram rail were of a peculiar construction; that he had never seen such insulators before; that he did not inquire whether there were any hazards connected with the work. There was also read to respondent certain portions of a rule book furnished by the Pacific Gas & Electric Company to all of its employees. These rules required that such employees make proper use of rubber gloves furnished by the company; that an employee while standing on a ladder must not lean to one side while working unless the ladder is secured; that the ladder must be placed directly in front of the work; that an employee must not touch exposed ungrounded lines unless he is insulated; that electrical equipment must always be considered as energized unless positively known to be dead; that a gas line must not be opened where there is an electric motor running, or where there is other sparking equipment, without first turning off the current; that a taper must be used to light pilot lights of automatic appliances. None of these factors determine, as a matter of law, that respondent was guilty of contributory negligence proximately causing his injury. So far as the rules are concerned, respondent testified that he was only required to be familiar and abide by the rules relating to workers in the gas department. Rubber gloves were not furnished employees in that department. Some of the other rules referred to obviously had no relation to such employees. The rules prohibiting the touching of live equipment and requiring all electrical equipment to be treated as energized unless the contrary were known could only have application to apparatus known to carry electric current. Moreover, the test to be applied to respondent is whether he exercised reasonable care. The rules of his employer are only important insofar as they embody rules of reasonable care. If they imposed a standard of care higher than that required by law they cannot inure to the benefit of appellants. Respondent testified that he did not know that the object upon which he rested his hand was a conductor; that it looked like a water pipe or gas line. An examination of the pictures introduced in evidence shows that the jury was justified in concluding that a reasonable examination would not have indicated the danger. From all the evidence it is apparent that, so far as the issue of contributory negligence is concerned, reasonable minds might differ on whether respondent exercised reasonable care. Since this is so, the jury's determination is conclusive. Christy v. Ulrich, supra; Skoglund v. Moore Dry-Dock Co., supra; DeGraf v. Anglo California Nat. Bank, 14

Cal.2d 87, 92 P.2d 899; Parker v. Manchester Hotel Co., 29 Cal.App.2d 446, 85 P.2d 152.

[9-11] The appellants next urge that prejudicial error was committed in denying appellants' motion to strike the testimony of respondent's witness Simonson. This witness, an electrical engineer, over the objection of appellants, was allowed to testify, in answer to a hypothetical question based on the facts of this case, that reasonable care required that a conductor placed in a location such as the one here involved should be guarded to protect persons working nearby. On direct examination he testified that there was a standard of care among electrical engineers, independently of the rules of the Industrial Accident Commission, that required guards to be placed around conductors such as the one that injured respondent. On cross-examination he stated that his opinion, in this regard, was partially based on certain rules of the Industrial Accident Commission requiring guards in such cases. On redirect, the witness stated that, independently of the compensation commission rules, electrical engineers have a standard of care that requires electric conductors to be guarded. Appellants' main objection to this witness' testimony is that the orders of the Industrial Accident Commission were inadmissible in this case either because there is no evidence of service of such orders on appellant company (Schmidt v. Pursell, 47 Cal. App. 440, 190 P. 846; Brumhall v. Sutherland, 110 Cal.App. 10, 293 P. 672) or because such orders are not intended to apply to actions other than those between employer and employee. Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231; see, also, § 6313, Labor Code, St.1937, p. 307. Of course, no such orders were here introduced. Appellants urge, however, that, through the use of an expert, respondent has accomplished indirectly what he could not have done directly. It is no doubt the law, as urged by appellants, that where an expert witness bases his opinion entirely upon incompetent matter, or where it is shown that such incompetent matter is the chief element upon which the opinion is predicated, such opinion should be rejected altogether. San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L.R.A. 604. But that argument has no application to the facts of this case. The opinion of this expert was not solely predicated on the rules of the Industrial Accident Commission, nor were those rules the basic premise upon which his opinion was predicated. A fair reading of his testimony discloses that the standard testified to by him was one adopted by electrical engineers independently of the rules of the commission. The mere fact that his opinion was partially based on inadmissible sources did not affect the admissibility of his opinion. In such case "The expert's testimony, though based on knowledge gained from inadmissible sources, is entitled to credit because of the added sanction of his general experience." Hammond L. Co. v. County of Los Angeles, 104 Cal.App. 235, 248, 285 P. 896, 902; see, also, Betts v. Southern California, etc., Exchange, 144 Cal. 402, 77 P. 993; People v. Marblehead Land Co., 82 Cal.App. 289, 255 P. 553; Fishel v. F. M. Ball & Co., Inc., 83 Cal.App. 128, 256 P. 493; Glantz v. Freedman, 100 Cal.App. 611, 280 P. 704.

[12] The approved standard of maintaining electric conduits in industrial plants is not a matter of common knowledge, and therefore the testimony of an expert was admissible as an aid to the jury on that question.

[13] Appellants also object to the refusal of the trial court to instruct the jury, as requested by them that "the rules of the Pacific Gas & Electric Company and application of defendant Bates Valve Bag Corporation for gas and electric services, offered in evidence herein do not, standing by themselves, place plaintiff in any more favored status than that of a licensee. In other words, said rules and application for service do not, taken by themselves, confer upon plaintiff the status of an invitee."

Appellants concede that the jury was fully and properly instructed on the distinctions between an invitee and licensee, but urge that the above instruction was also necessary to clarify that issue. While standing alone such rules might not make the respondent an invitee, there can be no doubt, for reasons already stated, that such rules were part of the contract of the consumer, were admissible, and if the jury believed respondent visited appellant company's premises pursuant to that contract (which is the only reasonable inference) then such rules could properly be considered in determining respondent's status. The instruction offered would have been misleading and was properly refused.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.

52 Cal.App.2d 58

NOLAND v. NOLAND.

Civ. 13024.

District Court of Appeal, Second District, Division 3, California.

May 11, 1942.

1. Venue 🔑70

Where defendant, moving for change of place of trial, filed no affidavit of merits and gave no reason for such failure, and her counsel, who filed affidavit that he was acquainted with facts of case by defendant and believed that such facts were fully and fairly stated to him and that defendant had good and substantial defense "to the merits", stated no factual basis for such first belief and did not assert that second belief was based on consideration of such facts, order changing place of trial cannot be sustained. Code Civ.Proc. § 396b.

2. Venue 🔑67

An affidavit of defendant's counsel in support of motion for change of place of trial that he believed that facts of case were fully and fairly stated to him by defendant and that she had good and substantial defense to merits was insufficient as without evidentiary value on basic point as to whether facts were fully and fairly disclosed to him, but expressing only naked belief without suggestion of personal knowledge or investigation as competent basis for forming opinion. Code Civ.Proc. § 396b.

3. Venue 🔑77

Where defendant, moving for change of place of trial, filed no personal affidavit of merits, and affidavit filed by defendant's counsel was insufficient, defendant "waived" right to transfer of action to county of her residence. Code Civ.Proc. § 396b.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by William Doster Noland against Vyola Bubb Noland. From an order changing the place of trial from one county to another, plaintiff appeals.

Reversed.

Calvin S. Mauk, of Los Angeles, for appellant.

William A. Reppy and Charles F. Blackstock, both of Oxnard, for respondent.

SCHAUER, Presiding Justice.

[1] Plaintiff appeals from an order changing the place of trial of this action from Los Angeles County to Ventura County. The only facts in the record which are pertinent and material on this appeal and hence require recital here are: No affidavit of merits as required by section 396b of the Code of Civil Procedure was filed by defendant, although she did file an affidavit of residence, thereby establishing that she was available and could have made an affidavit of merits if the facts justified it and she had been so minded. An additional affidavit bearing the same date as that signed by defendant was filed by one of defendant's counsel. In it he avers "that he has been acquainted with the facts of the case by the defendant * * * that he believes said facts have been fully and fairly stated to him; that he verily believes that the defendant has a good and substantial defense to the merits in this action; that it is the *bona fide* intention of the defendant to defend the same." Upon such showing the order cannot be sustained.

No reason is given for failure of the defendant to make her own affidavit of merits; no factual basis is stated for the loyal but apparently gratuitous belief of counsel that the facts were "fully and fairly stated to him." No acquaintance with the facts of the case is claimed by counsel except that given him by defendant. He does not even assert that his avowed belief that defendant has a good defense is based on a consideration of the facts stated to him by defendant; his belief as to the bona fide intention of defendant is obviously a conclusion and his belief that defendant has a "good and substantial defense *to* the merits" may envision something quite different from a defense *on* the merits.

[2] So far as defendant's affidavit is concerned the case is similar to that which was before the Supreme Court in Fernandez v. Fernandez (1938), 11 Cal.2d 568, at page 569, 81 P.2d 913, wherein it was said "If this was intended to be an affidavit of merits, it was clearly insufficient in that it failed to allege in substance that defendant had fully and fairly stated the case and all the facts thereof to her attorney, and that after such statement she was advised by

her attorney and verily believed that she had a good and substantial defense on the merits. [Citing cases]." Furthermore, unless the clear significance of the legion of cases holding consistently that the affidavit of merits must substantiate a showing in substance as above set forth is to be ignored, we can ascribe little potence to the affidavit of counsel. On the basic point as to whether the facts of the case had been fully and fairly disclosed to him it is devoid of evidentiary value; it expresses only naked belief, engendered perhaps by or in an unsworn statement of defendant but with no suggestion of personal knowledge or investigation as a competent basis for forming an opinion.

In Bailey v. Taaffe (1866), 29 Cal. 422, 425, it was held that an affidavit of merits by an attorney was "manifestly insufficient." In Nicholl v. Nicholl (1884), 66 Cal. 36, 4 P. 882, an affidavit by an attorney, declaring as the basis of his belief the written statement of the case made to him by his client and an affidavit filed in the case, and stating "as a reason why it was not made by the defendant, that he was at a long distance from the county where the action was pending, and could not arrive within the time allowed to plead, and if he pleaded without making the motion his right would be lost" was upheld. It was declared in Gardner v. Steadman (1916), 31 Cal.App. 447, 449, 160 P. 834, 835, that "We see no reason for holding that an affidavit of merits may not be made by any person on behalf of the defendant *who is sufficiently familiar with the facts of the case to make the same.*" (Italics added.) But we have discovered no case in which the proof of merits in the form of an insufficient affidavit personally executed by an available defendant has been held to be competently and adequately augmented by the addition of the mere sworn statement of *belief* of counsel, claiming no personal knowledge thereof, that the "facts have been fully and fairly stated to him" and that his client "has a good and substantial defense *to* the merits."

[3] Under section 396b of the Code of Civil Procedure a defendant waives his right to have an action which is commenced in a court of competent jurisdiction transferred to the county of his residence unless "at the time he answers or demurs, [he] files * * * an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court * * *." Under the circumstances depicted here the defendant must be held to have waived her right to a transfer. The order appealed from is reversed.

SHINN and PARKER WOOD, JJ., concurred.

52 Cal.App.2d 23

GOFF v. GOFF.

Civ. 13590.

District Court of Appeal, Second District, Division 1, California.

May 8, 1942.

Hearing Denied July 6, 1942.

1. Marriage 🔑40(6, 10)

The solemnization of a marriage raises a presumption of its legality giving rise to a presumption that any former marriage of the parties thereto has been dissolved, but the latter presumption may be controverted by evidence that former spouse is living and that neither a divorce nor an annulment of such former marriage was ever procured.

2. Marriage 🔑54

In order to invoke the protection of statute providing that a subsequent marriage contracted by any person during the life of a former spouse is valid until nullified by a competent tribunal if former spouse was absent and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed or believed by such person to be dead at the time subsequent marriage was contracted, good faith and honest belief of such persons that former spouse was dead was essential. Civ.Code, § 61, subd. 2.

3. Marriage 🔑60(7)

Evidence sustained findings that wife's former husband was living at the time of her second marriage, that former marriage was not dissolved, and that wife did not at the time of second marriage in good faith believe that former husband was deceased as warranting judgment annulling

the second marriage as invalid. Civ.Code, § 61, subd. 2.

4. Appeal and error 🔑1012(1)

In action to annul marriage, the credibility of the witnesses as well as the weight and intrinsic value of the evidence presented were questions addressed to the trial court whose decision could not be disturbed by District Court of Appeal unless the testimony upon which trial judge relied was so inherently lacking in probability as to amount to no evidence at all.

5. Marriage 🔑60(7)

The statute providing that no divorce shall be granted upon the uncorroborated statement, admission or testimony of the parties is confined alone to divorce actions, and has no application to annulment actions. Civ.Code, §§ 82 et seq., 130.

6. Divorce 🔑1
Marriage 🔑57

A "divorce" action has for its objective the dissolution of the bonds of a valid marriage by reason of something which occurs after the marriage, whereas an "annulment" proceeding is founded upon the theory that no valid marriage ever existed by reason of some cause which was present at the time of the marriage.

See Words and Phrases, Permanent Edition, for all other definitions of "Annulment" and "Divorce".

7. Appeal and error 🔑1011(1)

In husband's action to annul marriage, wherein wife sought an equal division of property, claimed by her to be community property, although standing in the name of the husband, conflicting evidence as to whether wife contributed toward the purchase price of such property was for the trial court.

8. Marriage 🔑60(6)

In husband's action to annul marriage, court's finding that property claimed by wife to be community property, although standing in husband's name, was the separate property of husband amounted to a finding against wife's claim that deeds conveying wife's interest in realty to husband were procured through undue influence, and was sufficient to sustain judgment that realty was separate property of husband, in the absence of any evidence substantiating the claim of undue influence. Civ.Code, § 158.

9. Marriage 🔑54, 65

A void marriage vests no rights in either of parties thereto so far as property of the other is concerned in like manner as the rights conferred by a valid marriage, but where parties innocently enter into a void marriage believing themselves to be husband and wife, the property acquired by their joint efforts will be divided equally between them.

10. Marriage 🔑60(7)

Evidence warranting conclusion that property claimed by wife to be community property was not acquired through the joint efforts of husband and wife, but belonged solely to husband, sustained judgment awarding such property to husband.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Harold F. Goff against Ruth Ann Goff for annulment of their marriage, wherein defendant filed a cross-complaint asking a divorce on ground of desertion and for an equal division of alleged community property. From a judgment annuling the marriage and awarding to plaintiff all the property involved except the household furniture, defendant and cross-complainant appeals.

Judgment affirmed.

P. E. Durkee, of Los Angeles, for appellant.

George Appell and Harry A. Mock, both of Los Angeles, for respondent.

WHITE, Justice.

Appeal by defendant and cross-complainant in an action for annulment of a marriage, wherein the court ordered judgment of annulment in favor of plaintiff and cross-defendant.

Epitomizing the facts, it appears from the record that on or about September 7, 1935, the parties hereto, after cohabiting together for a period of two years, entered into a marriage ceremony at Ventura in this state. On July 1, 1940, plaintiff commenced an action against defendant, in the first cause of action of which he prayed for annulment of the marriage on the grounds that defendant falsely and fraudulently represented to plaintiff that she was a single woman, when in truth and in fact she had, prior to the solemnization of her marriage to plaintiff, married one Derwood B. Williams, which prior marriage had not been dissolved. Defendant filed an answer and cross-complaint for divorce. By the former she denied each and every allegation in plaintiff's first cause of action contained, save and except the fact of her prior marriage to Williams, but asserted in reference thereto that such marriage, prior to her marriage to plaintiff, had been regularly and duly dissolved by decree of a competent court. In her cross-complaint defendant sought a decree dissolving her marriage to plaintiff on the ground of desertion, while in the same pleading she alleged the existence of certain community property both real, and personal, belonging to the parties, and asked for an equal division thereof.

Following trial, the court entered a judgment decreeing that the marriage between plaintiff and defendant be annulled and set aside as an invalid marriage and further decreeing that the plaintiff was the owner as his sole and separate property of all the property, both real and personal, title to which was placed in issue by the pleadings, save and except the household furniture, which was awarded to defendant.

As a first ground of appeal it is contended by appellant that her marriage to respondent was legal and valid by reason of the provisions of subdivision 2 of section 61 of the Civil Code, which provides that a subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, "* * * 2. Unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal."

In the instant case the husband testified that previous to the time of his marriage to the defendant she told him that she had been previously married, but that her first husband was dead. Plaintiff further testified that some three years after his marriage he received two letters from the defendant, in which communications she advised plaintiff, "I guess this will make you feel better to know that you are not married to me at all. * * * I was never divorced of my husband. That is why he was always after me for money or he would come and tell you about * * *." In one of the letters defendant advised plaintiff of her fear that her first husband would contact plaintiff and tell him of her prior marriage and of the fact that her first husband was living. Among other things, she wrote: "Believe me, I have had some hard time trying to keep you from know about it, and so every time he came round he wanted money, I had to get it some way for him. If I did not I know what he would do. * * *" Defendant further wrote: "I have lived in H—for the last 20 years with that fear always before that someone would some day find out about it. And the one I didn't want to know most of all was you." Plaintiff further testified that subsequent to the receipt of the two letters aforesaid he had a conversation with defendant in which he requested an explanation of the letters, whereupon defendant represented that the person referred to in her letters was her former husband, who was trying to induce her to obtain money from plaintiff to give to such former husband, and that she was afraid of the latter. Plaintiff further testified that defendant had at one time during their marriage been arrested and charged with perjury, and in support thereof introduced in evidence an original file of the Superior Court of Los Angeles County which contained a record of defendant's plea of guilty to a charge of perjury based upon certain statements made by her in connection with her receipt of state aid. Upon this charge defendant was placed on probation, and as a term of probation was required to serve approximately eight months in the Los Angeles County jail.

With reference to the property alleged by defendant in her cross-complaint to be community property, plaintiff testified that he had purchased said property with his own personal funds, taking title in the names of both himself and defendant; that subsequently, in consideration of ten dollars paid by him to the defendant, she executed deeds to the real property vesting title exclusively in the plaintiff.

It was also established at the trial that on August 1, 1939, there was filed in the Superior Court of Los Angeles County an action commenced by defendant herein against Derwood Belmont Williams, the former husband of defendant, in which action she sought a divorce from him on the ground of desertion. In this divorce proceeding the defendant herein, as plaintiff in such action, alleged that she was married to the therein named defendant, Williams, on September 13, 1915; that on or about January 26, 1916, her said husband deserted and abandoned her, "and ever since his, and still continues to, so wilfully and without cause, desert and abandon said plaintiff, and to live separate and apart from her without any sufficient cause, and without any reason and against her will and without her consent."

Testifying in her own behalf in the action with which we are here concerned, defendant testified that when she wrote the letters hereinbefore referred to she was in the hospital at San Mateo; that she was sick and infirm, and that the contents of the letters were not true. She denied the conversations with plaintiff hereinbefore narrated and stated on the witness stand that she had never seen her former husband since the date he deserted her in 1916. In answer to the question as to why she wrote the county clerk of Mendocino County after she had been married to plaintiff herein, requesting information as to whether her former husband had filed an action for divorce against her, she stated that she did so because she had learned from her former husband's mother that he had obtained a divorce, which fact she wanted to verify. With reference to filing an action for divorce against her former husband, defendant testified that she never intended such action to be against her former husband, but intended the same to be filed against her present husband. This fact, however, was contradicted by the attorney who prepared the pleadings in the divorce action against the former husband.

[1] It is true, as urged by appellant, that the law indulges in a presumption that the former marriage between the parties has been dissolved; such presumption being founded upon the solemnization of the second marriage, which ceremony raises a presumption of its legality; but such presumption may be controverted by evidence that the former spouse is living and that neither a divorce nor an annulment of such former marriage was ever procured. In the instant case we are persuaded that the court was authorized under the evidence to find and conclude that the spouse to whom appellant was formerly married was actually living; that the prior marriage was not dissolved, and that appellant had knowledge of these facts on the occasion of the solemnization of her subsequent marriage to respondent. Such a conclusion finds evidentiary support in the letters written by appellant some four years after the second marriage, in which communications she not only stated that her former spouse was living at the time she contracted the marriage to respondent, but that such former spouse had been in her life for years and was in possession of evidence regarding her past life upon the basis of which he extorted money from her as the price of his silence in regard thereto. Added to this is the testimony that appellant had written the county clerk of Mendocino County for information as to whether her husband by the former marriage had instituted an action against her for divorce. Furthermore, the trial court was confronted with testimony that appellant herself had filed an action for divorce against her former spouse in which she alleged his actual existence and the fact that he had continued to desert her since 1916.

[2-4] So far as the provisions of subdivision 2 of section 61 of the Civil Code, of which appellant seeks to avail herself, are concerned, in connection with her claim that her second marriage is valid notwithstanding her former husband was alive and the former marriage had not been dissolved or annulled, it must be remembered that the element of good faith and honest belief on her part that her husband was dead is essential. Indeed, the statute so makes it. Wilcox v. Wilcox, 171 Cal. 770, 776, 155 P. 95. In the light of the evidence before it, the trial court was justified in concluding that the first marriage of appellant with Williams was never dissolved or annulled, and further, that appellant did not at the time of her marriage to respondent in good faith believe that her former husband was deceased. The credibility of the witnesses, as well as the weight and intrinsic value of the evidence presented, were all questions addressed to the trial court whose decision therein cannot be disturbed by us unless we can say that the testimony upon which the trial judge relied was so inherently lacking in probability as to amount to no evidence at all. The testi-

mony in the case at bar upon which the findings are predicated deserves no such stricture.

[5, 6] It is next contended by appellant that a decree annulling a marriage cannot be sustained when the same depends upon the uncorroborated statements of the parties to the action. Section 130 of the Civil Code provides that no divorce shall be granted upon the uncorroborated statement, admission or testimony of the parties. However, we see no warrant for holding that the provisions of section 130 apply to annulment actions. Although it is sometimes said that the term "divorce" includes annulment actions, we are not in accord therewith because, strictly speaking, a divorce action has for its objective the dissolution of the bonds of a valid marriage by reason of something which occurs after the marriage, while an annulment proceeding is founded upon the theory that no valid marriage ever existed by reason of some cause which was present at the time of the marriage. The Code section relied upon by appellant, we feel, is confined alone to divorce actions. Section 130 of the Civil Code, is part of article III, chapter II, title I, part III of the Civil Code, which is an article entitled "Causes for Denying Divorce," whereas article I of chapter II is entitled "Nullity," and recites fully the requirements for the annulment of marriages for reasons existing at the time the contract of marriage was entered into. It seems to us very clear that the action for divorce referred to in section 130 contemplates the ordinary action for divorce and does not include proceedings for annulling a marriage, and is therefore not applicable thereto. The case of Millar v. Millar, 175 Cal. 797, 806, 167 P. 394, L.R.A.1918B, 415, Ann.Cas. 1918E, 184, supports our view in this regard.

[7, 8] As a further ground of appeal, it is contended by appellant that the court erred in failing to make a finding upon a material issue in connection with appellant's contention at the trial that certain real and personal property was community property of the parties and should be divided equally between them. In this regard, it is conceded, and the record shows, that the trial court found that respondent was the owner as his sole and separate property of the real property in question, as well as the owner and entitled to the possession of an automobile and a certain policy of insurance. But it is urged by appellant that the court failed to make a finding upon the allegation that she was acting under undue influence practiced upon her by respondent when she deeded to him the real property which originally stood in their joint names. The court's finding that the property was the separate property of respondent amounted to a finding against appellant's claim of undue influence. As to the manner and means by which the property was acquired, the most that can be said of defendant's contention that she contributed toward the purchase price thereof is that the evidence in that regard was in conflict and the trial court, as it had the right to do, resolved that conflict against her. There is no evidence in the record to substantiate appellant's claim that she was the victim of undue influence on the part of respondent prior to or at the time she executed the deeds to him. Even though we assume that the provisions of section 158 of the Civil Code are controlling in a case where the marriage is invalid, the facts and circumstances shown in the record here as to the conduct of plaintiff with defendant in connection with the transfer of defendant's property interest to him do not substantiate her claim of undue influence. It is therefore apparent that if more complete findings had been made on the issue of undue influence, they would have been adverse to the contentions of appellant. That being so, the failure of the court to find further than it did is not a ground for setting aside the judgment. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; Los Angeles County v. Industrial Acc. Comm., 13 Cal.App.2d 69, 78, 56 P.2d 577.

[9, 10] In answer to appellant's claim that the trial court was vested with jurisdiction to divide the property in an annulment proceeding, it may be said that the authorities seem clear in their holding that a void marriage vests no rights in either of the parties to it so far as the property of the other is concerned in like manner as the rights conferred by a valid marriage. However, the rule adopted by our courts seems to be that where a man and woman innocently enter into a marriage contract and innocently believe they are husband and wife, the property acquired by their joint efforts will be divided equally between them. Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386. Although we concede that the court had ju-

risdiction to divide the community property between the parties, nevertheless that jurisdiction did not make such action mandatory. Indeed, in the case at bar there is evidence warranting the conclusion on the part of the trial court that the property in question was not acquired through the joint efforts of the parties, but belonged solely to the respondent. Therefore the rule of equal division of such property cannot be invoked on appeal from a decree awarding the property under such circumstances to the party in whose name it stood.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

WEST KEY NUMBER SYSTEM

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52 Cal.App.2d 38

In re PAGEL'S ESTATE.

CEDARS OF LEBANON HOSPITAL v. PAGEL et al.

Civ. 13578.

District Court of Appeal, Second District, Division 2, California.

May 8, 1942.

1. Wills 🔑96

Any writing executed with the required formalities and containing posthumous dispositions may be given effect as a "will" regardless of its form.

See Words and Phrases, Permanent Edition, for all other definitions of "Will".

2. Wills 🔑96

That testamentary provisions are a very small part of the bulk of a document relied on as a will does not make such small part inoperative as a will.

3. Wills 🔑72

Where testamentary intent is clearly deducible from writing itself and the writing meets other formalities required for a will, there is a presumption of testamentary intent.

4. Wills 🔑93

If writing executed with formalities of a will is free from ambiguity on its face, it may not be shown that maker intended it to operate as a different type of instrument, and if it does not disclose a posthumous disposition by its very terms, parol evidence may not be received to supply the necessary animus testandi. Probate Code, § 105.

5. Wills 🔑93

If language of instrument executed with formalities of a will is ambiguous, so that it is not clear whether maker intended to create a will, extrinsic parol evidence is admissible to show the fact, but the type of evidence admissible is covered by general rules of evidence. Probate Code, § 105.

6. Wills 🔑93

Statements of decedents made prior to writing relied upon as a will are admissible as an exception to the "hearsay" rule, since they involve a future plan or design, but statements made after the writing are not within such recognized exception. Probate Code, § 105.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

7. Wills 🔑93

A letter by patient to hospital, expressing intention to leave property to hospital, and expressing hope that patient could induce hospital to furnish attorney to make will, was clearly not intended as a posthumous disposition, and patient's declarations to third parties were not admissible to show testamentary intent. Probate Code, § 105.

8. Wills 🔑72

Where letter expressing intention to leave property to hospital was not written with animus testandi, it could not achieve that status by any subsequent act of decedent short of a writing to that effect.

9. Wills 🔑72

Testamentary intent is never retroactive, but must concur with the writing relied on as a will, or is of no effect.

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of Leopold Pagel, deceased, for probate of will, wherein probate was revoked on objections by Isaac Pagel and others, opposed by the Cedars of Lebanon Hospital. From the judgment, the Cedars of Lebanon Hospital appeals.

Affirmed.

Mitchell, Silberberg, Roth & Knupp and Leonard A. Kaufman, all of Los Angeles, for appellant.

Fred M. Cross and Schell & Delamer, all of Los Angeles, for respondents.

HANSON, Justice pro tem.

In its final analysis the question for decision is whether a letter dated and signed by the decedent in his own handwriting and directed to the Cedars of Lebanon Hospital is or is not to be regarded as a testamentary disposition of his property to the hospital. The letter was admitted to probate as an holographic will, but thereafter at the behest of a brother and nephew of the decedent its probate was revoked on the ground that it did not disclose an intent that it should operate as a will. Accordingly, Cedars of Lebanon Hospital is here as appellant, contending, not that the document on its face was necessarily executed with animus testandi, but that the court erred prejudicially in refusing to receive and consider parol evidence of certain declarations by decedent, made prior and subsequent to the execution of the letter, bearing on decedent's intent that the letter should operate as a will.

We shall state the facts as they could have been found on the evidence received, refused and stricken, as we think that on all of such evidence the court would not have been entitled to find for appellant.

The decedent having been a patient of Cedars of Lebanon Hospital some time prior to October 15, 1939, he was again admitted therein as a patient on or about that date. He died in the hospital on November 26, 1939. On November 21, 1939, the decedent requested the presence of the manager of the hospital at his bedside. When the manager came the decedent handed him a sealed envelope and requested that he write on it, "To be opened after my death by Cedars of Lebanon Hospital." This was done, and thereupon decedent delivered the envelope to the manager with the remark that he was leaving all of his money to the hospital. After the death of decedent the sealed envelope was opened and was found to contain a letter directed to the hospital in decedent's handwriting, written in German and signed by him under date of October 17, 1939. This letter was offered for probate as a holographic will and probated as such. As translated it is set forth in the margin.[1]

On the same day that decedent entered the hospital, October 15, 1939, he told his landlord, a Mr. Cohen, that he had written a letter leaving all his belongings to the Cedars of Lebanon Hospital. Whether the letter offered for probate, which is dated October 17, 1939, was postdated or erroneously dated, or is the letter referred to, is not shown by the record. On November 15, 1939, one Sommers, an employee of a Jewish social welfare organization, visited the decedent, and according to his testimony decedent said: "Can you get me an attorney so I can make a will leaving my property to Cedars of Lebanon Hospital. I have relatives but my relations with them are strained." The court refused to receive the testimony of Cohen and struck out the testimony of Sommers.

In cases of the character of the one here involved little assistance is to be derived from a consideration of the facts found in the adjudicated cases. Accordingly we shall have occasion only to state the controlling principles of law and apply them to the facts of the case before us.

[1-6] The American and English authorities are unanimous in holding that any writing executed with the formalities required for an attested or holographic will

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[1] "To the Cedars of Lebanon Hospital,
Los Angeles.

"Since I am old and sick and did not see any possibility to earn money, but did not want under any circumstances to be dependent upon public charity for money, I clung tenaciously to the conservation of my small cash fund. If I did not give you the true facts as to my financial condition, I beg you to excuse this with the human weakness and fear of the future. However, when I accepted the benevolence of the Ced. of Lebanon Hospital it was for me a matter of course that my property and estate should only *to* to the Cedars of Lebanon Hospital after my death. I hope that I will succeed, when I will come to the Hospital within the next few days, to induce you to put your attorney at my disposal to make such a last will and testament.

"The following is a statement of my estate: [Here is set forth his property in detail, together with its location.]

"2834 Somerset Dr. October 17, 1939.
"Leopold Pagel"

and containing posthumous dispositions may, regardless of its form, be given effect as a will. 54 A.L.R. 918; 28 R.C.L. 113. The fact that there are non-testamentary provisions, as here, along with those testamentary, and that the latter are a very small part of the bulk of the document, does not make such small part inoperative as a will. Estate of Button, 209 Cal. 325, 287 P. 964; 1 Page on Wills, § 46. Moreover, while all the courts agree that the writing must be executed with animus testandi, there is nevertheless a difference of opinion as to the manner in which testamentary intent is or may be shown. Where a testamentary intent is clearly deducible from the writing itself and it meets the other formalities required for a will, all the authorities hold there is a presumption of testamentary intent. 1 Page on Wills, 3rd Ed., §§ 50–52, 59. See, also, Estate of Maloney, 27 Cal.App.2d 332, 80 P.2d 998—hearing denied by Supreme Court. While the courts often say that this presumption is rebuttable, an examination of the cases will show that the presumption is rebuttable only where an issue is made that the maker was without testamentary capacity, or that the will was procured by fraud, duress or undue influence, or that it had been revoked, or when executed it was not intended to operate as a will. Wigmore on Evidence, 3rd Ed., § 2421; Estate of Janes, 18 Cal.2d 512, 116 P.2d 438; In re Siemers' Estate, 202 Cal. 424, 261 P. 298; 1 Page on Wills, 3rd Ed., § 53. Moreover, if the writing is free from ambiguity on its face it may not be shown that the maker thereof intended it to operate as an instrument of a type different from that which on its face it purports to be, except in England and in a few American jurisdictions, of which California is not one. 1 Page on Wills, 3rd Ed., § 59. Where, however, a writing executed with the formalities of a will does not disclose a posthumous disposition by the very terms of the writing, parol evidence may not be received to supply the necessary animus testandi, either in this state (Estate of Young, 123 Cal. 337, 55 P. 1011; Estate of Kenyon, 42 Cal.App.2d 423, 109 P.2d 38) or by the great weight of authority in this country. 1 Page on Wills, 3rd Ed., §§ 57, 59. But if the language of the instrument is ambiguous, so that it is not clear whether the maker *did or did not intend* the writing to operate as a will, by the great weight of American authority, as well as by English authority, extrinsic parol evidence is admissible to show the fact. In re Spitzer's Estate, 196 Cal. 301, 237 P. 739; 1 Page on Wills, 3rd Ed., § 59. But the type of parol evidence admissible is necessarily governed by general rules of evidence. So statements of a decedent made prior to the writing relied upon as a will are admissible as an exception to the hearsay rule, as they involve a future plan or design. In re Spitzer's Estate, supra. But statements made after the execution of the writing relied upon are not within any recognized exception to the hearsay rule (Wigmore on Evidence, 3rd Ed., §§ 1735, 1736) and so by the weight of authority are not admissible. However, some courts have evolved a special exception to the rule and so admit declarations of the maker that he has or has not made a will or one of a particular tenor. Still others hold the declarations are admissible on the theory that they represent a state of mind, i. e., opinion or belief, and so are within that recognized exception to the hearsay rule. Wigmore on Evidence, 3rd Ed., § 1736. In cases where the issue is forgery California follows this rule. In re Morrison's Estate, 198 Cal. 1, 242 P. 939; In re Thompson's Estate, 200 Cal. 410, 253 P. 697. In that connection it should perhaps be stated that by express statute in this state, Probate Code, § 105, the oral declarations of the maker may not be received to correct an imperfect description, mistake or omission as to persons or property, or to assist in determining the application of any provisions of the will because of any uncertainty of language.

In the instant case, as has been indicated, appellant contends that decedent's declaration to Cohen, made before, and his declaration to Sommers, made after the date of the writing, should have been received to show testamentary intent. The declaration claimed to have been made to Cohen was to the effect that decedent *had made* a will in favor of the hospital. If he had done so, then it must be assumed the reference was to some instrument other than the letter, which is dated after the date of the alleged declaration. As there was no showing that the reference was to this particular letter, it seems clear that the declaration was properly excluded. With respect to the declaration alleged to have been made to Sommers after the letter was written, it is urged it was admissible on the authority of Estate of Spitzer, 196 Cal. 301, 237 P. 739, Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239; Estate of Hall, 154 Cal. 527, 98 P. 269; Sprague v. Walton, 145 Cal. 228, 78 P. 645, and Estate of Janes, supra. But before we proceed to an analysis of the cases cited—none of which we feel sustains appellant—we think it important to observe that the basis (in this state as in the majority of states) for the rule excluding declarations of testamentary intent, where the will affirmatively shows such intent, is as stated by Wigmore: "* * * since the maker is deceased, and the ascertainment of his actual intent is always an elusive and jeopardous inquiry, some practical rule of thumb must if possible be adopted, taking some tangible circumstance of outward conduct as the mark of intent. * * Given this knowledge and his ensuing act of signature, and further inquiry must cease,—subject only to those varying circumstances of fraud which may here and there arise. Such apparently is the judicial attitude today." Wigmore on Evidence, 3rd Ed., § 2421.

[7-9] In view of the rule just quoted it is evident that the declaration to Sommers was inadmissible. But even if the declarations to both Cohen and Sommers had been admissible, and we hold they were not, the trial court would not have been entitled to find for the appellant. We say this because the decedent made it perfectly clear by the language used in his letter that he did not intend the letter to act as a posthumous declaration, but on the contrary stated he desired that his posthumous disposition narrated in his letter should be declared in a last will and testament. In brief, when he wrote the letter it is perfectly obvious from its language that he did not regard it in and of itself as a posthumous disposition. As it is clear that it was not written with an animus testandi, it did not and could not achieve that status by any subsequent act on his part short of a writing to that effect. Testamentary intent is never retroactive. It must concur with the writing, else it is of no effect. That is elemental in the laws of wills everywhere. We turn now to a discussion of the five Supreme Court decisions relied upon by appellant.

In Estate of Hall, supra, the instrument was in form a deed to realty, with a proviso therein to the effect that it was to remain null and void during the grantor's lifetime but to become effective upon his death. Upon the death of the grantor probate was sought of the deed on the theory that it was a will. After a holding by the Supreme Court that the deed was not a will, the grantee contended that it represented a present grant to her, subject to a life estate in the donor. On the issue thus joined it was held that the declarations of a donor of property to the effect that he had parted with the property were admissible in evidence. It is obvious that the decision is not in point here.

In Estate of Carson, supra, [184 Cal. 437, 194 P. 9, 17 A.L.R. 239], the contestants of a will contended that the decedent made her alleged husband the residuary legatee of the will in the belief that her marriage to him was valid when in fact it was not. To sustain their case in part the contestants sought to introduce declarations by the decedent bearing on this particular issue. This was denied by the trial court, which was reversed for the error by the Supreme Court. It is obvious, as the court points out, that the declarations as to her state of mind were admissible, being one of the recognized exceptions to the hearsay rule. The Court said: "The rule is without exception so far as occurs to us at the moment, that whenever the intention, feeling, belief, or other mental state of a person at a particular time, including his bodily feeling, *is material to an issue under trial,* evidence of such person's declarations at the time, indicative of his then mental state, are admissible in evidence. It is wholly immaterial whether such declarations were made in the presence of an adverse party to the litigation or not, or what the character of the litigation is. The sole tests are, Is the intention, belief, or other mental state of the declarant at the time material to the issues under trial, and, does the declaration indicate what the declarant's intention, belief or other mental state at the time was? Estate of Arnold, 147 Cal. 583, 82 P. 252; Adkins v. Brett [ante, 184 Cal. page 252], 193 P. 251. Of course, if, as is frequently the case, and was the case here, the declarations include or are in the form of statements as to past events, the declarations *are not competent as proof of such events,* and if that is their only bearing, they are not admissible. This was in fact the only bearing of the declarations excluded in such cases as In re Calkins, 112 Cal. 296, 44 P. 577, and Estate of Gregory, 133 Cal. 131, 65 P. 315, referred to by counsel, and those decisions go upon that ground. In the subsequent case of Estate of Arnold, supra, certain declarations which did not bear on the testatrix's mental state were excluded for this reason, and others admitted which did. It is plain here that the belief of the testatrix at all times prior to her death that Carson was free to marry her, and that their marriage was valid, was material to the issues of the case. This being so, evidence of her declarations at any time indicating her then belief to that effect was competent and should have been admitted." (Italics ours.)

In Sprague v. Walton, supra, it was contended by the widow of decedent that certain executed written orders drawn by decedent in his lifetime upon his banks of deposit were gifts of the deposits to her. To sustain her contention she offered declarations of decedent made at or about the time the orders were drawn. It was held that the trial court erred in not receiving the declarations. We think it obvious that the case is not here in point.

In Estate of Spitzer, supra, the trial court refused probate of a letter in the handwriting of the decedent, dated and signed by him on the ground that it failed to show on its face that it was testamentary in character. It was held that the testimony of a brother of the decedent, with respect to declarations made to him by decedent prior to the date of the will as to his testamentary intentions, was properly admitted. The court said: "The testimony of appellant, Spitzer, was admissible as tending to show a plan or design and the prior intention of decedent. This evidence was not received as tending to supply the essential elements of a will which but faintly appear, but to show that the subject was in the mind of the testator at the time of the execution of the paper offered as a will." It was held, however, that the trial court erred in rejecting a proffer of proof by a witness who would have testified that within nine days after the will was made decedent told him that he was ill and did not expect to see the witness again—who was going for a visit in an eastern state; that he (decedent) had made his will; that he had written a letter to his brother and "that his wife would be taken care of," and that he likewise "wanted his daughter taken care of." We see nothing in this case which is of assistance to appellant. Certain general language of the opinion is not the decision. The case is not authority for a holding that all declarations made by a decedent after the execution of a document relied upon as a will are admissible.

We come then to the very recent case of Estate of Janes, supra, which is heavily relied upon by appellant. With respect to it appellant contends that it is authority for the proposition that in any case all declarations of a decedent during his lifetime bearing on his testamentary intent, made not only before but after the execution of his alleged will, are admissible. We do not regard the case as authority for any such principle. In that case a duly executed holographic will was offered for probate which affirmatively disclosed the requisite testamentary intent. For the purpose of showing that the decedent never intended that the particular instrument should operate as a will but that instead a duplicate should so operate and that the duplicate had been revoked, the contestant offered the declaration of the decedent as embodied in an unsigned and undated written notation. That the written notation was admissible on the issue that the particular document was never intended to operate as a will is the holding of all the authorities, as we have already pointed out by our reference to In re Siemers' Estate, supra, Wigmore on Evidence, 3rd Ed., § 2421, and 1 Page on Wills, 3rd Ed., § 53. The statement in the opinion of the Supreme Court upon which appellant relies reads: "It is not necessary, however, for the notation to be incorporated by reference since it is admissible, not as part of the will, but upon the issue of testamentary intent." [18 Cal.2d 512, 116 P.2d 440.] That quotation must be read in connection with its context and the issue before the court. So read it is evident that all the court intended to say was that the unsigned writing was admissible as a declaration of the decedent on the single issue that the decedent never intended the particular instrument to operate as his will. To ascribe a larger meaning to the quotation is to run counter to the reference set forth above and the court's holdings in Estate of Button, supra, Estate of Henning, 186 Cal. 307, 199 P. 39, and Estate of Watts, 186 Cal. 102, 198 P. 1036. See also Estate of Maloney, supra—hearing denied by the Supreme Court.

Judgment affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

52 Cal.App.2d 17

KEOGH v. MAULDING.

Civ. 13410.

District Court of Appeal, Second District, Division 1, California.

May 8, 1942.

Hearing Denied July 6, 1942.

1. New trial ⚷9

The trial court has power to grant a new trial on part of the issues. Code Civ. Proc. §§ 657, 662.

2. New trial ⚷6

The trial court has a wide discretion in determination of matters pertaining to the granting or denial of a motion for new trial. Code Civ.Proc. §§ 657, 662.

3. New trial ⚷71

An alleged "abuse of discretion" in granting or denying motion for new trial is not sustained by record that at most reveals a mere conflict in the evidence. Code Civ.Proc. §§ 657, 662.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

4. New trial ⚷9

A limited new trial should not be granted where substantial justice requires that a new trial if granted at all should cover all the issues. Code Civ.Proc. §§ 657, 662.

5. New trial ⚷9

If a second trial limited to one issue might be prejudicial to either party, the ordering of such a limited new trial constitutes an "abuse of discretion", and any doubt in that connection should be resolved in favor of new trial on all issues. Code Civ.Proc. §§ 657, 662.

6. New trial ⚷9

Where damages recovered by pedestrian for injuries sustained when he was struck by automobile were grossly inadequate if the pedestrian was entitled to recover at all, and suggested that verdict was a compromise and evidence was conflicting on issue whether pedestrian was intoxicated at time he was struck, granting of new trial to pedestrian on issue of damages only was an "abuse of discretion". Code Civ.Proc. §§ 657, 662.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge pro tem.

Action by Thomas B. Keogh against Charles V. Maulding for injuries sustained by plaintiff when he was struck by an automobile driven by defendant. Verdict was for plaintiff. From an order granting new trial to plaintiff on single issue of measure of damages, defendant appeals.

Order modified and as modified affirmed and cause remanded for new trial.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

Joseph A. Ball, of Long Beach, for appellant.

Carroll M. Counts, of Los Angeles, for respondent.

DORAN, Justice.

In this action for damages for personal injuries, plaintiff was awarded damages by the jury in the total sum of $1,000. Plaintiff moved for a new trial, but only "as to the measure of damages alone because of the inadequacy of the verdict." Said motion was granted. The order was as follows: "It is hereby ordered and decreed that a new trial be and is hereby granted to the plaintiff on the single issue of the measure of damages. Said order is granted on the ground of the insufficiency of the evidence to sustain the amount of the verdict."

Defendant appeals and the sole issue involved is whether the court, in granting a new trial, on the issue of damages alone, abused its discretion.

Plaintiff while walking across the street at an intersection was struck by an automobile driven by defendant. Each attributed the accident to the fault of the other. Aside from plaintiff and defendant, there were no eyewitnesses to the accident. Several witnesses, however, who saw and talked to plaintiff immediately following or soon after the accident, testified that he was under the influence of intoxicating liquor.

Special damages amounted to the sum of $708.77, itemized as hospital, medical bills, etc. However, at the time of trial, plaintiff had not recovered from the injuries received in the accident, and it is undisputed that the injuries are permanent. The tibia and fibula had been fractured, and the tibia, which had failed to unite, required further surgery of a major character.

It is conceded by appellant that a new trial should have been granted; that if plaintiff were entitled to damages at all, the award of $1,000 was grossly inadequate. But, it is contended, the inadequacy of the damages awarded indicates that the verdict was the result of a compromise and that to retry the cause on the issue of damages alone, would be highly prejudicial.

[1] That the trial court has the power to grant a new trial on part of the issues, there can be no question. Code Civ.Proc. §§ 657, 662. Indeed, such authority is not disputed. Whether the court has abused its discretion, however, in such circumstances, invariably presents an important question. In ruling on the motion for a new trial the trial judge made the following statement: "The court is of the opinion that the evidence was overwhelming; that defendant's negligence was the sole and proximate cause of plaintiff's injuries; and that there was no excuse for the defendant to strike the plaintiff, who was admittedly in a marked crosswalk. It, therefore, follows that in view of plaintiff's serious injuries that the verdict was inadequate. * * *"

It is at once evident that if the amount of the award is any indication of the jury's opinion on the question of liability, such opinion, and the expressed opinion of the court are irreconcilable.

[2-4] That the trial court has a wide discretion in the determination of matters pertaining to the granting or denial of a motion for a new trial is not disputed. And in that connection it is well settled that alleged abuse of discretion is not sustained by a record that at most reveals a mere conflict in the evidence. The foregoing rules are too well settled to require the citation of authority. It is equally true that many orders denying new trials and judgments as well have been reversed by appellate tribunals when and where the record reveals the award to have been so disproportionate to the injuries suffered as to amount to a miscarriage of justice. Generally, the reversal requires a retrial on all issues and hence the authorities involving the question here presented are not so numerous. It has been declared, however, that where the plaintiff has requested a new trial on the issue of damages alone the question of limiting a new trial to that issue is a "very serious one." A limited new trial should not be granted, where substantial justice requires that a new trial, if granted at all, should cover all the issues. Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845; Bencich v. Market St. Railway Co., 20 Cal.App.2d 518, 67 P.2d 398. In Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745, 746, the identical point was presented that is raised in the within appeal. Following a consideration of the general rules applicable to the exercise of the court's discretion in such matters the court declared that:

"Another situation is presented when it affirmatively appears from the record that nine of the jurors could not have agreed that the defendant was guilty of negligence which proximately caused the accident; that those jurors who conscientiously believed that defendant was not negligent departed from their beliefs while they entertained them and agreed to bring in a verdict for the plaintiff in a small and inadequate amount merely for the purpose of closing the case. Under such circumstances, the primarily important question, namely, the negligence of defendant, was not determined by the jury. It has been held that under such circumstances the trial judge should grant a new trial on all issues and that his failure to do so is an arbitrary refusal to exercise a reasonable discretion. * * *

"This question was before the court in the case of Bencich v. Market St. Ry. Co., [supra]. * * * In disposing of this issue the court said:

"'* * * The verdict of the jury which found, in effect, that defendants were guilty of negligence and that plaintiff was free from contributory negligence and yet allowed damages which were grossly inadequate, furnishes convincing proof as said in the Donnatin case, supra, 38 Cal.App. 8, at page 11, 175 P. 26, 177 P. 845, "That in order to reach an agreement, the verdict was the result of * * * two opposing factions of the jury." * * * It may well be that the jury did not believe there was any contributory negligence upon the part of the plaintiff, but some jurors might also have believed under the evidence that the driver of the apparatus was negligent * * * and in this mistaken belief they might have surrendered their convictions as to the amount of damages they should award. * * * In view of this uncertainty and the fact that clearly something other than the evidence on the question of damages must have actuated the jury, or some of them in arriving at such a low verdict, substantial justice requires that (as said in the Donnatin case, supra, 38 Cal.App. 8, at page 11, 175 P. 26, 177 P. 845), "* * * what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of 'splitting it up' between different judges and different juries."' * * *

"When we apply the rules which have heretofore been announced to the facts before us the conclusion is inevitable that nine jurors did not agree on the most important questions of defendant's negligence and its proximate cause of the collision. There is no other explanation for the inadequate verdict, unjust to plaintiff, had there been an agreement on defendant's liability."

It was held in effect, in the Wallace case, that the verdict obviously was a compromise verdict; and that such a verdict in such circumstances necessarily left undetermined the liability of defendant. The same situation is revealed by the record in the within appeal that existed in the Wallace case, supra. In the instant case the jury allowed only $291.23 for general damages and additional surgery with its accompanying hospital expenses.

[5] The logical test, for the determination of such a question, would appear to be that, if a second trial, limited to one issue, might be prejudicial to either party, then obviously, to order such a retrial would be an abuse of discretion. And any doubt in that connection should be resolved in favor of a trial on all issues.

The evidence, in addition to the testimony of plaintiff and defendant, as to the issue of liability briefly is as follows: The plaintiff, Keogh, was crossing Long Beach Boulevard within a marked pedestrian crosswalk on the south side of Plymouth. There were no witnesses to this accident produced at the time of trial except the plaintiff Keogh and the defendant Maulding. The version of the parties differs markedly. Plaintiff alleges that he was crossing from the west to the east side of Long Beach Boulevard; that he was perfectly sober; that he saw the automobile approaching from the south at all times prior to the time of the accident. On the other hand, the defendant claims that Keogh was crossing from the east to the west; that he stepped out from the shadow of a parked car which blocked Maulding's vision, at a time when Maulding was 8 or 10 feet from the crosswalk, and that the pedestrian took two or three steps into the right front fender of Maulding's automobile. The defendant claimed and offered proof that at the time of the accident Keogh was intoxicated. The defendant called two attending physicians and one eyewitness upon this important issue of intoxication, and the plaintiff in rebuttal called three witnesses. The peace officer who arrived on the scene shortly after the accident was of the opinion and so testified that plaintiff "had been drinking." The doctor on duty in the hospital when plaintiff arrived, following the accident, testified that when plaintiff was examined "he was vomiting and he had an odor of alcohol, it was quite distinct"; that in his opinion it was whiskey. Another doctor testified that he was called in to attend plaintiff and that when he first saw him he was lying on the X-ray table; that he was with him for two hours and that in his opinion he was under the influence of intoxicating liquor. Another witness, a student studying for a teacher's degree and who had studied medicine one semester, arrived at the scene of the accident a few minutes after it had occurred. He testified that he stopped to offer aid; that he noticed plaintiff had a fractured leg; that plaintiff wanted to stand but that he, the witness, wouldn't allow him to do so; that he talked to him; that plaintiff wanted to go home and insisted that he was not injured; that he had a definite odor of alcohol. This witness further testified he remained until the ambulance arrived, probably ten minutes or longer, and that in his opinion plaintiff was under the influence of intoxicating liquor. In rebuttal, Matilda McClure a pianist at the Bottoms Up Cafe, testified that she observed nothing about plaintiff's actions to indicate he was under the influence of intoxicating liquor. It was stipulated that another musician, Matilda Carter, if called as a witness would testify the same. Plaintiff was on his way home from the Bottoms Up Cafe when the accident occurred. Emma Myers testified that she took care of plaintiff after he "returned from surgery," for the rest of the night and at no time did she notice the odor of intoxicating liquor.

[6] The foregoing brief review of the evidence at once suggests that a retrial on the issue of damages alone would be highly prejudicial to the defendant. Hence it follows that the action of the court under the circumstances was an abuse of discretion.

The order granting a new trial as to the single issue of damages is modified to provide a new trial upon all the issues framed by the pleadings and raised by the evidence. And so modified the order is affirmed, and the cause remanded for a new trial.

YORK, P. J., and WHITE, J., concurred.

RIGGS v. DISTRICT RETIREMENT BOARD OF LOS ANGELES CITY SCHOOLS et al. *

Civ. 13041.

District Court of Appeal, Second District, Division 3, California.

May 8, 1942.

Hearing Granted July 6, 1942.

1. Schools and school districts 🔑146

The severance of employment of school teacher because she had reached age of 65 years after she had served over three years continuously in School District, thereby attaining status of permanent teacher, must be regarded as "retirement" on account of physical disability within statutory retirement provisions. School Code, § 5.500, as amended, and §§ 5.505, 5.506, as added by St. 1935, pp. 1880–1882.

See Words and Phrases, Permanent Edition, for all other definitions of "Retirement".

2. Statutes 🔑228

A proviso in statute limits principal part thereof only so far as it expressly or impliedly purports to do so.

3. Statutes 🔑228

A proviso in statute is construed strictly and takes no case out of enacting clause which is not fairly within its terms.

4. Schools and school districts 🔑146

The whole period of 15 years' service, specified in statutory proviso that school district teachers' retirement plan may provide for retirement on account of disability after such period of service, must be in district from which retirement salary is sought, though not expressly so required by statute. School Code, § 5.1104, as added by St.1937, p. 156.

5. Schools and school districts 🔑146

The statutory provision that teachers' retirement plan, established by governing board of more than one school district, may provide that service by any teacher in all districts for which plan is adopted may be counted in determining such teacher's eligibility for retirement, and declaring provisions thereof applicable to any district becoming part of another district having retirement plan, is inapplicable to teacher in school within territory constituting only part of district not covered by plan of district to which such territory was annexed. School Code, § 5.1104a, as added by St.1939, p. 481.

6. Evidence 🔑47

The District Court of Appeal cannot take judicial notice of provisions of school district teachers' retirement plan. School Code, §§ 5.1100 to 5.1111 as added by St. 1937, p. 154 et seq.

7. Mandamus 🔑187(9)

On appeal from mandamus judgment, requiring school district retirement board to pay a teacher retirement salary, District Court of Appeal cannot consider provisions of district retirement plan which are not set forth in pleadings or stipulation of facts on which case was submitted to trial court. School Code, §§ 5.1100 to 5.1111 as added by St.1937, p. 154 et seq.

8. Schools and school districts 🔑146

Provisions of school district teachers' retirement plan, authorizing teacher to count her period of service in school within part of another district's territory annexed to district for which such plan was adopted, cannot be permitted to override statutory provisions limiting terms of such plan. School Code, § 5.1104, as added by St.1937, p. 156; § 5.1104a, as added by St.1939, p. 481.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Mandamus proceeding by Chrisinda J. Riggs against the District Retirement Board of the Los Angeles City Schools and others to compel payment of retirement salary to plaintiff. Judgment for plaintiff, and defendants appeal.

Reversed with direction.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for appellants.

Henry C. Rohr, of Los Angeles, for respondent.

SHAW, Justice pro tem.

The plaintiff, a former school teacher claiming retirement salary under the district retirement plan established in the Los Angeles City School District, brought this proceeding in mandamus against the district retirement board in charge of the operation of that plan to compel the board to pay her such salary, which they had refused to do. The case was submitted to the trial court on the pleadings and a written stipulation of facts. Judgment was given for the plaintiff, from which defendants appeal.

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* Subsequent opinion 132 P.2d 1.

The stipulation of facts shows that, after plaintiff had served as teacher in the Culver City School District for six and one-half years, the last seven days of which were in the Betsy Ross School, a part of that district including the Betsy Ross School was, on February 7, 1930, regularly annexed to the Los Angeles City School District. The latter district paid plaintiff's salary for teaching between February 7, 1930, and June 30, 1930 (perhaps because she continued to teach in the Betsy Ross School, but this fact does not appear). On July 1, 1930, plaintiff was employed by the Los Angeles City School District as a teacher, and she was reemployed by it from year to year until June 30, 1939, at which time her employment with this district was "severed" because she had attained the age of 65 years. The Los Angeles City School District retirement plan was established on September 1, 1937, plaintiff elected to become a member of it, and she made payments into its funds, as required, until June 30, 1939. Since her application for district retirement salary she has been informed that these payments would be returned to her on request. The undenied allegation of the petition is that this application was made on January 18, 1940.

District retirement salaries are in addition to the general retirement benefits provided by the School Code for all teachers and other employees in the public school system of the state, and are provided for in part V of division V of the School Code, consisting of sections 5.1100 to 5.1111 as added by St.1937, p. 154 et seq. Upon an authorizing vote of the qualified electors of a school district, the governing board of such district must establish a plan for a "district retirement salary" for teachers and such other employees as it may determine. § 5.1101. Section 5.1103, dealing with the contents of such a plan, provides for a retirement salary which may be either a fixed sum or a variable amount based upon the amount of the earnings of the employee, subject to such provisions as may be made in said plan for minimum benefits. Section 5.1104, covering the same subject, as amended in 1937, provided, in part: "Every district retirement plan adopted pursuant to the provisions hereof, shall provide that only those teachers and other employees who have served as teachers or employees of the district for at least twenty years of full time service immediately preceding such retirement, and who shall have reached a minimum age specified in such district retirement plan, which age shall not be less than sixty years, shall be entitled to a district retirement salary; provided that such plan may provide for the retirement of teachers or other employees on account of disability after fifteen years of service immediately prior to the retirement, the proportion of the disability retirement salary to the full retirement salary to be specified in the plan."

[1] The stipulation of facts does not state that plaintiff has retired but merely that her employment was "severed," by reason of her age. However, it does appear that she had served more than three years continuously in the Los Angeles City School District, from which it would follow that she had attained the status of a permanent teacher. See School Code, § 5.500, as amended by St.1935, p. 1880. This being so, the severance of her employment by reason of her having reached the age of 65 must be regarded, under sections 5.505 and 5.506 of the School Code, as added by St.1935, pp. 1881, 1882, as a retirement on account of physical disability.

[2-4] It will be noted from the foregoing statement of the facts that the plaintiff does not have the twenty years' full time service as a teacher of the Los Angeles City School District which is required by section 5.1104 to entitle her to a district retirement salary; nor does she have the fifteen years of service immediately prior to retirement necessary under that section to entitle her to a disability retirement salary, unless she may properly add her six and one-half years of service in the Culver City School District to her service in the Los Angeles City School District in computing her service for that purpose. She contends that these two periods of service may be so aggregated, calling attention to the fact that the part of section 5.1104 providing for disability retirement salary does not expressly require the fifteen years' service to be in the district. In spite of that omission, we think such a requirement must be read into the section by construction. The general provision for a district retirement salary expressly and clearly limits the right thereto to

those who have served as teachers or employees of the district for at least twenty years. The provision for disability retirement is attached to this general provision as a proviso or limitation. It purports to decrease the required period of service in case of disability retirement but not to remove the limitation as to the place of service. If it had the effect last mentioned it would dispense with the necessity of any length of service at all in the district as a condition of district retirement—a result not likely to have been intended by the legislature. A proviso in a statute limits the principal part of the statute "only as far as it expressly or impliedly purports to do so." McAlpine v. Baumgartner, 1937, 10 Cal.2d 409, 417, 74 P.2d 753, 757. A proviso "is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms." McAlpine v. Baumgartner, supra, 10 Cal.2d at page 418, 74 P.2d at page 757; Dufton v. Daniels, 1923, 190 Cal. 577, 580, 213 P. 949. We therefore conclude that the whole period of service specified in the proviso here must have been in the district from which the retirement salary is sought.

[5] In 1939 the legislature added section 5.1104a to the School Code, which reads as follows: "Any district retirement plan heretofore or hereafter established by a governing board which governs more than one district may provide that service by any teacher, or other employee included in said plan, in all of the districts in which such teacher or other employee has served and for which said plan is adopted may be counted in the aggregate in determining eligibility toward retirement. The provisions of this section shall apply to any district which has become a part of any district for which a retirement plan is established by annexation, merger, consolidation or in any other manner." Stats. 1939, ch. 58, p. 481, § 5.1104a. Plaintiff contends that this provision applies to her case and gives her the right to aggregate her periods of service in the two districts and thus obtain a retirement salary from defendants. No such effect can be given this section. It deals with "districts," as such, not with territory constituting only a part of a district. The Culver City School District, in which plaintiff served, was not, at the time of her service, one of the districts for which the plan operated by defendants was adopted, and it has never since become a part of any such district; hence neither sentence of section 5.1104a can aid her. Moreover, this section merely extends a permission to the board establishing a district retirement plan, on which, so far as appears, that board here has not acted.

[6-8] Plaintiff urges upon us in argument certain purported provisions of the retirement plan adopted in the Los Angeles City School District and contends that they authorize her to count her Culver City service toward the service necessary for a retirement salary. These provisions are not set forth in the pleadings or in the stipulation of facts, and they are not matters of which we can take judicial notice. City of Oakland v. Brock, 1937, 8 Cal.2d 639, 641, 67 P.2d 344. We cannot, therefore, consider them; but if they were properly before us they could not be permitted to override the provisions of law above considered which limit the terms of such a plan.

The judgment is reversed and the trial court is directed to enter judgment for the defendants.

SCHAUER, P. J., and SHINN, J., concurred.

52 Cal.App.2d 835

MAHAFFEY v. MAHAFFEY.

Civ. 2855.

District Court of Appeal, Fourth District, California.

May 12, 1942.

Appeal and error 🔑554(2), 607(1)

Where no request to clerk to prepare a transcript was filed, no proceedings for a bill of exceptions were ever instituted, and time therefor had expired, and no additional time was allowed, motion to dismiss appeal was granted.

Appeal from Superior Court, San Diego County.

Action by Adger Calhoun Mahaffey against Julia Mae Mahaffey. From an adverse judgment, the defendant appeals, and the plaintiff moves to dismiss the appeal.

Motion granted, and appeal dismissed.

H. V. Daley, of Beverley Hills, for appellant.

Fitzgerald & Selleck, of San Diego, for respondent.

PER CURIAM.

The respondent has moved to dismiss this appeal on the ground that no transcript or bill of exceptions has been prepared or filed.

It appears from a clerk's certificate that notice of appeal was filed on April 25, 1941; that no request to the clerk to prepare a transcript was filed; that no proceedings for a bill of exceptions was ever instituted; that the time therefor has expired; and that no additional time has been allowed by any judge of the superior court.

The motion is granted and the appeal is dismissed.

* * *

CHALLENGE CREAM & BUTTER ASS'N v. PARKER, Director of Agriculture. *

Civ. 11978.

District Court of Appeal, First District, Division 2, California.

May 12, 1942.

Hearing Granted July 10, 1942.

1. Food 🔑4

Milk control law provision permitting the determination of minimum wholesale prices by the Director of Agriculture contemplates the determination and stabilization of prices based on all factors enumerated in the statute and the application of such prices to all distributors similarly engaged in any one marketing area. St.1935, p. 922; St.1937, p. 47, § 736; St.1939, p. 2647, § 736.12 and subds. (6), (3).

2. Food 🔑4

Milk control law provision permitting determination of minimum wholesale prices by Director of Agriculture was written in the public interest to supply milk to the consumer at the lowest cost the traffic will permit, to guard against waste, and to encourage use of new machinery and processes by distributors to effect such purposes. St.1937, pp. 43, 44, 47, §§ 735(b), 735.1, 736; St.1939, p. 2647, § 736.12, and subds. (6), (3).

3. Food 🔑1

Under milk control law commanding Director of Agriculture to designate marketing areas in which conditions are reasonably uniform and to fix minimum prices for milk, director has no statutory authority to act within a sound discretion or reasonably upon which to base claim of implied power to fix different prices for milk distributed in glass and fiber containers, and order fixing different prices for milk so distributed violates statutory purpose of stabilizing milk prices. St.1937, pp. 47, 1373, §§ 736, 736.11, 736.12.

4. Food 🔑1

The reference in the milk control law to type and methods of distribution refers to different systems of delivery of milk to dwellings, hotels, restaurants, and stores, and not to difference between fiber and glass containers so as to permit Director of Agriculture to fix minimum price of milk sold in fiber containers higher than that of milk sold in glass containers. St.1937, p. 1373.

5. Food 🔑1

Director of Agriculture is a "public official" and as such under the milk control law has powers with reference to fixing milk prices expressly enumerated by the statute, and implied powers necessary to the exercise of the powers expressly granted. St.1935, p. 922; St.1937, pp. 42, 1372; St.1939, p. 2641.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Official".

6. Food 🔑1

Where order of Director of Agriculture fixing different prices for milk sold in glass containers and milk sold in fiber containers was not necessary to the exercise by the director of the express powers given him in the milk control law, power to make such order was not "implied." St.1935, p. 922; St. 1937, pp. 42, 1372; St.1939, p. 2641.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Power".

7. Food 🔑1

Under milk control law when conditions require that different prices be set, the Director of Agriculture may establish different marketing areas or modify areas already established, but he cannot establish different prices in one area merely because of different cost to distributors by reason of differences in their containers or means of transportation. St.1935, p. 922; St.1937, pp. 42, 1372; St.1939, p. 2641.

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* Subsequent opinion 142 P.2d 737.

8. Appeal and error ⟹1008(3)

In suit to enjoin enforcement of order of Director of Agriculture fixing price for milk sold in fiber containers higher than that sold in glass containers, where trial court had complete record of hearing held by Director of Agriculture and there were inferences which sustained the contention of each party, a reasonable construction by the trial court of the statutes involved would not be disturbed on appeal. St.1935, p. 922; St.1937, pp. 42, 1372; St.1939, p. 2641.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Suit by Challenge Cream & Butter Association against W. B. Parker, as Director of Agriculture, to enjoin defendant from enforcing an order fixing the price of milk sold in fiber containers in the Alameda county marketing area. From a judgment for plaintiff, defendant appeals.

Affirmed.

Earl Warren, Atty. Gen., W. T. Sweigert, Asst. Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for appellant.

Webb, Webb & Olds, of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal by defendant, Director of Agriculture, from a judgment in an action for injunctive relief in favor of the plaintiff.

The action presents a question regarding the proper construction of the milk control law. Ch. 10, div. 4, art. 2a, Agr. Code, §§ 735–738, St.1935, p. 922, St.1937, pp. 42, 1372, St.1939, p. 2641. It arose out of the following facts. By a general regulation effective April 28, 1937, the Director of Agriculture designated among others Alameda County Marketing Area. On April 25, 1939, the plaintiff commenced the business of distributing fluid milk in said area to retail stores, hotels, and restaurants, using glass containers only. The plaintiff is a non-profit cooperative marketing association having approximately 32,000 members. It has a large business handling each year butter fat in excess of 2,000,000 pounds and whole milk in an amount of 2,300,000 pounds. On May 27, 1939, it commenced the use of fiber containers. In August of that year it discontinued the use of glass containers entirely. Pursuant to the provisions of the Agricultural Code in 1940 the defendant issued Order No. 79 and later Order No. 80. The effective date of the latter order was June 9, 1940. Said order contained twenty-three schedules, among others those known as Parts A, C, and D. To each of those schedules was annexed a provision as follows: "If fluid milk is sold or delivered in containers for which a deposit is not required, which milk is sold for consumption off the premises, the prices for such fluid milk shall be one-half cent (½¢) above the minimum wholesale prices established in Parts A, C, and D of this schedule. If fluid milk is sold or delivered in fiber containers, which milk is sold for consumption on the premises, the prices for such fluid milk shall be one-half cent (½¢) above the minimum wholesale prices established in Parts A and D of this schedule." If the plaintiff sells milk for less than such prices it commits a misdemeanor. If it offers its milk in fiber containers at the prices mentioned it is handicapped because the other distributors using glass containers are authorized to sell at ½-cent less. It was stipulated that if the subject of damage is material the fact is that the damages of the plaintiff were in such amount as to be actionable. Contending that Order No. 80, as quoted above, was made without any authority of law and was void, the plaintiff commenced this action. Under the judgment the defendant is perpetually enjoined from enforcing the part of the order complained of in the Alameda County Marketing Area.

On the first page of his brief the defendant states two questions are involved. It states the first question is: "Does the Milk Control Law (chap. X, div. IV, art. IIa, Agr.Code, §§ 736.10–736.12) empower the Director of Agriculture to fix a minimum wholesale price for milk sold and distributed in a paper or fiber (single service) container different from the minimum wholesale price fixed for milk sold and distributed in a glass (multiple service) container * * *?" The answer involves the correct construction of section 736.12 Agricultural Code which provides:

"736.12. In determining minimum wholesale prices and minimum retail prices in any marketing area, the director shall first make an investigation in such marketing area to establish such facts as shall be necessary to permit him to carry out the intent of this article within the standards herein prescribed. In making such investigation, the director may examine the books and records of distributors and retail stores in such marketing area and shall hold one or more public hearings, take testimony and may subpœna witnesses. All testimony received at such hearings shall be under oath. Notice of any hearing held by the director, pursuant to this article, shall be given by the director to every distributor and retail store in such marketing area whose name appears upon the records of the Department of Agriculture or who files a request for the same with the department, by mail or by publication for the time and in the manner prescribed in section 736.1 of this chapter. A record of any and all hearings held by the director, pursuant to this article, shall be made and filed in the office of the director and shall, at all times, be available to inspection by any interested person.

"In determining minimum wholesale and minimum retail prices for any marketing area, the director shall take into consideration the following economic factors operative in such marketing area:

"(1) The quantities of fluid milk or fluid cream, or both, distributed in such marketing area.

"(2) The quantities of fluid milk or fluid cream, or both, normally required by consumers in such marketing area.

"(3) The cost of fluid milk or fluid cream, or both, in such marketing area to distributors and retail stores, which in all cases shall be, respectively, the prices paid by distributors to producers and the minimum wholesale prices, as established pursuant to this chapter.

"(4) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors and retail stores, respectively, including all costs of hauling, processing, selling and delivering by the several methods used in such marketing area in accomplishing such hauling, processing, selling and delivery, as such costs are determined by impartial audits, of the books and records, or surveys, or both, of all, or such portion of the distributors and retail stores, respectively, of each type or class in such marketing area as are reasonably determined by the director to be sufficiently representative to indicate the costs of all distributors and retail stores, respectively, in such marketing area.

"In determining the cost of handling and distributing fluid milk or fluid cream, or both, by retail stores handling commodities in addition to fluid milk or fluid cream, or both, the director shall determine the cost of doing business for each such representative retail store and for such purpose shall consider all costs and expenses of doing business including depreciation on inventory and equipment. In the absence of satisfactory evidence to the contrary, the cost of handling such fluid milk or fluid cream, or both, shall be presumed to be the same percentage as the cost of doing business of such retail store in conducting its entire business.

"(4a) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors in hauling, processing, selling and delivering to restaurants, confectioneries or other places for consumption on the premises wherein it is required by law that service to customers be made from the original container. In fixing the minimum wholesale price to be paid distributors by such persons, the director shall take into consideration such legal requirements and other factors and distribution costs peculiarly affecting service to such persons, and if the director reasonably determines that such factors and costs require that the minimum wholesale prices to be paid distributors by such persons vary from the minimum prices established for other wholesale customers, the prices established to be paid by such persons may vary accordingly.

"(5) The amount of the available capacity for processing and distributing fluid milk, or fluid cream, or both, of all distributors in such marketing area and the estimated extent to which such available capacity is being used by such distributors.

"(6) The purchasing power of consumers in such marketing area." St.1939, p. 2647.

[1, 2] That provision was so written for the obvious reason that the cost to each distributor "hauling, processing, selling and delivering" will, in all probability, be different from the cost to each and every other distributor although the total cost

to each may be approximately the same—depending on the length of the haul, the nature of the road, the mode of haul (by train, or by truck, or otherwise), the mode of processing, selling, and delivering. But in no event may minimum wholesale price be based on nor be determined on any one single factor. Otherwise there must necessarily be as many prices as distributors. But the statute clearly contemplates the prices will be based on all of the factors enumerated in section 736.12 of the Agricultural Code and will apply to all distributors similarly engaged in any one marketing area as fixed and determined under and by the terms of section 736 of said code. That that is so is indicated by other provisions of the statute. By its title (Stats.1935, p. 922) the statute is one "relating to the stabilization and marketing of fluid milk and fluid cream." We find no section at variance with, but all in accord with "stabilization." But to hold that a separate price may be formulated and based on each change is to unstabilize rather than to stabilize. Furthermore the statute does not frown on new machinery, new processes, or new methods. It is written to encourage not to obstruct such matters. § 735.1. But the statute does frown on "up-charges." Every passage that has been called to our attention shows that the statute was written in the public interest, that is, in the interest of the consumer. The latter is to be supplied with good, pure, wholesome milk and cream. All other things being equal he is to be supplied at the lowest cost the traffic will permit. § 736.12, subs. (6), (3). Again it is expressly provided that waste will be duly guarded against. § 735, sub. (b).

[3] The defendant notes the use of the word "cost" as it is used in several places in the statute and contends that "* * * whenever the director finds upon adequate evidence that different cost factors exist between various methods or types of distribution of milk and that such differences are substantial and reasonably recognizable and separable * * * he may establish differential prices. He does not contend such power is expressly granted in any part of the statute. The sum total of his contention is that such power is implied. We find no merit in the contention. Instead of such power being implied we think different provisions in the statute negative the granting of such power. As the number of prices is increased and varied, the degree of stabilization is decreased. By the provisions of section 736 the director is commanded to designate marketing areas in which he finds the conditions are "reasonably uniform." Then by the provisions of section 736.11 he is given power to fix the minimum prices, both wholesale and retail, for which the distributors may make sales in each area. There is no place in the statute containing any expression to the effect that in fixing prices he will act within a sound "discretion" or "reasonably." But the statute (§ 736.12) is quite long and contains an extended list of specifications which must be followed by him in fixing said prices. To grant the contention of the defendant is to fail to give any force or effect to any of said specifications.

If a variance in the cost between glass containers and fiber containers, constitutes a "* * * substantial and reasonably recognizable and separable * * *" difference which will justify the creation of a different class, it is clear that many classes must be created for similar reasons, and following the practice there will be no "stabilization" and the very reason for the enactment of the statute will be set aside.

[4] The defendant notes that the statute in several places uses the expression "types or methods" and he argues that expression refers to "fiber or glass" containers. We think that is not a correct construction. The expression was inserted in the statute when it was amended. Stats. 1937, p. 1373. At that time fiber containers for milk were not known to the trade. But at that time deliveries to dwellings, hotels, restaurants, and stores were commonly practiced and were different "methods and types" of distribution. In the latter sense the words should now be construed.

[5-7] From what has been said it is apparent that the defendant claims the power to make the order under attack. Being a public official his powers flow from the statute. As stated in 21 Cal.Jur. 874, "A public officer or board has not only the powers expressly enumerated by law, but also those implied powers which are necessary to the exercise of the powers expressly granted * * *." Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 334, 253 P. 726. In this case it is not claimed that the defendant has been given the express power to make the said order. His

power, if any, must rest on his implied powers. But there is nothing whatever in the record showing that power to make the order complained of is or was necessary for the defendant to exercise any express power granted to him. It follows that the power is not implied. Merriam v. Barnum, 116 Cal. 619, 624, 48 P. 727. If conditions in the Alameda County Marketing Area are such that different prices must be set, the director shall have the power to establish additional areas or to modify areas heretofore established. § 736. But if one distributor uses bottles for containers and another uses fiber containers, if one uses gasoline trucks and another uses distillate trucks, or if one ships by rail and another ships by truck or horse drawn vehicles, the variation in costs will not warrant numerous sales prices instead of the stabilized price which the statute authorizes the director to determine and enforce. That, in different localities, different prices did heretofore prevail, was directly announced by the legislature. §§ 735 and 736. But to cope with that condition the legislature authorized areas to be formed and classified. The law to that effect has not been repealed but to give force and effect to the contention of the defendant is to hold that both areas and persons may be classified. As shown above we think his contention may not be sustained.

[8] After a full and complete hearing the trial court ruled against the defendant. Before the trial court was a complete record of the hearing held by the defendant and which was the basis for defendant's order. The construction placed on the statutes by the trial court in the light of all the facts before it was a reasonable one. The most that can be said is that possibly there were inferences sustaining the contention of the defendant and inferences sustaining the contention of the plaintiff. Under such circumstances the judgment of the trial court may not be reversed. In Silva v. Gustine Creamery, 217 Cal. 146, at page 149, 17 P.2d 699, at page 700, the court said: "If the inferences fairly deducible from the evidence are such that different conclusions might rationally be drawn therefrom by men equally sensible and impartial, the conclusion reached by the trial court should be deemed final and not disturbed on appeal for want of sufficient evidence to justify the findings."

As we have come to the conclusion that the portion of Order No. 80 which is under attack was not authorized by the statute, it is unnecessary to discuss the claim of the plaintiff that said statute is unconstitutional. Therefore we do not express any opinion on that point.

We find no error in the record. The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

52 Cal.App.2d 61

SCOTT v. McPHEETERS.

Civ. 6672.

District Court of Appeal, Third District,
California.
May 11, 1942.

1. Jury 🔑97(2)

In action against physician for malpractice during plaintiff's birth where prospective juror admitted that defendant had been her family physician but from her voir dire it did not appear that she would have been biased or prejudiced in defendant's favor, denial of plaintiff's challenge of juror for cause was not error. Code Civ.Proc. § 602, subd. 7.

2. Jury 🔑85

In passing upon the qualifications of a juror the trial judge has a sound discretion to accept or reject him upon the evidence adduced. Code Civ.Proc. § 602, subd. 7.

3. Appeal and error 🔑1045(3)

Where juror who was challenged for cause by plaintiff did not sit on jury, plaintiff was not prejudiced by the denial of challenge notwithstanding that plaintiff was forced to use last peremptory challenge to remove juror and was thereby prevented from peremptorily challenging another juror. Code Civ.Proc. § 602, subd. 7.

4. New trial 🔑56

In action against physician for malpractice in plaintiff's birth where juror on voir

dire was not asked whether she knew physician, in the absence of showing that her acquaintance affected the verdict for physician, denial of plaintiff's motion for new trial made on ground that juror was guilty of prejudicial "misconduct" in concealing that she was a former patient of physician was not error.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

5. Appeal and error ⚿922

In action against physician for malpractice during plaintiff's birth where jury discussed only the instructions of the court and the facts adduced in the evidence and juror who had been former patient of physician made no mention of her acquaintance with physician and disregarding such juror's vote more than the number of jurors necessary to render a valid verdict voted for physician, in support of the judgment the Appellate Court would assume that even though such juror were biased, her bias in no way affected the verdict.

6. Jury ⚿110(6)

Where during trial of action against physician plaintiff learned that juror had once been patient of physician and failed to call matter to court's attention or request further examination of the juror, plaintiff "waived" any objection to juror's disqualification on that ground.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Stanislaus County; Gustav B. Hjelm, Judge.

Action by Eleanor Catherine Scott, a minor, etc., against Earl Robey McPheeters, a physician, for damages for alleged malpractice during the birth of plaintiff. From a judgment for defendant, plaintiff appeals.

Affirmed.

Lercara & Nelle, of Oakland, C. Ray Robinson, of Merced, Nichols & Richard, of Oakland, and Francis O. Hoover, of Modesto, for appellant.

Griffin & Boone and Cleary & Zeff, all of Modesto, and Dearing & Jertberg, of Fresno, for respondent.

STEEL, Justice pro tem.

The plaintiff has appealed from a judgment in favor of the defendant, which was rendered pursuant to the verdict of a jury in a suit for damages for alleged malpractice of a physician.

A reversal of the judgment is sought on the ground that the court erred in denying plaintiff's challenge, for cause, to a prospective juror, under section 602, subdivision 7 of the Code of Civil Procedure, for bias in favor of the defendant because he had formerly acted as her physician. The plaintiff exercised her last peremptory challenge to that juror, and she was excused from the panel. It is also contended the court erred in denying plaintiff's motion for a new trial on the ground that a juror who sat in the trial of the case, was guilty of prejudicial misconduct in failing to disclose the fact that she had also previously been a patient of the defendant, and therefore entertained bias in his favor.

The complaint alleges that the defendant was guilty of malpractice in the negligent use of metal clamps and forceps incident to the birth of plaintiff. A demurrer to that complaint was sustained. On appeal, the judgment which was rendered pursuant thereto, was reversed. Scott v. McPheeters, 33 Cal.App.2d 629, 92 P.2d 678, 93 P.2d 562. Upon the first trial of this cause the jury failed to agree upon a verdict. The trial which is involved on this appeal was had before twelve jurors, including both men and women. One additional alternate juror was also examined and sworn, but he did not participate in the determination of the case. After the examination of several jurors on their voir dire, and after the plaintiff had exhausted five of her peremptory challenges Mrs. Bertha M. Gum was thoroughly examined by the plaintiff as a prospective juror. In reply to an inquiry from plaintiff's attorney she stated that the defendant had previously been her family physician, but added:

"I think I can be fair minded and fair and just. * * * I could put aside any prejudice in weighing the testimony. * * *

"Q. In the back of your mind there is a little doubt about it, because there might be a tendency to find in favor of Dr. McPheeters. That is true, isn't it? A. No. I cannot say there is. If I firmly get my mind to weigh the evidence, unless I am convinced in my mind that the evidence was against him."

The juror further said she would obey the instructions of the court and disregard any feeling of friendship which she might have for either party and decide the case solely on the evidence adduced at the trial. Plaintiff's challenge to the juror, for cause, was denied.

When counsel for the defendant commenced to cross-examine the juror as to her state of mind, the attorney for the plaintiff announced that, "I might save some time by stating in advance that I am going to exercise my last challenge," on this juror.

No further examination occurred, and the juror was peremptorily challenged by the plaintiff. She did not sit as a juror. Previous to the examination of any jurors on their voir dire, the entire panel was instructed that this was a suit against the defendant, Earl R. McPheeters, a physician, for damages for alleged malpractice exercised in the course of his professional care during the birth of the plaintiff. In the examination of several jurors, the plaintiff's attorney called attention to the fact that expert medical witnesses would be called in behalf of the defendant, and sought to elicit their mental attitude toward such medical testimony. He also asked the jurors whether they knew certain named medical experts, whom he assumed would be called for the defendant, and whether any of them had acted as physicians for such jurors, and if so, whether the jurors would be biased or prejudiced by the physicians' evidence on that account. Mr. Harlan K. Bigelow, the juror who was examined at length in that regard, was specifically asked if he knew any one of the seven physicians, each of whom he identified by name, to which question the juror replied "No." The attorney then asked him if he knew the defendant, Dr. McPheeters, to which he also replied "No."

Mrs. Maggie Cooper, who lived in Modesto, as did also Dr. McPheeters, was subsequently examined as a juror. She was merely asked if she had an acquaintanceship "with any of the doctors that have been mentioned," to which she replied that she knew Dr. Gould, whose name had been previously mentioned as a probable witness who would be called. She said he used to be her family physician. In an extensive examination she positively stated that her acquaintance with Dr. Gould would not influence her verdict in any manner. She was not asked if she was acquainted with the defendant, Dr. McPheeters. She said she would fairly and impartially try the cause and render her verdict in accordance with the instructions of the court and the evidence adduced at the trial. The plaintiff made no objection to this juror, and she was sworn to try the cause.

During the course of the trial and before the cause was submitted to the jury for its determination, one of plaintiff's attorneys told one of the attorneys for the defendant, that he had a letter from some one informing him that the juror, Maggie Cooper, had formerly been a patient of the defendant, Dr. McPheeters, and asked if he knew whether that was true. Defendant's attorney replied that he knew nothing about that alleged fact. In spite of that information, which was received by plaintiff's attorney during the trial of the case, no application was made to the court to further examine the juror in that regard. The attention of the court was not called to the information derived from the letter, regarding the juror, Mrs. Cooper. The trial was completed and the cause was argued and submitted to the jury. After deliberation thereon, a verdict was returned in favor of the defendant, by a vote of eleven to one. Mrs. Cooper agreed to the verdict for the defendant. Only one juror voted against it. This fact is shown by an affidavit signed by the eleven jurors who agreed to the verdict, which was filed in opposition to plaintiff's motion for a new trial, on the ground of the prejudicial misconduct of the juror Mrs. Cooper. The motion for a new trial was denied.

[1, 2] The court did not err in denying plaintiff's challenge to the juror, Bertha M. Gum, for cause. From her examination, taken as a whole, in spite of the fact that she had known Dr. McPheeters, as her family physician, it does not appear she would have been prejudiced or biased in his favor, if she had been accepted as a juror. She asserted that she would be governed by the instructions of the court and by the evidence adduced at the trial. In passing on the qualifications of a juror, the trial judge has a sound discretion to accept or reject him upon the evidence adduced. County of Mono v.

Flanigan, 130 Cal. 105, 108, 62 P. 293. In 15 Cal.Jur. 429, sec. 100, it is said in that regard: "The judge is in the best position to pass upon the question of the juror's attitude, so that his decision accepting a juror is ordinarily conclusive, and will be reviewed only when it can be said as a matter of law that the juror was biased—the case must be one in which the law leaves nothing to the conscience or discretion of the judge" before a reviewing court will be warranted in reversing a case on that account.

[3] Since Mrs. Gum did not sit as a juror, the appellant was not prejudiced by that ruling of the court. Her only complaint of that ruling is that she was thereby forced to exercise her last peremptory challenge on that account, which prevented her from challenging the other juror, Mrs. Cooper for her alleged bias in favor of the defendant. There is no merit in this contention.

[4] The court did not err in denying plaintiff's motion for a new trial on the ground that the juror, Mrs. Cooper, was guilty of prejudicial misconduct in concealing from the plaintiff the fact that she had formerly been a patient of the defendant, Dr. McPheeters. She was not asked on her voir dire examination whether she knew the defendant. In her affidavit which was filed on the motion for a new trial, she averred that she did not understand plaintiff's attorney was inquiring regarding her acquaintance with any doctor except those who had been previously named as expert witnesses. She also stated that she had not been a patient of the defendant since 1936, which was four years before the date of the trial. The affidavit of Dr. McPheeters, which was also filed on the motion for new trial, confirmed that fact. He stated that Mrs. Cooper had not been a patient of his for four years. There is no showing that acquaintance affected the verdict in any respect. The great weight of evidence in that regard is just the contrary. Eleven jurors who voted for the verdict, averred that,

"There is no effort on the part of any juror to influence any member of the jury in the jury room other than by reference to the facts that were produced in evidence in the case and reference to the instructions of the judge as to the law governing the case."

[5] In support of the judgment we must therefore assume that even though Mrs. Cooper was biased in favor of the defendant, that fact in no way affected the verdict, for she did not mention her acquaintance with the defendant to any member of the jury. Los Angeles County Flood Control Dist. v. Abbot, 24 Cal.App.2d 728, 741, 76 P.2d 188. The only matters that were discussed by the jurors were the facts adduced in evidence and the instructions of the court. The evidence does not show that the verdict was affected by any bias on the part of the juror Mrs. Cooper, nor that she was disqualified as a juror on account of any prejudice or favoritism for either party. Even disregarding her vote, more than the number of other jurors necessary to render a valid verdict voted for its adoption.

[6] Moreover the plaintiff waived any objection to the juror's disqualifications on that ground, for her attorney had warning by letter during the progress of the trial that Mrs. Cooper had once been a patient of the defendant, Dr. McPheeters, and he failed to call the court's attention to that fact or to request the court to further examine her in that regard. Sherwin v. Southern Pacific Co., 168 Cal. 722, 726, 145 P. 92; Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 495, 55 P.2d 870; 20 Cal.Jur. 54, § 33.

The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

52 Cal.App.2d 154

MOSK v. SCHEINBERG et al.

Civ. 12949.

District Court of Appeal, Second District, Division 3, California.

May 19, 1942.

1. Attorney and client ⚿143

Where attorney, who had agreement with law firm to pay firm 50 per cent. of legal fees earned in exchange for use of office facilities, was employed by client to form business trust and received some assistance from law firm in drafting declaration of trust, and during attorney's absence, law firm drafted dissolution of partnership for such client, and law firm had previously helped attorney without special charge for services, there was no "employment" of law firm by attorney or his client upon which assignee of law firm could predicate an action for fees.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

2. Attorney and client ⚿165

In action by assignee of law firm for fees, where demand was based upon alleged liability of associate attorney's client arising out of a separate and distinct contract of employment, any cause of action against associate attorney for breach of contract with law firm for division of fees was not within the issues.

3. Appeal and error ⚿1071(5)
Trial ⚿388(2)

Where a judgment of nonsuit is entered in favor of defendant, findings are unnecessary, but the fact that the court made findings is not reversible error.

4. Judgment ⚿231
Trial ⚿165

An order granting a motion for nonsuit constitutes the "decision", and a judgment of nonsuit based upon such order is superfluous.

See Words and Phrases, Permanent Edition, for all other definitions of "Decision".

5. Appeal and error ⚿1071(5)

Where a judgment of nonsuit was entered in favor of a defendant, plaintiff could not be prejudiced by findings in favor of such defendant made after such defendant had been eliminated from the case.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Edward Mosk against Nathan Scheinberg and others for the reasonable value of legal services alleged to have been performed for defendants by plaintiff's assignors. From a judgment of nonsuit in favor of defendants Sherman, Nasmah, Inc., and Van Nuys Theatre Corporation, and from a judgment on the merits in favor of the defendants Scheinberg and Horwitz, plaintiff appeals.

Affirmed.

Borah & Borah and Desser & Rau, all of Los Angeles, for appellant.

Martin Gendel, of Los Angeles, for respondents.

SHINN, Justice.

Plaintiff appeals from a judgment of nonsuit in favor of defendant Sherman and the two corporate defendants, Nasmah, Inc., and Van Nuys Theatre Corporation, and a judgment in favor of defendants Scheinberg and Horwitz on the merits in an action for the reasonable value of legal services alleged to have been performed for the several defendants by plaintiff's assignors, Messrs. Desser and Rau. The court found that the attorneys were not employed by the defendants or either of them and that they performed no services for the defendants of any value or at the latter's special instance and request.

Upon the appeal from the judgment of nonsuit the question is whether plaintiff's evidence would have supported a judgment against the defendants whose motions for nonsuit were granted. We are of the opinion that the evidence was such as to necessitate the decisions that were made, not only upon the motions for nonsuit but upon the merits as well.

Defendant Sherman, who is the son of defendant Scheinberg, was employed as a messenger and law clerk and later was associated as an attorney in the office of Desser and Rau. After he was admitted to practice he entered into an arrangement with Desser and Rau under which he was to receive a small weekly compensation, was to have the use of office space, telephone, secretarial and other services, and was to pay Desser and Rau 50 per cent of all legal fees he earned and collected. Certain fees were charged to his clients, including Scheinberg and Horwitz, on billheads of Desser and Rau; the fees were paid to Desser and Rau and were divided between the firm and Sherman. The billheads of Desser and Rau were used as a matter of convenience. Scheinberg and Horwitz were partners in the ownership of the stock of the corporate defendants and of other corporations, which they wished to place in a business or operating trust and they advised with Sherman concerning the procedure to be followed. The latter, with the assistance of trust department executives of a bank and the use of one of the bank's forms and with some collaboration upon the part of Desser and Rau, drafted a declaration of trust, which was executed by Scheinberg and Horwitz. During the absence of Sherman from the city Desser and Rau prepared an agreement for dissolution of partnership for Scheinberg and Horwitz. After the matter of the preparation of the declaration of trust had extended over a period of nearly a year, Sherman severed his connection with the firm, established an office elsewhere, and several months thereafter the declaration of trust was executed. Desser and Rau billed the defendants, other than Sherman, for legal services in the amount of $3,500 and, liability being denied, caused this action to be instituted. At or about that time Sherman fixed his fees to his co-defendants at the sum of $100; $75 was paid on account, and $50 was tendered by Sherman to Desser and Rau, which they refused.

There was a sharp conflict in the testimony as to the amount of time and effort expended by Desser and Rau in connection with the preparation of the declaration of trust and certain minor services. In view of the findings that there was no employment, express or implied, it was not necessary for the court to determine the value of the services of the firm. The witnesses were also in disagreement as to whether Desser and Rau had the right to fix the fees to be paid by Sherman's clients after consultation with him, or whether Sherman had the right to fix them after consultation with Desser and Rau, but this question, as we shall point out, was not one in issue in the present case.

[1] Plaintiff's evidence, construed most strongly in his favor, was clearly insufficient to show that there was an express or implied agreement of employment of Desser and Rau by any of the defendants in whose favor nonsuits were ordered. It may be noted that Sherman was added as a defendant by amendment in the place of "Doe 1." and on the statement that his true name was unknown at the time the complaint was filed. Under no construction of plaintiff's evidence could the judgment of nonsuit be held erroneous.

There was no evidence of a direct employment of anyone except Sherman and no agreement other than the general one we have mentioned for the payment of any sums to Desser and Rau. The court might have believed and we think did believe, from the testimony, that all of the parties understood that the services of Desser and Rau were rendered without obligation on the part of anyone to compensate them otherwise than in accordance with their arrangement with Sherman for division of fees, and that the latter, only, was employed by the other defendants. The finding made on that issue is fully supported by the evidence and it negatives any implied obligation upon the part of the defendants to pay Desser and Rau directly for their services and any obligation upon the part of Sherman to compensate Desser and Rau otherwise than through the agreement for the division of fees. There was no evidence of any agreement that Desser and Rau were specially employed by the defendants or that there was any agreement that they were to be specially paid, in case they assisted Sherman in his work. They had helped him before and had never made a special charge for their assistance.

[2] If, in charging a fee of $100 to Scheinberg and Horwitz, Sherman in any manner breached his agreement with Desser and Rau for charging and dividing fees, any cause of action based upon such breach was not within the issues framed by the pleadings or triable in the present action. The demand was not based upon the agreement for division of fees but upon an alleged liability arising out of a separate and distinct contract of employment.

The causes of action based upon an alleged book account and an account stated were disposed of by nonsuit, to which plaintiff consented.

[3-5] It is contended that the court improperly made findings in favor of defendant Sherman after having granted his motion for nonsuit. Findings were unnecessary as to this defendant (Estate of Baird, 1926, 198 Cal. 490, 246 P. 324), but the fact that the court made them does not

call for a reversal. The judgment as entered in favor of defendant Sherman was one of nonsuit and so recites. It was based upon the order granting the motion and not upon the findings and was superfluous, since the order constituted the decision. Finch v. Ekstrom, 1931, 115 Cal.App. 381, 1 P.2d 516. Plaintiff is in the position of having suffered a judgment of nonsuit in favor of these three defendants and cannot be prejudiced by the findings complained of in favor of defendant Sherman, made after he had been eliminated from the case.

Certain rulings on the admission of evidence are assigned as error, but they relate only to the extent of the services rendered and require no discussion in view of the fact that the evidence was insufficient to establish liability.

The judgments are affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

51 Cal.App.2d 759

PEOPLE v. HARBY.

Cr. 3549.

District Court of Appeal, Second District, Division 2, California.

May 7, 1942.

Hearing Denied June 6, 1942.

1. Officers 🔑70

The procedure under Penal Code relating to removal of officers does not require strict application of the rules which govern civil or criminal actions. Pen.Code, § 758.

2. Officers 🔑66

"Willful misconduct" in office, within statute authorizing removal of an officer for willful misconduct, includes any willful malfeasance, misfeasance, or nonfeasance, and such official misconduct does not necessarily imply corruption or criminal intention. Pen.Code, § 758.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

3. Municipal corporations 🔑159(5)

An accusation, charging city councilman with violating a city ordinance forbidding unauthorized use of city-owned motor vehicles and of violating Penal Code section relating to embezzlement, sufficiently charged "willful misconduct" in office, so as to support proceedings to remove councilman from office. Pen.Code, §§ 504, 758, 759.

4. Municipal corporations 🔑159(6)

Even if accusation charging city councilman with willful misconduct in office was insufficient when tested by special demurrer, reversal would not be granted, where offense was established by abundant evidence. Pen.Code, §§ 758, 960; Const. art. 6, § 4½.

5. Municipal corporations 🔑159(6)

In proceeding to remove city councilman, where willful misconduct in office charge was based on councilman's alleged unauthorized use of city-owned automobile, error, if any, in allowing prosecution to make proof of councilman's request for exempt license plates for automobile was not prejudicial, in view of councilman's admission that he used automobile for his vacation trip to Montana. Pen.Code, §§ 504, 758, 960; Const. art. 6, § 4½.

6. Municipal corporations 🔑159(1)

In proceeding to remove city councilman, where willful misconduct in office charge was based on councilman's alleged unauthorized use of city-owned automobile, proof of councilman's request for exempt license plates for automobile was properly admitted upon question of councilman's intent at time of his departure from Los Angeles for Montana on his vacation. Pen. Code, §§ 504, 758.

7. Municipal corporations 🔑159(1)

In proceeding to remove city councilman, where willful misconduct in office charge was based on councilman's alleged unauthorized use of city-owned automobile, testimony of one to whom councilman had allegedly stated, just prior to his departure on his vacation, that "no one can tell me what to do", after such person had inquired whether councilman would drive city-owned automobile or his own automobile on his vacation, was properly admitted. Pen.Code, §§ 504, 758.

8. Municipal corporations ⚷159(1)

In proceeding to remove city councilman based on alleged unauthorized use of city automobile, where councilman appeared voluntarily before grand jury and stated his own version of his travels in order to defeat charge then under consideration by such tribunal, councilman assumed responsibilities incident thereto, and, his attempt having proved unsuccessful, he could not escape effect of his utterances there upon plea that corpus delicti was not established by other proof. Pen.Code, §§ 504, 758.

9. Municipal corporations ⚷159(6)

In proceeding to remove city councilman, where part of councilman's testimony given before grand jury was read to jury upon suggestion of councilman's attorney during course of trial, councilman had no ground for complaint against admission of such testimony. Pen.Code, §§ 504, 758.

10. Municipal corporations ⚷159(1)

Where willful misconduct in office charge was based on councilman's alleged unauthorized use of city-owned automobile, and report of city attorney, which was in evidence, contained councilman's statement that he was not conscious of doing anything wrong at time of driving city-owned automobile to Montana, councilman's testimony given before grand jury in which he stated that in his campaign against his predecessor he had charged predecessor with unlawful use of city-owned automobile in making his campaign for re-election was admissible to contradict councilman's claims of good faith. Pen.Code, §§ 504, 758.

11. Municipal corporations ⚷159(6)

Where willful misconduct in office charge was based on councilman's alleged unauthorized use of city-owned automobile, error, if any, in admitting testimony of another councilman that no authorization or request by city council was made upon defendant councilman to proceed to Great Falls, Mont., to make an inspection of its park system was not prejudicial, in view of defendant councilman's stipulation at trial that he left on a trip to Great Falls without being given any direction to make any survey on behalf of city. Pen.Code, §§ 504, 758, 960; Const. art. 6, § 4½.

12. Municipal corporations ⚷156

Where city councilman had no authority to drive city-owned automobile to Montana, councilman's use of automobile for such a journey was inconsistent with nature of trust reposed in him and therefore it was an "embezzlement". Pen.Code, § 504.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement".

13. Municipal corporations ⚷60

The city council has no authority to give its sanction to an act by a councilman which was forbidden by a general statute as well as by specific provision of Municipal Code.

14. Municipal corporations ⚷159(1)

Evidence was sufficient to justify removal of councilman for "willful misconduct" in office through unauthorized use of city-owned automobile. Pen.Code, §§ 504, 758.

15. Municipal corporations ⚷159(6)

In proceeding to remove city councilman, error, if any, in giving of certain instructions and refusal of others was not prejudicial, in view of record which disclosed that no injustice could result from affirmance of judgment removing councilman from office. Pen.Code, § 758; Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Harold Harby was found guilty of misconduct in public office, and, from a judgment removing him from office and from an order denying new trial, he appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Arthur E. Briggs, Mark L. Herron, and Jerome J. Mayo, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and Jere J. Sullivan and D. L. Di Vecchio, Deputy Dist. Attys., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant was accused by the Grand Jury of Los Angeles County of having appropriated a city-owned automobile, which had been entrusted to him for his official uses as a city councilman, to a purpose not in the due and lawful execution of his trust. After conviction by a jury, he presented his motion in arrest of judgment. This was denied. Whereupon the court pronounced its judgment removing appellant from office as city councilman and declaring the office then held by him to be vacant. He grounds his appeal upon: (1) The insufficiency of the pleading, (2) the insufficiency of the evidence, (3) errors in giving and refusing instructions.

The specific misfeasance charged was that as such councilman appellant operated and drove the city's Chrysler sedan from Los Angeles to Great Falls, Montana, and return for "a purpose other than for or upon the official business of the said city of Los Angeles, towit: for the private purpose and upon the private affairs of him, the said Harold Harby" and that such act was in violation of section 504 of the Penal Code and in violation of section 63.106 of the Municipal Code of the city of Los Angeles.

Defendant was re-elected to the office of city councilman for the eleventh councilmanic district at the primary election held April 1, 1941. July 1 he qualified and was at all times thereafter and until judgment herein a qualified acting member of such city council. Prior to the commencement of his new term, towit, May 19, 1941, by written communication he requested the council to purchase an automobile to replace the old 1937 Studebaker car which he had used in the performance of his official labors. Acting upon such request, the city council purchased the new Chrysler sedan for "the official" use of defendant as city councilman and thereafter, on or about June 25, 1941, it was delivered to the city garage. On June 30, 1941, upon his request defendant was granted permission by the city council to be absent from its sessions for a period of two weeks beginning July 7, 1941. On July 3 he requested to be placed on the Chrysler car exempt license plates bearing the number E 19534, which plates had not been issued by the State Motor Vehicle Department for the use of the Chrysler but were taken from a city-owned Pontiac automobile. On the day upon which the license plates were affixed to the sedan, defendant with his wife and a friend departed from the city garage in the new vehicle and directed his course to the city of Great Falls, Montana, where he and his wife had formerly lived and where both had relatives and friends.

Defendant's journey to Montana, including side trips to the Grand Canyon and other places of interest, required him to travel more than 4,000 miles. Upon his return to Los Angeles July 18, the matter of his unauthorized use of the Chrysler for his distant travels became the subject of open discussion at the meetings of the city council. He was charged in a criminal complaint. Subsequently it became the subject of a report by the city attorney in which it was stated that defendant had offered to reimburse the city for all detriment to the sedan resulting from his travels. The extent of the damage was fixed by the bureau of budget and efficiency, computed on a time basis and adjusted to abnormal use in the sum of $122.12. This amount was paid to the city treasurer by appellant after its acceptance was recommended by the finance committee of the city council.

On the day of his second councilmanic induction on July 1, 1941, defendant was appointed chairman of the "Council Parks and Recreation Committee." At no time prior to his departure for Great Falls was he authorized to make an excursion from Los Angeles in order to survey any park or parking system for the benefit of the city. However, on September 3, 1941, defendant presented to the city council a letter in which he stated that, as chairman of his committee, he had been privileged to visit several cities and particularly he had made observations of the parking system of Great Falls which he set forth in his communication. On the same day, the city council adopted a resolution accepting defendant's "report" and declaring that his studies and research with relation to the parking system constituted official business of the city of Los Angeles. When appellant appeared before the grand jury he testified that on the day of his departure from Los Angeles he had set out on a private trip but that upon his arrival at Great Falls he recalled its fine boulevards and parking systems and became interested in trying to solve the problems of his own district and "felt that he would like to duplicate" the parking system of Great Falls in Los Angeles; that thereupon he spent time interviewing people and made his inspection of the parks of Great Falls.

On October 17, 1940, during appellant's first term as councilman, the city council adopted section 63.106 of the Municipal Code. Subdivision (a) thereof reads as follows: "It shall be unlawful for any person to use or operate any unit of automotive equipment or any automobile truck or other motor vehicle owned by the city of Los Angeles for any purpose other than for official business of the city of Los Angeles." Defendant stated to the grand jury that he had no recollection of having ever voted on the quoted section; that although he was present at the time of its adoption, he did not recall "it ever coming before us"; that he recalled its first reading but remembered none of its provisions. However, at the same time defendant admitted to the grand jury that during his first campaign for election he had "lambasted" his predecessor for his misuse of city owned automobiles for private purposes and that during the campaign he believed that his predecessor was violating the law by using the city owned car for electioneering purposes. At the trial defendant did not take the witness stand.

Appellant makes the claim now, as he did below, that the acts alleged to have been willful misconduct, as recited in the pleading, were not alleged to have been done in office; that the pleading is ambiguous and unintelligible; that it alleges that as councilman defendant did willfully, unlawfully, fraudulently and corruptly appropriate the automobile to a use and purpose not in the due and lawful execution of his trust and that he "drove the automobile for a purpose other than for and upon the official business of the said city of Los Angeles, towit, for the private purpose and upon the private affairs of him, the said Harold Harby.[1]

It will be observed upon an inspection of the accusation which appears on the margin hereof that the facts constituting alleged misconduct are set forth "in ordinary and concise language, and without repetition" as required by section 759 of the Penal Code. Section 758 provides that an accusation in writing against any municipal officer for willful or corrupt misconduct in office may be presented by the grand jury of the county of the officer accused. Pursuant to the requirements of section 925, following his indictment, defendant was supplied with a copy of all of the testimony given before the grand jury as well as with a copy of the pleading. By these documents he was fully informed as to the character of the charges and made acquainted with the evidence to be used against him at the trial.

[1, 2] The procedure under section 758 does not require the strict application of the

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[1] (Caption omitted)

Accusation willful misconduct in office

The Grand Jury of the County of Los Angeles, State of California, hereby accuses Harold Harby, as a member of the Common Council and City Council of the City of Los Angeles, County of Los Angeles, State of California, of willful and corrupt misconduct and misdemeanor in office, committed as follows, to wit:

That the said Harold Harby was, on the first day of April, 1941, elected a member of the Common Council and City Council of the City of Los Angeles for a term of two years, commencing on July first, 1941;

That on said July 1, 1941, the said Harold Harby duly qualified as such City Councilman and he, the said Harold Harby, is now, and at all times since July 1, 1941, has been a duly elected, qualified and acting member of the Common Council and City Council of the said City of Los Angeles, and as such an officer of said City;

That prior to July 3, 1941, and at all times herein mentioned subsequent thereto, the said Harold Harby as such City Councilman had in his possession and under his control as such City Councilman, a certain automobile and motor vehicle owned by said City of Los Angeles for the use of him, the said Harold Harby, as such City Councilman, in and upon the official business of said City;

That between the third day of July, 1941, and the 18th day of July, 1941, the said Harold Harby, as such Councilman, did willfully, unlawfully, fraudulently and corruptly appropriate said automobile to a use and purpose not in the due and lawful execution of his trust, in violation of Section 504 of the Penal Code and in violation of subdivision (a) of Section 63.106 of the Municipal Code of said City of Los Angeles, in that the said Harold Harby did use, operate and drive, and did cause to be used, operated and driven, said automobile and motor vehicle owned by the said City of Los Angeles, as aforesaid, from the said City of Los Angeles to the City of Great Falls, Montana, and return therefrom to said City of Los Angeles, for a purpose other than for or upon the official business of the said City of Los Angeles, to wit, for the private purpose and upon the private affairs of him the said Harold Harby.

Said subdivision (a) of said Section 63.106 reads as follows, to wit: "(a) It shall be unlawful for any person to use or operate any unit of automotive equipment, or any automobile, truck, or other motor vehicle owned by the City of Los Angeles, for any purpose other than for official business of the City of Los Angeles." And which subdivision and section was in full force and effect at all times herein mentioned. (Here follows the names of the witnesses before the grand jury.)

rules which govern civil or criminal actions. It is not required that the misconduct charged against an official should necessarily constitute a crime. It is exempt from technical rules of procedure. Reid v. Superior Court, 44 Cal.App. 349, 356, 186 P. 634. Willful misconduct in office includes any willful malfeasance, misfeasance or nonfeasance. Coffey v. Superior Court, 147 Cal. 525, 82 P. 75. Such official misconduct does not necessarily imply corruption or criminal intention. The officer who, by the exercise of the power of his office, does an act forbidden by a penal statute is guilty of the conduct contemplated by section 758. Ibid.

In addition to the charge of violating a city ordinance (§ 63.106) specifically forbidding the unauthorized use of city-owned motor vehicles, defendant was accused of violating a public statute (§ 504, Pen.Code) which renders a person guilty of embezzlement who "fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession, or under his control by virtue of his trust * * *."

[3, 4] The violation of either the ordinance or of the statute is, at least, a misdemeanor which betrays, in the heart of the malefactor, a contempt for the law and is therefore sufficient to constitute willful misconduct in office. Coffey v. Superior Court, supra. Consequently, the accusation contains every essential requirement of the law. In the light of the facts revealed by the record appellant's hypertechnical criticism of the pleading is a vain protest against a solemn judgment soberly derived. He entered upon the trial in possession of all available information. At the time of committing his offense he knew of the inhibitions against his making private use of the city's vehicular units and, as an official, he was especially forbidden to make such use thereof. At the trial he stipulated to having committed the act of which he was accused. How then could he have suffered prejudice by reason of any defect in the pleading? His conviction resulted from the proved facts from which it is painfully clear that no injustice has been done. Although it might be conceded, arguendo, that the accusation was insufficient when tested by special demurrers, yet if the offense was established by abundant evidence, reversal is improper by virtue of section 4½, article VI of the Constitution, and of section 960 of the Penal Code. People v. Beesly, 119 Cal.App. 82, 87, 6 P.2d 114, 970; People v. Hinshaw, 194 Cal. 1, 23, 227 P. 156; People v. Norton, 45 Cal.App.2d 789, 115 P.2d 44.

Over defendant's objection, the court admitted certain evidence which rulings are assigned as erroneous and prejudicial. In view of appellant's admissions that he had possession of the motor car in his official capacity and that he made private use of it on a pleasure jaunt from Los Angeles to Great Falls, his contentions in the premises are unavailing.

[5-7] Unquestionably any error in allowing the prosecution to make proof of appellant's request for exempt license plates for the Chrysler sedan was not prejudicial in view of his admission that he used that automobile for his vacation trip to Great Falls. Also it was properly admitted upon the question of appellant's intent at the time of his departure from Los Angeles for Montana. People v. Lisenba, 14 Cal.2d 403, 430, 94 P.2d 569. For the same reason it was proper to admit the testimony of Constance Sutton to whom appellant stated just prior to his departure that "no one can tell me what to do" after she had inquired whether he would drive the Chrysler or his own Ford car to Montana.

[8] He next complains that his testimony given before the grand jury was erroneously admitted without the corpus delicti of the offense having been established, aliunde. But the minutes of the council and appellant's stipulations at the trial proved the corpus delicti: he was a councilman; the new Chrysler car was purchased at his request and turned over to him for his official use; he was granted two weeks vacation; he left for Great Falls without direction to investigate any parks at all; and upon his return, he not only made a report of his unauthorized survey of the parks of Great Falls but after he had made his report and received the thanks of the city council for engaging in his "studies and research" he offered to pay and did pay the city for all detriment it suffered by reason of his unofficial use of the vehicle. He says in his brief that at no time did he attempt to conceal the fact that he had driven the Chrysler to Great Falls. This statement alone in the light of his stipulations could mean nothing less than an admission to this court that he drove the car on his long journey and to places where at the time and under the cir-

cumstances he could perform no official duty. In other words he now establishes the corpus delicti in the same breath in which he asserts that there was no proof of it aside from his testimony before the grand jury. He appeared voluntarily before that body and stated his own version of his travels in order to defeat the charge then under consideration by that tribunal. Having made such voluntary appearance, he assumed the responsibilities incident thereto. People v. Byers, 5 Cal.2d 676, 55 P.2d 1177.

His attempt having proved unsuccessful, he may not now escape the effect of his utterances there upon the plea that the corpus delicti was not established by other proof. This action was to test his right to remain in a civil office and not to impose penalties for crime.

[9, 10] Special emphasis is laid upon the ruling of the court in allowing that part ot the appellant's testimony given before the grand jury in which he stated that in his campaign against his predecessor he had charged the latter with unlawful use of a city owned automobile in making his campaign for re-election. But the record discloses that such portion of his testimony was read to the jury upon the suggestion of appellant's counsel during the course of the trial. Appellant therefore has no ground for complaint against the admission of that testimony. However the criticized ruling was further justified by the fact that the report of the city attorney, which was in evidence, contained the statement of appellant that he was not conscious of doing anything wrong at the time of driving the sedan to Montana and that he did not know that it was an illegal act and that he was not familiar with section 63.106 of the Municipal Code. To contradict such claims of good faith and innocence, appellant's criticisms of his predecessor's misuse of a city-owned motor car was competent evidence. People v. Byers, supra.

[11] Finally, it is urged that prejudicial error was committed in admitting the testimony of Councilman Burns to the effect that no authorization or request by the city council was made upon appellant to proceed to Great Falls to make an inspection of its parking system. This assignment is without merit in view of appellant's stipulation at the trial that "he left on a trip to Great Falls without being given any direction to make any survey whatever on behalf of the city of Los Angeles of any park, either in Montana or elsewhere." Also, while testifying before the grand jury, appellant stated that he left Los Angeles and started on a private trip but conceived the idea of making a survey of the fine boulevard and park system of Great Falls upon arriving at the city where he had formerly lived. In the light of the foregoing no prejudice could have been suffered by appellant by reason of any of the cited rulings.

It is next contended that the verdict is contrary to the evidence: (1) In that there was no proof of embezzlement as defined by section 504 of the Penal Code and (2) that section 63.106 of the Municipal Code did not prevent the council from exercising its discretion in determining retroactively that appellant's use of the Chrysler "constituted official business." Section 504 makes it embezzlement for any official of a city fraudulently to appropriate "to any use or purpose not in the due and lawful execution of his trust, any property which he has in his possession, or under his control by virtue of his trust." Subdivision 2 of section 63.106 makes it a misdemeanor for any person to use or operate any unit of automotive equipment owned by the city for any purpose other than upon the official business of the city. Appellant was accused under section 758 of the Penal Code which authorizes the grand jury to accuse any municipal officer "for willful or corrupt misconduct in office." It was not necessary for the accusation to specify the section from which its authority was derived. The thing which was necessary for the pleading to allege was acts of willful or corrupt misconduct in office. The pleading complied with the statute and the evidence at the trial supported the accusation. That evidence was obtained from the witnesses and the documents which had been presented to the grand jury. To drive a city-owned automobile on a 4,000 mile pleasure jaunt was so clearly an appropriation of the vehicle to a private use that illustration and authority seem supererogatory. His only right to the Chrysler was to use it in performing the city's business. To use it otherwise was a violation of his trust. Without authority he appropriated the use of this public property to his own pleasure.

But appellant argues in this wise: (1) If a councilman was already on a leave of absence, he was not in the lawful possession of the vehicle at the time of his departure and therefore he had no trust because he had no right of possession; (2) if he had authority to drive the Chrysler to Montana, he was, of course, not guilty because the journey was in the "due and lawful execution of his trust"; if the sedan was purchased for his own use and if no instructions were given to him with reference to its use, and if the council thereafter resolved that his jaunt to Great Falls "constituted official business" then he committed no breach of his trust because he used the car on official business; (3) if section 63.-106 contains no limitation upon the authority of the council to grant the use of a vehicle to a councilman, or upon its power to determine that appellant's use of the Chrysler was official business, then the council's determination that the trip to Great Falls constituted official business was final and absolved appellant of misconduct; (4) if the section did contain such limitation it would operate to prevent subsequent legislation contrary to the charter by which the council has power: (a) to judge the qualifications of its members; (b) to provide them with automotive equipment; (c) to enact ordinances upon any subject of municipal control; and the fact that the council had authority to permit the use of the Chrysler for appellant to travel to Montana proves that it is not limited by section 63.-106.

The fallacies underlying such esoteric dialectics instantly appear when subjected to the test of sober thought and legalistic reasoning. To say that he could not on Tuesday embezzle a motor car that was in his possession as an official on Monday because at night-fall Monday he left his officials cares for a season, is not only fanciful but fantastic. One might as well say that a bank president who strolled into the vaults of his institution in the late evening and carted away its bullion and its bonds to enliven his evening at cards was not guilty of embezzlement because he was off duty at the time of the asportation. But whether in the supposititious case the president stole or embezzled, his act was willful and it was corrupt. If a city treasurer should perform such an act, he would be subjected to the penalty which must follow his conviction under the provisions of section 758 et seq., and the judgment of the court would necessarily be removal of the treasurer from office. Pen.Code, § 769.

[12, 13] Appellant had no authority to drive the sedan to Montana. Such a journey without authorization required a use of the car that was inconsistent with its owner's rights and inconsistent with the nature of the trust reposed in appellant and therefore it was an embezzlement. People v. Baker, 64 Cal.App. 336, 221 P. 654. Such a journey subjected the automobile to substantial detriment. It was therefore to the extent of its use an embezzlement of the property of the city. The council had no authority to give its sanction to an act which was forbidden by a general statute as well as by a specific provision of the Municipal Code. It possesses none of the powers which by the constitution and the code are vested in the superior court to adjudicate charges against officials accused of willful or corrupt misconduct in office. Const., art. VI, § 5; Pen.Code § 758. We are not called upon to determine whether the city council has authority under the charter to provide a city owned vehicle for each councilman to use in going to and from his residence and other points within the city. What we do say is this: that from the moment that a city-owned automobile comes into the possession of a councilman, his conduct with respect thereto is governed by statute, and by the charter, and the ordinances of the city relating to the subject. Such laws clearly forbid unofficial week-end trips by councilmen with city-owned automobiles, after which they are covered with "the usual dirt which we see most every Monday morning on all council cars" as testified by the garage superintendent. If, during his term of office and the period of his possession of the vehicle, a councilman decides that the laws enacted in the past for his guidance are of less account than the gratification of his personal wishes, the council may not accommodate him by a special suspension of the ordinances or of the general statutes. Indulgences are unknown to the law which applies continuously and to all persons alike. The sovereign power may through its constituted agencies forgive partially or totally the debt incurred by the violation of a penal statute. But such leniency is exercised by the state only after a conviction of crime. Neither section 758 nor any other statute contains a provision for softening the fall of an official adjudged guilty of willful or corrupt misconduct. The legislature left no alternative to his removal from office.

[14] Even though appellant had been on trial for the crime of embezzlement, he would have no grievance. All the elements of that crime were charged in the accusa-

tion and established by proof. But the purpose of the pleading was not to convict appellant of a crime. Its sole purpose was to inquire whether he was guilty of willful or corrupt misconduct in office as denounced by section 758. This could have been done by the commission of any number of acts prohibited by penal statute or by ordinances of the city of Los Angeles. It was clearly charged by the pleading and fully established by the proof that in violation of section 504 of the Penal Code, and with a flippant disregard of a city ordinance (§ 63.106) appellant made a selfish use of a "unit of automotive equipment" by driving it on a pleasure jaunt for more than 4,000 miles. His knowledge of his duties and of the law which prescribed his course of conduct left no excuse for his behavior. People v. Dillon, 199 Cal. 1, 15, 248 P. 230.

That a public office is a public trust is a universal truism. No trustee thereof may with impunity exploit its prerogatives, embezzle its properties, or appropriate its funds. Should he do so, he is answerable to the wrath of the sovereign beneficiary to the extent of the utmost farthing. Every state or municipal office is a sanctuary whereat not only should keep vigil the constituted guardians of the public store-house but wherein should toil the standard-bearers of public virtue. An incumbent defiles himself and desecrates his office as would the priest at the altar when he plunders the wealth or usurps the privileges under his watch-care. The rights of the owner of property are instinctively comprehended by every normal person. No cloak of office should so dull his conscience or his sense of values as to render an official untrustworthy when unguarded. He should delight in the unfailing consciousness that he has performed tasks not legally required of him and that he has contributed his own substance for the common good rather than to have been the stealthy profiter from the public bounty. Unless this standard be the pole-star of those who serve the state, we may envisage the day when the trailing vines and clinging mosses will cover the tomb of a once proud civilization.

[15] Appellant assigns as error the giving of certain instructions and the refusal of others as a result of which he claims to have been aggrieved. We have examined all of such instructions and find no prejudicial error in them. But if the court had erred in each instance specified, in view of the record which discloses beyond a peradventure that no injustice can result from an affirmance of the judgment (Const. art. VI, § 4½) we shall not extend this discussion by presenting even a summary of the criticized instructions.

The argument that the court erred in denying appellant's motion for a new trial has been disposed of by the foregoing.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

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HOSCH v. HAMPTON.

Civ. 13045.

District Court of Appeal, Second District, Division 1, California.

May 14, 1942.

Hearing Denied July 10, 1942.

1. Guardian and ward ⇨33

An action by ward to cancel release executed to guardian was not dismissible as a "collateral attack" on judgment in guardianship proceedings which had become final.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

2. Appeal and error ⇨1011(1)

The settlement of conflict in evidence rests within exclusive province of trial court.

3. Guardian and ward ⇨69

Evidence justified a judgment canceling deed and release executed by ward to guardian, who was the ward's mother, on ground that execution was induced by guardian's false and fraudulent representations.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Action to cancel a deed and release by Robert Melville Hosch against Maude Arline Hampton. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

John A. Coleman, of Hollywood, for appellant.

Rosecrans & Emme and Joseph R. McGuire, all of Los Angeles, for respondent.

DORAN, Justice.

In this action to cancel a deed and release, the plaintiff prevailed and defendant appeals.

The pertinent facts as revealed by the record are as follows: Appellant and respondent are mother and son respectively. The appellant worked in a law office in the city of Butte, Montana, for several years and also worked for a period of months in the office of the clerk of the court in Florida. The respondent went to the eleventh grade in school and thereafter worked as a laborer commencing in 1937, except for a period of approximately one and one-half years spent in the United States Navy.

Respondent's father died on July 24, 1928. Respondent received $15,000 from an insurance policy upon the life of his father. In 1932 respondent was living with his then guardian, Miss Nona Dunston, and was then thirteen and one-half years old. Thereafter appellant was appointed guardian of the person and estate of respondent in lieu of Miss Dunston in March of 1932. Appellant received from the former guardian a promissory note in the sum of $12,000 secured by deed of trust upon the real property involved in this litigation.

Respondent resided with the appellant from 1932 until he joined the Navy in August, 1937. In 1935 the guardian acquired the real property involved in this litigation as a result of a compromise agreement with the payors of the promissory note, which said property had secured.

It is stated in appellant's petition (as guardian) for authority to enter into a compromise and adjustment of said promissory note, that petitioner (appellant herein) "is informed that a recent appraisal of said property was made by appraisers of the Home Owners Loan Corporation and a value of $19,500 was placed thereon."

The respondent joined the United States Navy in August, 1937, and remained in service until April, 1939, at which time he received a medical discharge. During this period of time the appellant continued to draw the sum of $50 per month for the support and maintenance of respondent. Upon leaving the Navy, respondent took up his residence with his mother and remained with her until October 25, 1939.

About October 8, 1939, respondent informed his mother that he desired to get married and needed some money. A loan on the guardianship property was suggested which was later consummated and $1,000 obtained. It was in connection with this transaction that the deed from the son to the mother was executed which is the basis of the within action.

The trial court found the facts to be as follows, viz.:

"That it is true that on or about the 10th day of October, 1939, plaintiff herein requested the defendant, Maude Arline Hampton, also known as Maude Hosch Hampton, to negotiate a loan on the above described property, which the said defendant then and there agreed to do.

"That it is further true that on or about the 25th day of October, 1939, the said defendant falsely and fraudulently and with intent to deceive and defraud, represented to the plaintiff herein that she had been successful in negotiating a loan on the said property and that it would be necessary that plaintiff execute a document in order to receive the sum of $1,000 as a loan on the above described real property.

"That it is true that thereupon the said defendant falsely and fraudulently induced the plaintiff herein to execute a grant deed conveying the said above described property to the defendant, Maude Arline Hampton."

"That it is true that plaintiff herein had explicit faith, confidence and trust in the representations made to him by the said defendant and that the plaintiff relied upon the representations made by the said defendant; that it is further true that plaintiff believed at all times that the document which he had executed was a document necessary to be executed to obtain the said loan on the said property and was not a conveyance or a transfer of the property to the said defendant herein; that it is further true that had the said plaintiff known or suspected that he was executing a conveyance or transfer of said property to the defendant, plaintiff would not have executed said deed.

"That it is true that all of the foregoing representations made by said defendant to the plaintiff herein were made by the said defendant with the knowledge that at the time of the making of said representations that said representations were false and fraudulent and were in fact made with the intent to defraud and deceive. It is further true that the plaintiff relied upon such false and fraudulent representations without knowledge that they were in fact false or fraudulent."

"That it is true that plaintiff was induced to execute the said deed, a copy of which is attached to plaintiff's complaint marked Exhibit 'A,' by reason of the explicit faith, confidence and trust reposed by him in his mother by reason of the relationship of mother and son existing between the plaintiff and the said defendant, and also the relationship of guardian and ward existing between plaintiff and said defendant; that it is true that plaintiff herein resided with his mother at the time of the execution of said deed and had so resided with her for some time prior thereto.

"That it is true that on or about the 25th day of November, 1939, the defendant Maude Arline Hampton, also known as Maude Hosch Hampton, falsely, fraudulently and with intent to defraud and deceive, represented to the plaintiff herein that it was necessary that he execute a release to the guardian for the sole purpose of the said defendant being released from her bond and the exoneration of the bond in said guardianship matter; thereupon the said defendant presented to plaintiff a release and requested the plaintiff to sign the same, which the plaintiff did execute; that in executing said release, plaintiff relied upon the representations made to him by his said mother that the said release was for the sole purpose of exonerating the guardianship bond, when in truth and in fact said release was a release and quitclaim of all actions, causes of action, suits and reckonings, accounts, debts, dues and demands whatsoever; that said release is filed in the records of said guardianship proceedings."

[1-3] It is contended on appeal that the within action is a collateral attack on the judgment in the guardianship proceedings, which had become final, and particularly as to the "matters and things referred to specifically in said Release to Guardian," which, it is urged, became and are res judicata.

Appellant relies on In re Ryan's Estate, 177 Cal. 598, 171 P. 297, to support the above contention. The case is not in point; nor has additional research produced any authority in support of appellant's argument in this regard.

It is also contended that the evidence failed to preponderate in plaintiff's favor. At most, appellant's argument in this connection discloses the usual conflict in the evidence, the settlement of which rests within the exclusive province of the trial court.

Appellant's final contention, raised for the first time on appeal, that the trial court failed to take an accounting between the parties, is without merit.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DRAPEAU, Justice pro tem., concurred.

WHITE, J., deeming himself disqualified, did not participate in the hearing or determination of this matter.

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SCHWARTZ v. CALIFORNIA CLAIM SERVICE, Limited, et al.

Civ. No. 12886.

District Court of Appeal, Second District, Division 3, California.

May 8, 1942.

1. Courts 🔑472(6)

Judgment debtor's second cause of action for $226.80, allegedly paid to marshal pursuant to execution caused to issue by judgment creditor upon judgment debtor's bank account for $147.45 after judgment debtor had paid judgment creditor $15 pursuant to written agreement in settlement of judgment, did not state a case triable in the superior court, but the demand was one of which the municipal court had exclusive jurisdiction. Code Civ.Proc. § 89.

2. Judgment 🔑407(1)

Judgment debtor's second cause of action, alleging payment of specified sum in settlement of judgment for a greater sum pursuant to written agreement, and that thereafter defendants caused an execution to be issued and levied upon judgment debtor's bank account which was paid over to marshal who refused to pay it to judgment debtor, was insufficient to allege a case for equitable relief, since the plain, speedy, and adequate legal remedy of motion for an order directing satisfaction of judgment of record was available. Code Civ.Proc. § 675.

3. Attorney and client ⚷100

Judgment debtor's agreement with judgment creditor who received and retained amount offered in satisfaction, to accept $15 in settlement of judgment for $147.45, for which judgment debtor received written satisfaction signed by attorney purporting to act for judgment creditor, was not violative of statute providing that a judgment creditor's attorney may not acknowledge satisfaction of judgment except upon payment thereof. Code Civ.Proc. § 283, subd. 2.

4. Execution ⚷470

In judgment debtor's action for wrongful levy of execution after execution of written satisfaction of judgment for a lesser sum, complaint alleging that defendants, strangers to the original action, knowingly and maliciously participated in the acts charged, was sufficient as against contention that only judgment creditor or its attorney could have given instructions to marshal making the levy.

5. Execution ⚷470

In judgment debtor's action for wrongful levy of execution after execution of written satisfaction of judgment for lesser sum, judgment debtor's third cause of action, alleging issuance of execution against his bank account and payment thereof to a marshal and that defendants caused such execution to be issued and wrongfully levied and maliciously refused to satisfy judgment, causing damages, etc., was not fatal on ground that it did not allege that judgment was rendered in judgment debtor's favor in action in which the unlawful levy was made.

6. Accord and satisfaction ⚷5

The statutes providing that part performance of an obligation expressly accepted by the creditor in writing in satisfaction, though without any new consideration, extinguishes the obligation, that an obligation is extinguished by written release with or without consideration, and that a written instrument is presumptive evidence of consideration dispense with necessity for new consideration for validity of an accord and satisfaction based upon partial performance by obligor. Civ.Code, §§ 1524, 1541, 1614.

7. Accord and satisfaction ⚷12(1)

A "judgment", being a debt of record, is indistinguishable as relating to payment of money from a "liquidated claim", and is an "obligation" within statute providing that part performance of an obligation expressly accepted by creditor in writing as satisfaction extinguishes the obligation. Civ.Code, §§ 1427, 1541; Code Civ.Proc. § 26.

> The word "obligation" is defined as that which constitutes a legal or moral duty and which renders a person liable to coercion and punishment for neglecting it, and is a word of broad meaning, and the particular meaning intended is to be gained by consideration of its context. An obligation or debt may exist by reason of a judgment as well as an express contract, in either case there being a legal duty on the part of the one bound to comply with the promise.
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> See Words and Phrases, Permanent Edition, for all other definitions of "Judgment", "Liquidated Claim" and "Obligation".

8. Accord and satisfaction ⚷12(1)

The statute providing part performance of an obligation, expressly accepted by creditor in writing in satisfaction though without any new consideration, extinguishes the obligation, does away with the rule holding invalid an accord and satisfaction based upon partial performance by obligor, and gives recognition and validity to business practices of common occurrence. Civ.Code, § 1524.

9. Accord and satisfaction ⚷25(2)

Judgment debtor's third cause of action alleging receipt of written satisfaction of judgment signed by an attorney purporting to act for judgment creditor for $15 as settlement of judgment for $147.45, alleged sufficient facts to constitute a valid "accord and satisfaction" of the judgment debt. Civ. Code, § 1524.

> See Words and Phrases, Permanent Edition, for all other definitions of "Accord and Satisfaction".

10. Execution ⚷472

Judgment debtor's alleged damage through loss of good will, credit, and business was not recoverable as having proximately resulted from alleged wrongful issuance and levy of execution permitted to

remain as a lien against judgment debtor's real property contrary to written satisfaction of judgment on receipt of a lesser sum, although alleged damage might have been proved as a fact to be considered with claim for exemplary damages for wrongful levy. Civ.Code, § 1524.

11. Courts ⚷122

In judgment debtor's action for wrongful levy of execution after execution of written satisfaction of judgment for a lesser sum, prayer for punitive damages of $5,000 was required to be regarded as an appendage of the demand for $50 actual damages, so as to give superior court jurisdiction on ground that more than $2,000 was involved.

12. Courts ⚷122

"Jurisdiction" depends upon the amount which is claimed in good faith, implying that the court may disregard allegations of a pleading which have been made in obvious bad faith, but the single fact that a complaint may have a demand for exemplary damages in an amount appearing to trial court to be out of all proportion to gravity of alleged malicious acts of defendants would not establish "bad faith".

See Words and Phrases, Permanent Edition, for all other definitions of "Bad Faith" and "Jurisdiction".

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Louis A. Schwartz against the California Claim Service, Limited, and others, to quiet title to real property, for damages from allegedly wrongful execution, and for damages from failure to enter satisfaction of judgment and permitting execution to remain as a lien on plaintiff's property. Plaintiff dismissed the action to quiet title upon trial. From a judgment upon the pleadings for defendants, plaintiff appeals.

Reversed.

Zuckerman & Stein, Edward K. Zuckerman, and Arthur Edmund Stein, all of Los Angeles, for appellant.

Samuel C. Cohn, of Los Angeles, for respondents.

SHINN, Justice.

Plaintiff appeals from a judgment on the pleadings in favor of defendants. The complaint contained three causes of action. The first, which was to quiet title to real property, was dismissed by plaintiff upon the trial. The ruling was upon the second and third causes of action, and the question is whether either one of them stated sufficient facts to support a judgment of the superior court in plaintiff's favor.

In the second cause of action it was alleged that defendant California Claim Service, Ltd., held a judgment against plaintiff, rendered in the municipal court, for the sum of $147.45; that plaintiff in writing offered the judgment creditor $15 in full settlement of the judgment, which offer was accepted, and that pursuant thereto plaintiff paid the judgment creditor $15 and received a written satisfaction of the judgment, signed by an attorney purporting to act for the client; that thereafter defendants caused an execution to be issued on the judgment, caused it to be levied upon plaintiff's bank account in the amount of $226.80, which was paid over to the marshal, and that the latter refuses after demand to pay the same to plaintiff. It was not alleged what, if any, interest the defendants, other than the judgment creditor, had in the judgment or what their motives were in causing the execution proceedings.

The third cause of action alleged the foregoing facts and in addition thereto that the defendants caused said execution to be issued and levied wrongfully and maliciously, and maliciously refused to satisfy the judgment and allowed the same to remain as a lien against plaintiff's real property; that by reason thereof plaintiff has been injured through "loss of good will, credit and business, to Plaintiff's damage in the sum of $500.00," and an additional $50 "for title, escrow and other otherwise unnecessary expenses caused to Plaintiff by said acts of Defendants in the obtaining of title to the property described in Plaintiff's first cause of action." It was also alleged that defendants' acts were done deliberately, knowingly, wilfully, wrongfully and maliciously and that plaintiff was therefore entitled to punitive damages of $5,000. The prayer of the complaint (excluding the first cause of action) was (1) that the municipal court judgment be declared satisfied and the writ of execution be declared null and void and be ordered returned; (2) that the defendant marshal of the municipal court be ordered to pay plaintiff the sum of $226.80; (3) "for damages against the Defendants, and each of them, with the exception of the Defendant, Frank R. Holt, Marshal of the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California in the sum of $500.00 for loss of good will, credit and business"; (4) "For damages against the Defendants, and each of them, with the exception of the Defendant, Frank R. Holt, Marshal of the Municipal Court of the City of Los Angeles, County of Los Angeles in the sum of $50.00 for title and escrow expenses"; (5) "For damages against the Defendants, and each of them, with the exception of the Defendant, Frank R. Holt, Marshal of the Municipal Court of the City of Los Angeles, County of Los Angeles in the sum of seven per cent. (7%) per annum on the sum of $226.80 from October 14, 1939 until said sum is released from levy of execution"; and (6) "For damages against the Defendants, and each of them, with the exception of the Defendant, Frank R. Holt, Marshal of the Municipal Court of the City of Los Angeles, County of Los Angeles in the sum of $5,000.00 for punitive damages."

[1] The second cause of action (standing alone) did not state a case triable in the superior court. Viewed as an action at law for the recovery of $226.80 from the defendant marshal, or for the recovery of damages from defendants in that amount, the demand was one of which the municipal court had exclusive jurisdiction. Code Civ. Proc. § 89.

[2] If by the second cause of action it was attempted to allege a case calling for equitable relief, the facts stated were insufficient. If the judgment had been satisfied by executed agreement and the execution for that reason had been erroneously or wrongfully issued, plaintiff (the judgment debtor in the municipal court action) had a right to apply by motion in the municipal court for an order directing satisfaction of the judgment of record. Code Civ.Proc. § 675. He could not go directly into a court of equity to obtain relief which was available to him through a legal remedy that was plain, speedy, and adequate. See cases collected in 10 Cal.Jur. 465, et seq.

We do not know why the trial court held the third cause of action to be insufficient but we feel reasonably certain that it could not have been upon any of the grounds relied upon by respondent for affirmance of the judgment. They will be readily seen to be insufficient.

[3] It is contended that the agreement to compromise the judgment was void. Reliance is placed upon section 283, subdivision 2 of the Code of Civil Procedure, which provides in substance that a judgment creditor's attorney may not acknowledge satisfaction of a judgment except upon payment thereof. The allegation of the complaint was that the agreement was with the judgment creditor and that the latter received and retained the amount offered in satisfaction, so the argument based upon the code section is without merit.

[4] Another point is that since only the judgment creditor or its attorney could have given instructions to the marshal, and the other defendants were "strangers to the action," no cause of action was stated against them. If, as alleged, those defendants knowingly and maliciously participated in the acts charged, their liability for the tort would be the same as that of the judgment creditor, California Claim Service, Ltd.

[5] Another proposition relied upon is stated in respondent's brief as follows: "The third cause of action is fatal in that it does not allege that a judgment was rendered in plaintiff-appellant's favor in the action in which said unlawful levy was made. (3 Cal.Jur. 554, § 126)," etc. The rule referred to has application to actions for malicious attachments and the cases cited in support thereof are not in point. The instant case relates exclusively to the issuance and levy of an execution.

The next point is that "impairment of plaintiff's credit is not proximate but a remote consequence of the attachment" (sic). This objection, of course, does not go to the sufficiency of the complaint as a whole.

Since the judgment is to be reversed we should consider certain other matters which may have influenced the trial court or which may arise in future proceedings. It occurs to us that the ruling of the court may have been based upon either or both of the following grounds: first, that the agreement to satisfy the judgment for less than its total amount was without consideration to the judgment creditor and was therefore void, under the rule announced in Deland v. Hiett, 1865, 27 Cal. 611, 87 Am.Dec. 102; or second, that the amount of the recovery under the third cause of action was insufficient to give the superior court jurisdiction because the amount of punitive damages asked, $5,000, should not be taken into account. We think the ruling cannot be supported for either of these reasons.

The rule followed in Deland v. Hiett, supra, is that a liquidated indebtedness presently due cannot be discharged by payment of less than the whole sum because a contract of that nature is nudum pactum. The history of the rule, which had its origin in early English cases, is replete with opinions of learned judges condemning it for its want of logic, reason, and fairness and with specious reasons for restricting its application, until the so-called exceptions to the rule have been so numerous and varied as to raise a doubt whether they were not more often followed than the rule itself. See article by Professor Ames in 12 Harvard Law Review, 524, and annotations to Rye v. Phillips, 1938, 203 Minn. 567, 282 N.W. 459, 119 A.L.R. 1120; annotations to Fuller v. Kemp, 1893, 138 N.Y. 231, 33 N.E. 1034, 20 L.R.A. 785; and annotations to Jaffray v. Davis, 1891, 124 N.Y. 164, 26 N.E. 351, 11 L.R.A. 710. The theory of nudum pactum which the courts finally accepted was a want of consideration passing to the creditor for acceptance of a part only of a liquidated demand in satisfaction of the whole.

[6] This much disputed point of law was settled in favor of the validity of an accord and satisfaction based upon partial performance by the obligor by the adoption of section 1524 Civil Code, which reads as follows: "Part performance of an obligation, either before or after a breach thereof, where expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation." See corresponding § 1541. It is required that the obligee's acceptance be in writing, and this is in accord with a rule which has been followed in some jurisdictions that the primary rule has no application to a release under seal, which imports a consideration (Harrison v. Close, 1807, 2 Johns., N.Y., 448, 3 Am.Dec. 444; Foakes v. Beer, [1884] L.R. 9 App.Cas. 605; Pinnel's Case, 1602, 5 Coke, 117a, 1 Eng. Rul.Cas. 370; 119 A.L.R. 1127), and this, of course, is true of a written instrument, under section 1614 Civil Code, which was adopted at the same time as the two sections mentioned. These code provisions dispense with the necessity for a new consideration and therefore render inapplicable the common law rule followed in Deland v. Hiett, supra.

[7] The word "obligation" is defined in section 1427 Civil Code as follows: "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing." It is also defined in section 26 of the Code of Civil Procedure as follows: "An obligation is a legal duty, by which one person is bound to do or not to do a certain thing; and arises from: 1. Contract; or 2. Operation of law." Webster's International Dictionary defines the word "obligation" as follows: "A formal and binding agreement or acknowledgment of a liability to pay a certain sum or to do a certain thing." Black's Law Dictionary defines the word as "* * * that which constitutes a legal or moral duty and which renders a person liable to coercion and punishment for neglecting it * * *." Within the meaning of section 1524, Civil Code, a judgment is an obligation. Of a judgment it was said in Dunsmoor v. Furstenfeldt, 1891, 88 Cal. 522, 529, 26 P. 518, 520, 12 L.R.A. 508, 22 Am.St. Rep. 331: "Indeed, it was a debt in the strict legal sense,—a judgment,—a debt of record. Burill, Law Dict." "Obligation" is a word of broad meaning and the particular meaning intended is to be gained by a consideration of its context. An obligation or debt may exist by reason of a judgment, as well as by reason of an express contract. In either case there is a legal duty on the part of the one bound to comply with a promise. In the case of an express contract the duty arises in the promise; in the case of an applied contract or a judgment the duty to fulfill the obligation is implied by law. The origin of a judgment may be either in contract, quasi contract, or in a liability imposed by law, but there is a legal duty on the part of the judgment debtor to pay it regardless of its origin. There is no reason to believe that the word "obligation" as used in section 1524, Civil Code, was intended to have less than its broadest meaning, which would include the obligation of judgments, or to believe that it was intended to distinguish between judgments and liquidated claims which have not been reduced to judgment. Each one, where it relates to the payment of money, represents a legal duty to pay a

definite sum in satisfaction of an obligation, and it would seem illogical to apply the principles of accord and satisfaction to liquidated claims without a new consideration and not to apply them to judgments upon the same terms. There is no inviolability in a judgment which should distinguish it as a subject of accord and satisfaction from liquidated demands that have not been reduced to judgment. The promise of one man to pay a sum of money may be better than a judgment against another and the collection of judgments frequently entails great delay, litigation and expense, not to mention the unpredictable amounts represented by judgments which are never paid at all. Had it not been for the element of want of consideration, valid settlements and satisfactions of judgments and liquidated claims could have been made under the common law as freely and effectually as they were made of unliquidated or disputed claims, and the necessity for a new consideration having been removed by statute, full effect should be given to this declaration of new policy.

[8] Section 1524, Civil Code, does away with a rule which has long been regarded by the courts as supported by scarcely more than a superstition, and it gives recognition and validity to business practices that are of common occurrence. The satisfaction of judgments for less than their face value is of everyday occurrence, and since every such settlement represents an agreement mutually satisfactory to the parties and fraught with some benefit to each, it should not be the policy of the law to discourage such sensible arrangements under which a creditor can satisfy a judgment for what he thinks it is worth and a debtor can settle it for what he can afford to pay. A judgment debtor should not have to go into bankruptcy to rid himself of a judgment where he and his creditor are ready, able and willing to adjust and settle the debt. These are some of the considerations which the legislature may well have had in mind in the enactment of sections 1524 and 1541, Civil Code, and which support the meaning we have given to the word "obligation" as used therein.

[9] The settlement alleged in the complaint was in writing, consisting of an offer of the debtor to pay $15 and the acceptance of that amount by the creditor and the endorsement of the check under the words:

"Endorsement of this check by Payee, acknowledges receipt in full for the following accounts:
Description Amount
Full settlement Judgment -vs- L. A. Schwartz, Mun. Ct. No. 360257

Arthur Edmund Stein
No. 1139
Attorney at Law
Richfield Building
555 South Flower Street
Los Angeles, Cal. January 17, 1939

Pay to the Order of California Claims Service Ltd. $15.00
The Sum of $15 and 00cts Dollars
To the Union Bank & Trust Co.
Los Angeles, Cal. Arthur Edmund Stein"

followed by the delivery to the attorney for the debtor of a written satisfaction of judgment executed by an attorney who, though apparently not the attorney of record in the case no doubt executed the same under instructions of the judgment creditor. Sufficient facts were alleged in the third cause of action to constitute a valid accord and satisfaction of the judgment debt.

It may be argued that the case is not within the jurisdiction of the superior court for the reason that the recovery sought is in an amount insufficient to give the superior court jurisdiction. This would be true if the demand for $5,000 as exemplary damages should be disregarded. The demand for $50 as damage sustained through the payment of expenses in connection with plaintiff's title to real estate which were alleged to have been made necessary by the refusal to satisfy the judgment of record was one which would have been recoverable if sustained by the proof.

[10-12] The alleged damage through loss of "good will, credit and business" was not recoverable as having proximately resulted from the levy of the execution (Elder v. Kutner, 1893, 97 Cal. 490, 493, 32 P. 563), although it might have been proved as a fact to be considered in connection with the claim for exemplary damages. Birch Ranch & Oil Co. v. Campbell, 1941, 43 Cal.App.2d 624, 628, 111 P.2d 445. But these two items amounted to only $550, which was far below the $2,000 required to give the superior court jurisdiction. Unless the claim for exemplary damages is taken into consideration, the case belongs in the municipal court. In connection with the latter claim the question arises whether in a case where actual damages are alleged in a very small sum and there is in addition a prayer for punitive damages in an amount which brings the total demand to over $2,000, the court should give effect to the

prayer for punitive damages in determining whether the case belongs in the superior court. While it would appear that we are viewing a small bird with an extraordinarily large tail, we think that the prayer for punitive damages of $5,000 must be regarded as an appendage of the demand of $50 as actual damages and that the complaint therefore stated sufficient facts to give the superior court jurisdiction. The rule is that jurisdiction depends upon the amount that is claimed in good faith, which implies that the court may disregard allegations of a pleading which have been made in obvious bad faith (Becker v. Superior Court, 1907, 151 Cal. 313, 318, 90 P. 689), but the single fact that a complaint may have a demand for exemplary damages in an amount which appears to the court to be out of all proportion to the gravity of the allegedly malicious acts of the defendants would not establish bad faith. Nevertheless it may properly be remarked that the puffing of a claim for exemplary damages for the sole purpose of getting the case into the superior court would be an unworthy act upon the part of an attorney which the court unquestionably would not tolerate if the motive were proven. Hartog v. Memory, 1886, 116 U. S. 588, 591, 6 S.Ct. 521, 29 L.Ed. 725, 726.

In Barry v. Edmunds, 1886, 116 U.S. 550, 6 S.Ct. 501, 507, 29 L.Ed. 729, the court considered an appeal from a judgment of dismissal for want of jurisdiction to allege damage in the amount of not less than $500. The suit was for "a willful and malicious trespass, in seizing and taking personal property, with circumstances of aggravation and averments of special damage," which trespass was alleged to have consisted in part of the seizure of property worth less than $200 to enforce collection of a tax of less than $100. The complaint alleged in part, "That while the said defendant was unlawfully and wrongfully upon the plaintiff's premises as aforesaid, he did many other wrongs and injuries to the plaintiff of a malicious nature, by all which wrongs and injuries the plaintiff has been injured and damaged six thousand dollars." After reviewing numerous authorities relating to exemplary damages and pointing out that such cases, as in other actions for tort where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict, the court said (116 U.S. 550, 6 S.Ct. at page 509, 29 L.Ed. at page 734): "In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award." And it was further said (116 U.S. 550, 6 S.Ct. at page 509, 29 L.Ed. at page 734): "There was clear error in the circuit court in its ruling, as matter of law, that there could be no lawful recovery, in such a case as that stated in the declaration, of an amount equal to that which is necessary to support the jurisdiction of the court." Upon the authority of this decision, especially as it is the only one we find on the point, the third cause of action in the complaint is to be considered as seeking a recovery of more than $2,000 so as to bring the case (as to both counts) within the jurisdiction of the superior court. Emery v. Pacific Employers Ins. Co., 1937, 8 Cal.2d 663, 666, 67 P.2d 1046.

The judgment is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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52 Cal.App.2d 158

HALL v. BAKERSFIELD COMMUNITY HOTEL CORPORATION.

Civ. 3007.

District Court of Appeal, Fourth District, California.

May 19, 1942.

1. Appeal and error 🔑930(1)

Where defendant admitted that evidence supported jury's implied finding that hall, banquet room and steps leading thereto, on which plaintiff fell, were not sufficiently lighted, District Court of Appeal was required to assume negligence on defendant's part in that respect, and the absence of due care in failing sufficiently to light the way down the steps into the banquet room.

2. Witnesses 🔑397

In guest's action against hotel for injuries from a fall, guest's deposition taken before trial and conflicting with the testimony given at trial bore only on the weight to be given her evidence and on her credibility.

3. Witnesses ⚷397

In guest's action against hotel for injuries from a fall, jury was not required to accept guest's deposition taken before trial which conflicted with the evidence given at trial, but was authorized to accept as true the testimony given at trial.

4. Appeal and error ⚷996

The rule is not that for an inference to be established by circumstantial evidence it must be the only inference which can fairly or reasonably be drawn from the circumstances relied on, or that if other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced from it, the principle being more applicable as a rule to guide a jury in its deliberations on the facts than it is as a rule to guide the appellate court in passing on the sufficiency of the evidence. Code Civ.Proc. § 1958.

5. Appeal and error ⚷930(1)

On appeal, all conflicts in evidence must be resolved in respondent's favor and all legitimate and reasonable inferences indulged to uphold the verdict.

6. Appeal and error ⚷989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with determination whether there is any substantial evidence contradicted or uncontradicted which will support verdict.

7. Appeal and error ⚷996

When two or more inferences can reasonably be deduced from the facts, reviewing court may not substitute its deductions for those of trial court.

8. Innkeepers ⚷10

In guest's action against hotel for injuries from a fall, conflicting evidence justified jury's inference that defendant's negligence consisting of insufficient lighting and improper construction and maintenance of steps with no platform at the top and of the same color as the floor was the proximate cause of plaintiff's injury.

9. Appeal and error ⚷996

Where conflicting evidence justified jury's inference that defendant's negligence was the proximate cause of plaintiff's injuries, District Court of Appeal was not justified in disturbing such inference, notwithstanding that a contrary inference if drawn would have had to be supported on appeal.

10. Innkeepers ⚷10

In guest's action against hotel for injuries from a fall, guest's contributory negligence under evidence that she pushed a door open and fell down steps was for jury.

11. Appeal and error ⚷999(3)

In guest's action against hotel for injuries from a fall, where jury settled question of guest's contributory negligence in her favor, District Court of Appeal was not authorized to disturb such implied finding on appeal.

12. Innkeepers ⚷10

In guest's action against hotel for injuries from a fall, evidence of plaintiff's impaired vision and hearing after the accident was, under expert evidence attributing such impairment to nervous shock, within issues made by complaint unattacked by special demurrer alleging shock and disturbance of nervous system, and denial of such allegation for lack of information.

13. Appeal and error ⚷1051(3)

In guest's action against hotel for injuries from a fall down steps, where defendant admitted the steps were not safe, admission of architect's testimony that construction of the steps was not safe was not prejudicial.

14. Trial ⚷260(8)

In guest's action against hotel for injuries from a fall, where trial court charged that plaintiff had burden of proof, and could not recover without meeting it, refusal to give defendant's offered instruction that jurors could not guess as to cause of the accident did not constitute prejudicial error.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Emily F. Hall against Bakersfield Community Hotel Corporation for damages from a fall down steps of hotel owned by defendant. From an adverse judgment, defendant appeals.

Affirmed.

Borton, Petrini, Conron & Borton, of Bakersfield, for appellant.

T. H. Werdel and Brittan & Mack, all of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment for damages resulting from a fall down steps which lead from a hall into a banquet room in the El Tejon Hotel in Bakersfield. The hotel was owned by defendant.

It is admitted that plaintiff, who was about 92 years of age, was a guest in the hotel at the time of the accident; that she had the right of an invitee to go from the hall into the banquet room; that defendant owed her the duty of using ordinary care to maintain the premises in a reasonably safe condition so as not to cause her injury.

The banquet room was reached through a hall about 10 feet long which ran north and south. The opening into the banquet room was in the west wall of the south end of the hall. The floor of the banquet room was about one foot below the level of the floor of the hall and was reached by descending steps which consisted of two risers and one step.

[1] Plaintiff urges numerous grounds of negligence in the construction and maintenance of the entry from the hall to the banquet room. While not conceding negligence on its part as a matter of fact, defendant has simplified our task by admitting that the evidence, while sharply conflicting, supports the implied finding of the jury that the hall, the banquet room and the steps leading down into it were not sufficiently lighted. We must, therefore, assume negligence on the part of defendant in this respect, and the absence of due care in failing to sufficiently light the way of the guest down the steps into the banquet room. It is also conceded that the steps leading into the banquet room were of hard wood and were of the same color as the floor of that room; that the steps descended immediately from the doors of the hall into the banquet room without any platform on the banquet room side; that the opening into the banquet room was 5 feet 8 inches wide with two swinging doors; that the door on the south half opened into the hall and the door on the north half opened into the banquet room. There is evidence that the south half of the door was open at the time of the accident, and that the north door was closed but not fastened. While the evidence was conflicting on this question we will assume the truth of the testimony just outlined.

The accident happened in the afternoon of January 28, 1940. Plaintiff and her daughter expected to attend a dinner to be served in the banquet room on the evening of that day. She desired to inspect the seating arrangements so she could secure a seat as near as possible to that to be occupied by her daughter. She proceeded down the hall and turned at the door to enter the banquet room. She fell down the steps and was found on the floor of the banquet room at the bottom of the steps seriously injured. Her testimony contains the only description in the record of her fall. The material portions of her testimony are as follows:

"Q. And did you come in through a door into a hallway? A. I came in through a door that opened—one side of the door was opened and the other side was closed, I think that was it.

"Q. And that was going into the banquet room? A. That was going into the banquet room.

"Q. Did you put your hand on either of these doors? A. I did—I put my hand * * *

"Q. Mrs. Hall, after you put your hand on the door, what happened? A. I fell. The door went the other way and there was no floor. I was standing on the floor, but as I was holding on the door the door went away from me and I fell head first.

"Q. Do you remember anything while you were falling? A. I tried to catch something, but there was not a thing there. It was just opened out. It was just a narrow place—that whole place is just a narrow place. * * *

"Q. Mrs. Hall, do you remember this fall yourself, from your independent recollection? A. I certainly do, because I carry the effects of it all the time.

"Q. But you remember the fall yourself? A. I positively remember it myself. * * *

"Mr. Petrini: Mrs. Hall, as I understand your testimony, you put your hand on the door, is that what you did? A. I did.

"Q. And did you lean on it or push on it or what? A. I think I just simply put my hands on the door to either look in or go in.

"Q. And one half of the door was open, wasn't it? A. One half was open and the other half was closed.

"Q. Could you see inside of that room? A. No, not unless I leaned over like that, and I just wanted to see where they had the seats for people that were going to have the big places that was doing something, and I wanted to get a seat near Alma."

[2, 3] Defendant urges there is no casual connection shown between its negligence and the injury of plaintiff; that there is a failure to prove proximate cause of the accident. It quotes at length from a deposition of plaintiff taken before the trial. If this deposition furnished the only evidence of the accident it would be insufficient to support the judgment as plaintiff was then so confused that she was uncertain whether the accident happened in the hotel or at some other place. However, this evidence in the deposition merely conflicted with her testimony given at the trial and bore on the weight to be given her evidence and on her credibility. The jury was not required to accept the testimony in the deposition as true, and evidently accepted, as true, her testimony given at the trial. We must then measure the argument that the proximate cause of the accident was not proven by that evidence.

The question is this: Could the jury draw the reasonable inference from the evidence of plaintiff that the negligence of defendant was the proximate cause of the injury?

[4] In discussing inferences to be drawn from evidence the Supreme Court, in Juchert v. California Water Service Co., 16 Cal.2d 500, at page 506, 106 P.2d 886, at page 890, said:

"An inference is a deduction which the reason of the jury makes from the facts proved. Sec. 1958, Code Civ.Proc.

"The rule is not, as is sometimes contended and occasionally stated by the courts, that in order for an inference to be established by circumstantial evidence it must be the only inference which can fairly or reasonably be drawn from the circumstances relied on, or that if other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced from it.

"As stated in Robertson v. Weingart, 91 Cal.App. 715, 723, 267 P. 741, said principle is more applicable as a rule to guide a jury in its deliberations upon the facts, than it is a rule to guide the appellate court in passing upon the sufficiency of the evidence. Peters v. McKay & Co., 136 Cal. 73, 68 P. 478."

[5-7] Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, at page 13, 47 P.2d 462, at page 468, defined the duty of an appellate court in cases of this kind as follows:

"As was said in Crawford v. Southern Pacific Co. [3 Cal.2d 427], 45 P.2d 183, 184:

" 'In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' "

In addition to the poor lighting, it is admitted that the steps descended immediately from the door without any platform on the banquet room side and that they were the same color as the floor. It is not shown that plaintiff had been through the doorway before. The inference reasonably may be drawn from this evidence that if the steps had been well lighted, if there had been a platform on the banquet room side of the doors upon which plaintiff could have stood, and if steps had been of a color contrasting with that of the floor, plaintiff would have seen the steps descending in front of her and would not have fallen.

[8, 9] Therefore, we conclude that the jury was justified in drawing the reasonable inference that the negligence of defendant was the proximate cause of plaintiff's injury. That negligence consisted of the insufficient lighting and also the improper construction and maintenance of the steps with no platform at the top and with the steps the same color as the floor so that they could not be seen easily by one using them. Either act of negligence would be sufficient to support the judgment, and combined as they must be, they justify the reasonable inference of proximate cause drawn by the jury which we cannot disturb here even though a contrary inference, if it had been drawn, also would have had to be supported on appeal.

[10, 11] Defendant urges that plaintiff was guilty of contributory negligence as a matter of law that bars her recovery. We cannot agree with this contention. Under the evidence her contributory negligence was a question of fact addressed to and settled by the jury in her favor. We cannot disturb that implied finding on appeal.

Defendant urges that the trial court erred in admitting evidence of plaintiff's impaired vision and hearing after the accident, arguing that such evidence was beyond the issues made by the pleadings.

[12] The complaint alleged in detail specific injuries suffered by plaintiff, but contained no allegation of specific injury to her eyes or ears. It was alleged that her nervous system was shocked and disturbed. There was no special demurrer interposed to this allegation and it was denied for lack of information or belief. In his opening statement to the jury, counsel for plaintiff stated that he expected to prove as a part of her injuries that "it is impossible for her to read and it is impossible for her to hear as well as it was before the accident." The evidence shows no direct traumatic injury to plaintiff's eyes or ears. Her physicians attribute her inability to hear and see as well as she did before the accident to the nervous shock suffered by her which comes within the allegation to which we have already referred.

[13] Plaintiff called an architect who was permitted to testify that the construction of the steps was not safe. Defendant urges that this evidence was inadmissible because it invaded the province of the jury to pass on a question of fact which was within the common knowledge of the jurors and therefore not a subject for expert evidence. Plaintiff cites the case of McStay v. Citizens' National Trust & Savings Bank, 5 Cal.App.2d 595, 43 P.2d 560, as upholding the admissibility of similar evidence.

However, we do not regard the question as of serious importance here. It is admitted that the steps were not properly lighted. The question of the necessity for a platform inside the doors at the top of the steps and that the steps be of a color contrasting with that of the floor to make them safe for use might well be questions within the knowledge of the jurors. If they were within the common knowledge of the jurors, the admission of the expert testimony should not be regarded as prejudicial, as was held in regard to the testimony of one witness in McStay v. Citizens' National Trust & Savings Bank, supra.

[14] Defendant urges prejudicial error in refusing to give several instructions offered by it to the effect that the jurors could not speculate or guess as to the cause of the accident. In this connection the trial judge repeatedly instructed the jury that plaintiff had the burden of proving negligence on the part of defendant which was the proximate cause of the injury and that she could not recover without meeting that burden of proof. While one of the proposed instructions well might have been given, we cannot regard the refusal to give it so prejudicially erroneous as to require a reversal of the judgment. The instructions on burden of proof and proximate cause were so full and complete that we cannot see how the jury could have been mislead by the failure to give one of the requested instructions.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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52 Cal.App.2d 210

PEOPLE v. SCARBOROUGH.

Cr. 3574.

District Court of Appeal, Second District, Division 3, California.

May 22, 1942.

1. Criminal law ⚷1023(12)

An order, entered in a criminal prosecution in which defendant prevailed on issues raised by his sole plea of "not guilty by reason of insanity", directing defendant to be committed to state hospital for insane, was not an "appealable order". Pen.Code, §§ 1026, 1237, subds. 1–3.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Habeas corpus ⚷19

An order, entered in a criminal prosecution in which defendant prevailed on issues

raised by his sole plea of "not guilty by reason of insanity", directing defendant to be committed to state hospital for insane, was prima facie proper, and if defendant wished to challenge sufficiency of the commitment, he could do so by habeas corpus. Pen.Code, §§ 1026, 1237, subds. 1–3, and § 1368.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Proceeding by the People against George O. Scarborough. From an order committing defendant to the state hospital for the insane, the defendant appeals. On respondent's motion to dismiss the appeal.

Appeal dismissed.

Robert B. Hughes and George G. Glick, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

SCHAUER, Presiding Justice.

The notice of appeal filed by defendant declares that it is taken "from the order of this [the superior] Court heretofore made and entered * * * ordering him to be committed to the Mendocino State Hospital for the insane." Respondent's motion to dismiss such purported appeal on the ground that the order attempted to be appealed from is not an appealable order must be granted.

The order from which defendant has sought to appeal resulted from his having prevailed at the trial on the issues raised by his sole plea of "Not guilty by reason of insanity" which he had interposed to certain felony charges filed against him. Section 1026 of the Penal Code provides in material part that "If the verdict or finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the state hospital for the criminal insane, or if there be no such state hospital, then that he be confined in some other state hospital for the insane. If, however, it shall appear to the court that the defendant has fully recovered his sanity such defendant shall be remanded to the custody of the sheriff until his sanity shall have been finally determined in the manner prescribed by law. A defendant committed to a state hospital shall not be released from confinement unless and until the court which committed him, or the superior court of the county in which he is confined, shall, after notice and hearing, find and determine that his sanity has been restored."

The trial upon the issues raised by defendant's plea was had before the court sitting without a jury. Its finding is stated in the record as follows: "The Court finds the defendant 'Not guilty by reason of insanity' and further finds that the defendant is insane at the present time." Although the issue of defendant's sanity at the time of the trial was not then being tried formally pursuant to section 1368 of the Penal Code, which section governs the trial of proceedings to determine present sanity of a defendant, the pronouncement noted above definitely establishes that in the opinion of the court the defendant had not "fully recovered his sanity" and therefore that the commitment to the Mendocino State Hospital was at least prima facie legally proper pursuant to the above quoted provisions of section 1026 of the Penal Code.

[1, 2] Section 1237 of the Penal Code specifies the instances in which an appeal may be taken by the defendant. They are: "1. From a final judgment of conviction; 2. From an order denying a motion for a new trial; 3. From any order made after judgment, affecting the substantial rights of the party." Obviously the attempted appeal in this case is not from a final judgment of conviction, from an order denying a motion for a new trial, or from an order made after judgment. The defendant has been acquitted of the offenses charged against him, he has not sought a new trial, and no judgment in this case has been or can be pronounced against him. The defendant therefore has not suffered any adverse judgment or order from which an appeal may be taken, but if he wishes to challenge the sufficiency of the commitment or otherwise to subject the legality of his detention at the state hospital to judicial test he may do so by application for a writ of habeas corpus (In re Slayback, 1930, 209 Cal. 480, 491–492, 288 P. 769; People v. Lee, 1929, 97 Cal.App. 321, 324, 275 P. 815.) The purported appeal is dismissed.

SHINN and PARKER WOOD, JJ., concurred.

EXTENSION OIL CO. v. RICHFIELD OIL CORPORATION.

Civ. 3021.

District Court of Appeal, Fourth District, California.

May 13, 1942.

Rehearing Denied June 10, 1942.

Hearing Denied July 10, 1942.

1. Mines and minerals 🔑78(2)

Where lease provided for continuous drilling of eight oil wells in succession with allowance of 60 days from completion of one well to the beginning of the next, requiring in the event of a default the service of a written notice of failure to perform upon the lessee and requiring performance by lessee within 30 days after service of such notice, right of forfeiture arose if lessee did not cure the default within such 30-day period.

2. Landlord and tenant 🔑112(2)

Landlord's acceptance of rents after a forfeiture of a lease has been accomplished "waives" the forfeiture.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Landlord and tenant 🔑112(2)

Landlord's acceptance of rents after a known default as a general rule is a "waiver" of the past default, but whether or not it is a waiver of a future breach is dependent upon the nature of the duty to be performed and the form of the contract.

4. Landlord and tenant 🔑112(2)

Generally, where there is a single covenant or condition in a lease that is breached by the lessee, the acceptance of rent by the landlord after knowledge of the breach is a "waiver" of the breach which prevents a forfeiture of the leasehold estate.

5. Landlord and tenant 🔑112(1)

Where the conditions in a lease are continuing in their nature, the consent to or waiver of a breach does not preclude the right of the lessor to proceed against the lessee for subsequent breaches.

6. Mines and minerals 🔑78(1, 5)

Provision in lease that lessee must drill continuously after oil was discovered in first well in paying quantities was a "continuing covenant" and was successively breached by failure of lessee to continue drilling operations, and acceptance of rentals by lessor after lessee stopped drilling operations until forfeiture was declared "waived" prior breaches but did not "waive" right to declare a forfeiture after notice was given lessee to resume operations.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Covenant".

7. Mines and minerals 🔑78(6)

Where lease on oil property had been cancelled for failure of lessee to continue drilling operations after date of cancellation, lessee was in wrongful possession of the property and liable to lessor for the gross value of the hydrocarbons it wrongfully produced and converted to its own use.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Extension Oil Company against Richfield Oil Corporation to quiet title to land and recover the value of oil, gas and gasoline produced from the property. From judgment for plaintiff, defendant appeals.

Affirmed.

H. L. Dunnigan and Louis J. Irving, both of Los Angeles, for appellant.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiff's title to forty acres of land in Kern County and for the value of the oil, gas and gasoline produced from the property by defendant after October 24, 1938.

Plaintiff is the owner of the land in question. On March 8, 1923, it entered into an oil lease whereby the property was leased to W. J. Grindle. There were several successive transfers of the lessee's interest which finally vested in defendant.

The lease was for twenty years and as long thereafter as oil and gas be produced in paying quantities. It provided "that in the event oil is discovered in the above mentioned well (the first) in paying quantities the lessee agrees to drill continuously thereafter on said leased premises, with an intermission allowed of not more than sixty (60) days from the completion of one well until the beginning of another, until eight (8) wells shall have been drilled to a depth of thirty-three hundred feet, or to oil in paying quantities at a lesser depth."

The lease contained the following forfeiture clause: "That in the event of violation or default of any of the covenants, conditions or agreements herein contained, on the part and behalf of the lessee to be observed and performed, and the continuance of such violation or default for a period of thirty (30) days after service of written notice by the lessor upon lessee specifying the covenants, conditions or agreements so violated, or particulars in which said lessee is so in default, then, at the option of the lessor, this lease and all rights and provisions hereunder acquired shall be forfeited and the lessor shall have the right at any time hereafter to enter upon said lands and premises and remove all parties therefrom, and take and have the same as in its first and former state, free and clear of all claims and demands on the part of the lessee and those claiming any rights under him, and this lease and privilege shall be at an end, and thereupon the lessee or those claiming under him shall peaceably surrender and quit possession of all of said demised premises."

Four wells were drilled on the property all of which produced oil in paying quantities. In 1928 the then lessee had not drilled the fifth well, according to the lease, and a contract was entered into to suspend drilling operations for one year on the payment of $1,000 per month to plaintiff. Extension for a longer period could be given under certain conditions. This agreement expressly provided for a revivor of the drilling and forfeiture clauses of the lease at the end of the extension period and that, except as to the extension, all the terms of the lease should remain in full force and were ratified and confirmed.

Plaintiff was paid the monthly rental for twenty-six months and the lessee commenced drilling the fifth well which was completed on August 30, 1930. This well produced oil for about six years but no other wells were drilled.

On September 6, 1938, plaintiff served on defendant a written notice of its default in failing to drill eight wells on the property, requiring that default to be remedied by resuming drilling operations within thirty days or suffer cancellation of the lease. As drilling was not resumed, plaintiff, on October 24, 1938, served notice of cancellation of the lease and demanded possession of the leased premises which defendant failed to give but remained in possession and continued to produce oil, gas and gasoline from the leased property.

Plaintiff was paid its royalties under the lease up to the time of its cancellation but refused to accept them thereafter. Defendant urges that the acceptance of these royalties for several years after drilling had stopped amounted to a waiver of default and estopped plaintiff from cancelling the lease. This is the sole question presented on this appeal.

[1] It is clear from the lease that plaintiff had the right to require the lessee to continue drilling operations after the expiration of sixty days after the completion of well number five, and that the lessee was in default in failing to start drilling the sixth well in accordance with the terms of the lease. Under the clear terms of the lease that default did not in itself work a forfeiture. As a necessary step towards a forfeiture plaintiff was required to serve a written notice on the lessee of failure to perform. If the lessee did not cure the default within the thirty days the right of forfeiture then arose. Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 P. 369.

[2, 3] It is well settled that acceptance of rents after a forfeiture of a lease has been accomplished will waive the forfeiture. Jones v. Della Maria, 48 Cal.App. 171, 191 P. 943; Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 6 P.2d 71, 80 A.L.R. 453. Also, acceptance of rents after a known default, as a general rule, is a waiver of the past default, but whether or not it is a waiver of a future breach generally may depend on the nature of the duty to be performed and the form of the contract.

[4, 5] It is well established in California as a general rule that where there is a single and not a continuing covenant or condition in a lease that is breached by the lessee, the acceptance of rents by the landlord after knowledge of the breach is a waiver of the breach which prevents a forfeiture of the leasehold estate. McGlynn v. Moore, 25 Cal. 384; Kern Sunset Oil Co. v. Good Roads Oil Co., supra; Jones v. Della Maria, supra; Inman v. Schecher, 86 Cal.App. 193, 260 P. 605. It is equally well settled that, "Where the conditions are continuing in their nature, such as covenants for the payment of

rent at stated intervals, or for the carrying on of only certain kinds of business in the demised premises, or against subletting without written consent, the consent to or waiver of a breach does not preclude the right of the lessor to proceed against the lessee for subsequent breaches. Jones v. Durrer, 96 Cal. 95, 30 P. 1027; Seaver v. Colburn, 10 Cush., Mass., 324; Taylor on Landlord & Tenant, § 501." German-American Savings Bank v. Gollmer, 155 Cal. 683, 102 P. 932, 934, 24 L.R.A., N.S., 1066. It therefore becomes important to determine the nature of the covenants contained in the lease and whether the obligation of the lessee, and his successors to drill eight wells on the leased property at successive intervals was a single and entire covenant that was waived by acceptance of royalties after the original breach or was a continuing covenant under which the acceptance of royalties would waive past but not future breaches.

The early case of McGlynn v. Moore, supra, laid down this rule which has been followed in subsequent cases without deviation: "A covenant to pay rent by instalments, to keep the premises in repair, to keep them insured, to pay the taxes, to properly cultivate the land, and many others that indicate or necessarily imply the doing of the stipulated acts successively, or as often as occasion may require, are continuing covenants; but the covenant to repair or insure on or before a time certain, or forthwith, to pay a gross sum as rent for the term, or not to assign the lease, and others of a like character, are not continuing covenants, because the parties contemplated by such covenants, to provide for the doing or the omission of a single act."

The following cases illustrate those various covenants which have been held to be continuing covenants and apply the rule announced in the McGlynn case: Jones v. Durrer, supra; Stevinson v. Joy, 164 Cal. 279, 128 P. 751; Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 P. 951; Myers v. Herskowitz, 33 Cal.App. 581, 165 P. 1031; Matthews v. Digges, 45 Cal.App. 561, 188 P. 283; Mulborn v. Montezuma Improvement Co., 69 Cal.App. 621, 232 P. 162; Kendis v. Cohn, 90 Cal. App. 41, 265 P. 844; John v. Elberta Oil Co., 124 Cal.App. 744, 13 P.2d 538; Bank of America N. T. & S. Ass'n v. Casady, 15 Cal.App.2d 163, 59 P.2d 444.

With the rules announced by the foregoing cases before us we must return to a consideration of the drilling requirements of the lease to determine if the obligation to drill eight wells was single and entire or was a continuing obligation that rested on defendant. If the obligations were single, then the acceptance of royalties after the breach would waive it under the facts here. If the obligations were continuing, the acceptance would waive past but not future breaches and the judgment cancelling the lease must be affirmed.

[6] It is clear that the lease required the drilling company to start the drilling of the sixth well within not more than sixty days after the completion of well number five on August 30, 1930. Admittedly this was not done. There was no time limit specified within which any one well was required to have been completed. There also remained the obligation resting on the drilling company to start and complete wells number seven and eight allowing not more than sixty days to intervene between the completion of the preceding well and the commencement of drilling the succeeding well. No definite time for completing well number six or starting or completing wells number seven and eight can be found in the contract. If the obligation "to properly cultivate the land" is a continuing covenant, as held in McGlynn v. Moore, supra, certainly the covenant found in the lease before us "to drill continuously" after oil was discovered in the first well must be held to be a continuing covenant. It is clear that the contract before us indicates and specifically provides for "the doing of the stipulated acts successively, or as often as occasion may require, [and that they] are continuing covenants." McGlynn v. Moore, supra.

What was said in Woodard v. Glenwood Lumber Co., supra [171 Cal. 513, 153 P. 955], is particularly applicable here: "Here the lumber company's cessation of work took place in July, 1908, and the alleged rescission was not made until two years later. But the obligation to cut down the timber, manufacture it into lumber and ship it, was a continuing covenant. Every day's failure, without justification, to resume operations was a new breach of the contract and the fact that plaintiff may have waived the breach up to a given time did not preclude him from asserting a subsequent breach. 3 Page on Contracts,

§ 1496; Jones v. Durrer, 96 Cal. 95, 30 P. 1027. Furthermore, while the plaintiff is obliged to rescind promptly the defendant cannot rely upon delays which have been the result of an indulgence extended to him by the plaintiff."

Defendant maintains that this conclusion conflicts with that reached by the Supreme Court in the case of Kern Sunset Oil Co. v. Good Roads Oil Co., supra. The provisions in the two oil leases make the cases easily distinguishable. In the Kern Sunset Oil Co. case the lease required the lessee to drill and place on production two wells each year until sixteen wells had been completed. Five wells were never completed and the lessor without objection accepted royalties for several years after all of the wells should have been completed under the terms of the contract and then gave a notice of default and notice of cancellation of the lease. The lessor accepted royalties even after the notice of cancellation was served and for three months after his suit to declare the lease forfeited had been filed. Under these circumstances the Supreme Court could do nothing else than hold there had been a waiver. It expressed the opinion that the obligation to complete two wells each year rested on the lessee and that each failure to perform was a completed breach; that the failure to drill the sixteen wells in eight years according to the contract was a completed breach; that the acceptance of royalties thereafter and especially after the notice of cancellation and the filing of the action was a waiver of the breaches.

We have no such situation here where there was no completion date specified for any well. The obligation to drill successive wells was continuing with no determinable starting or completion dates for wells number seven and eight nor completion date for well number six. Thus the contract was continuing and was successively breached so that the acceptance of royalties would only waive its prior but not its subsequent breaches.

[7] The trial court gave plaintiff judgment for the value of the hydrocarbons removed by defendant from the property after the lease was cancelled. After that date defendant was in wrongful possession of the property and was liable for the gross value of the hydrocarbons it wrongfully produced and converted to its own use. Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 66 P.2d 1215; Union Oil Co. v. Mutual Oil Co., 19 Cal. App.2d 409, 65 P.2d 896.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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52 Cal.App.2d 137

CROME et al. v. ALLEN.

Civ. 3005.

District Court of Appeal, Fourth District, California.

May 16, 1942.

1. Pleading 🔑237(1)

Amendments to correspond to proof, if not prejudicial, are favored.

2. Appeal and error 🔑959(1)
Pleading 🔑236(1)

Where oral agreement entitled manager of sport-goods department to bonus based on net profits, and employer's answer admitted allegation in manager's cross-complaint that cost of goods to employer was basis to be taken in computing net profits, allowance of amendment to employer's answer, effect of which was to charge to manager his share of any depreciation in price of merchandise because of goods becoming old or shopworn, was discretionary, and would not be disturbed on appeal. Code Civ.Proc. § 470.

3. Appeal and error 🔑1010(1)

In employer's action against employee for money had and received, wherein employee filed cross-complaint for balance due, whether oral contract whereby employee received $28.50 a week as manager of sport-goods department and $21.50 a week as advertising manager, plus bonus, was modified when employee was relieved of duties as advertising manager, so that the $21.50 was to be treated as a cash advance against bonus, was for trier of facts under evidence which sustained determination in favor of employer.

4. Master and servant ⟹6

Where oral contract entitled manager of sport-goods department to bonus based on net profits, in action between employer and manager, evidence sustained determination that manager was not entitled to have his bonus figured on basis of original cost to employer of goods on hand, but that cost was to be determined from the inventory value of the goods on hand.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action for money had and received by George Crome and others against Lloyd J. Allen, wherein defendant filed counterclaim and cross-complaint. From an adverse judgment, defendant appeals.

Affirmed.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for appellant.

Brittan & Mack, of Bakersfield, for respondents.

GRIFFIN, Justice.

Respondents employed appellant as manager of the sport-goods department of their hardware store in 1935. An oral agreement was then made for the payment to appellant by respondents of a salary segregated as follows: $28.50 a week for his services in the sport-goods department, and $21.50 a week for his services as advertising manager of the entire store. In addition, Allen was to be paid a 10 per cent bonus which is based upon a sales quota of $20,000 a year and a gross profit margin of 27½ per cent on sales from the sport-goods department. No bonus was to be payable unless the sales of his department exceeded the quota of $20,000. If sales exceeded that minimum, Allen was to receive a bonus on the excess of 10 per cent if the margin of profit in his department was maintained at 27½ per cent. If the margin between cost of doing business and the return therefrom (the margin of profit) either exceeded or fell below 27½ per cent, the sales volume was to be adjusted to show a return of that arbitrary figure and the bonus was then to be calculated on the adjusted figure. About March, 1940, the relationship between appellant and respondents was terminated and a controversy arose out of the mutual accounts between the parties at that time. The solution of this controversy depends on the terms of the oral contract between the parties. Respondents' complaint alleged that certain money was due under an ordinary money had and received count. Appellant answered, denied generally the allegations of the complaint, alleged payment, and by way of counterclaim and cross-complaint claimed that $4,619.09 was due him. The cross-complaint, in addition to many other claims, alleged that in computing the net profits of any given year, the *cost* of the goods to plaintiffs was the basis to be taken. Respondents answered the cross-complaint containing this allegation, admitted certain portions thereof, one of which contained this particular language in reference to the cost.

During the second day of trial respondents moved to amend their answer to the cross-complaint by interlineation and by permission of court added after the word *cost,* as italicized, the words "based on inventory value to cross-defendants" rather than "cost of the goods to plaintiffs."

[1, 2] Appellant now claims that the court erred in allowing the amendment at that time to his prejudice because the allowance of the amendment removed an admission upon which he was entitled to rely under the pleadings, citing Bank of Woodland v. Heron, 122 Cal. 107, 54 P. 537. We see no merit to this point. This amendment was offered after testimony was taken on the question of how the cost was to be determined. The admission in the pleadings, if it constituted such, was only an admission as to the facts set forth, but was not an admission as to the method in which the cost was to be determined. The effect of the change was to charge to appellant his share of any depreciation in price of the merchandise in the sport-goods department because of goods becoming old or shopworn, instead of throwing all of the depreciation onto the store. This was in accordance with the testimony produced by respondents on the subject. Amendments to correspond to the proof, if not prejudicial, are favored. 21 Cal.Jur. p. 207, § 142 et seq. There was no surprise occasioned to appellant's counsel in permitting the amendment to show the terms of the contract relating to the inventory because early in the case appellant's then counsel stated: "We evidently will have a dispute in the evidence about the terms of this contract, all facts relating to this contract are proper in evidence to show the reasonableness of the statements of the

parties. * * *" No request was made for a continuance on this or any other ground. The inventories were all produced in evidence and full cross-examination allowed concerning them. No showing of abuse of discretion has been made. The allowance of the amendment was discretionary and will not be disturbed on appeal. Sec. 470 Code Civ.Proc.; Kamm v. Bank of California, 74 Cal. 191, 15 P. 765; Williams v. Flinn & Treacy, 61 Cal.App. 352, 357, 214 P. 1024; Fetterley v. Gibson, 210 Cal. 282, 291 P. 411.

[3] Appellant for several years served in the capacity of advertising manager and also as manager of the sport-goods department, and drew the apportioned salaries. It appears from respondents' evidence that about January 1, 1939, another advertising manager was hired and paid a salary in place of Allen. The evidence discloses that Allen was then told that "his department was falling behind and also that the advertising was being neglected and that we would have to make other arrangements insofar as the advertising was concerned * * * and that he would be relieved at the beginning of 1939 of that responsibility, and, of course, also of the income for it. * * * I told him, however, we wouldn't reduce the amount of his check for the time being, but the $21.50 that he had been paid as advertising manager would be considered as a cash advance. * * *" Respondents continued to pay appellant a total of $50 per week over the remaining period but charged $21.50 per week, the amount he had been receiving as advertising manager, against his bonus account. Allen denied any such change in arrangements and contended that the $21.50 per week was not a proper charge against his bonus. However, he did admit that he had a conversation with respondents regarding a change of advertising policy. He testified in answer to the question:

"What was that conversation? A. Simply that they were hiring somebody else as general advertising manager and that my duties would be changed accordingly.

"Q. And did he say anything about your salary? A. He did; he said that there would be a change, but there wasn't any exact amount mentioned."

During 1939 and 1940, Allen had drawn several hundred dollars from the store as advances on his bonus. The record discloses that shortly after the end of the year 1939, appellant received a statement of his earnings and bonus for 1939. On this statement his salary for the year was indicated as $1,482, which was figured at $28.50 per week. Appellant made no complaint at that time in reference to the statement or the cash advance against his bonus. The two versions of the oral contract in this regard were matters for the trial court's consideration, and it appears from the record that the court's version was substantially supported.

[4] The only remaining question presented is whether appellant was entitled to have his bonus figured at the end of the year upon a basis of the original cost to the company of the goods on hand, or whether the cost should be determined from the inventory value of those goods. The evidence in this regard, as to the oral agreement, is conflicting. A Mr. Stone, manager of respondents' store, testified in this respect that he had a conversation with Allen when he was hired and that he told him about handling deductions in the inventory and that he said to him "the cost of goods sold, the inventory's determining factor, and that our inventories are taken on a basis of the cost or market, whichever is lower." He also testified that that method of calculating costs was a common practice and that similar deductions were made as to other departments in this store; that he had discussed those methods of deductions with appellant "throughout the time he was there"; and particularly at inventory times it was mentioned about depreciating shopworn merchandise at less value.

Originally, appellant questioned the returns from the year 1938, and charged that respondents had fraudulently charged his department for that year with hundreds of dollars worth of goods which had not been purchased by him. Respondents permitted appellant to employ an auditor to audit the books for that year. Instead of the shortage claimed, he found the books to be correct. Appellant abandoned further claim to any amount due him for that or previous years.

Allen testified that he was present when the 1939 inventory was taken and that some of the employees told him then that the inventories were being "marked down" due to depreciation; that he knew that if goods were marked down that they would have to be carried on the inventory at the marked-down price the next time they were inventoried and that then "he would be bound by that inventory." There was no evidence of falsification of any of the accounts between appellant and respondents. The evidence substantiates the court's findings and judgment.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

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52 Cal.App.2d 80

CALDWELL et al. v. GEM PACKING CO. et al.

Civ. 13580.

District Court of Appeal, Second District, Division 2, California.

May 12, 1942.

1. Action 🔑6

Appeal and error 🔑949

A trial court may refuse to entertain an action for declaratory judgment if the court concludes that its declaration is not necessary or proper at the time, and hence the District Court of Appeal is without power to review the trial court's action denying such a declaration, except where an abuse of discretion is shown.

2. Action 🔑6

Where there was no showing that trial court abused its discretion in refusing to grant declaratory relief and it was plain on the record that there was no basis for declaratory relief, demurrer to count seeking declaratory relief was rightly sustained.

3. Pleading 🔑192(2)

In action by partners engaged in wholesale meat business against vendor of packing plant and purchaser for damages for eviction of partners from portion of plant, partners' allegation that vendor transferred its interest in plant to purchaser, and that purchaser evicted partners, not by virtue of such transfer, but under a "title paramount", exonerated purchaser from liability to partners, and introduced such uncertainty into complaint as to require the sustaining of demurrer to the complaint on that ground.

4. Pleading 🔑312

In action for damages for eviction, terms of alleged lease control as to its meaning and character, and not the conclusions which the plaintiffs chose to place on the alleged lease by their allegations.

5. Landlord and tenant 🔑180(1)

To sustain a cause of action for eviction, it is essential that the contract relied on by the plaintiffs be a lease or a contract for a lease.

6. Landlord and tenant 🔑22(2), 180(1)

A letter from owner of meat packing plant to partners engaged in wholesale meat business, reciting that partners were to deliver not less than 100 head of livestock monthly to be slaughtered by owner of plant, that partners were to pay owner of plant a certain price per head, and that owner of plant should furnish all necessary labor and equipment and not only refrigeration, but in addition cooler space suitable for display and office space for partners, was not a "lease" or a "contract for a lease" which would give partners a cause of action for eviction.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract for a Lease" and "Lease".

7. Licenses 🔑44(1)

A mere permission by owner of realty to another to use an unidentified part of the realty is a mere "license" where the owner retains a dominion over it.

See Words and Phrases, Permanent Edition, for all other definitions of "License".

8. Landlord and tenant 🔑1

A permissive occupation of premises conferring a legal estate and possession thereof is essential to the relation of "landlord and tenant".

See Words and Phrases, Permanent Edition, for all other definitions of "Landlord and Tenant".

9. Fraudulent conveyances 🔑226

If there was no adequate consideration for the transfer of packing plant which thereby caused vendor to breach his contract with partners, the partners had an "adequate remedy at law" in having execution issue against the plant on any judgment recovered against the original owner of the plant for breach of contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Remedy at Law".

10. Torts ⚷12

If there was an adequate consideration for sale of packing plant, purchaser of packing plant was not liable to partners who had a contract with the vendor with respect to slaughter of livestock at so much a head, with incidental provisions for refrigeration and display of dressed meats, along with a limited office space for the partners, merely because the purchaser purchased the plant knowing that the effect of the purchase would be to cause the vendor to breach his contract with the partners.

11. Pleading ⚷214(5)

Conclusions alleged by plaintiffs in their complaint were not admitted by demurrer to the complaint.

12. Corporations ⚷1

The alleged fact that two stockholders of corporation which sold packing plant and corporation which purchased packing plant were fully cognizant of contract of corporation selling the plant with partners for slaughter of livestock, with incidental provisions for refrigeration and display of dressed meats, along with limited office space for partners, did not warrant piercing the corporate veil of either corporation and classing both as one, in order to permit partners to recover from the corporation purchasing the plant, for breach of contract.

13. Damages ⚷157(6)

Allegation of plaintiffs, made on information and belief, that they had been damaged, and that, when the damage was ascertained, they would ask permission to amend, created no issue.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Harry Caldwell and A. Himmelfarb, doing a wholesale business as the Model Meat Company, against the Gem Packing Company, the Producers Packing Company, and others, for a declaratory judgment and for damages because of plaintiffs' alleged eviction from certain premises. From an adverse judgment, the plaintiffs appeal.

Affirmed.

I. Charles Rubin, of Los Angeles, for appellants.

Byron O. Smith and Stephens, Jones, Inch & La Fever, all of Los Angeles, for respondent.

HANSON, Justice pro tem.

Appellants, Harry Caldwell and A. Himmelfarb, doing a wholesale business as Model Meat Company, brought this action against the Gem Packing Company, a corporation, predicated upon an alleged written contract between the parties, and against the Producers Packing Company, a corporation, which subsequently purchased the plant of the Gem Packing Company. The theory upon which liability was predicated against the purchasing corporation was based on the claim that the contract, aside from certain personal agreements therein contained, was a lease of a part of its plant by Gem to plaintiffs, and so Producers took title thereto subject to the lease and the possession which plaintiffs alleged they held to a part of the premises. Demurrers filed by Producers to the original complaint, the amended complaint and the second amended complaint were all sustained, the last being without leave to amend.

The second amended complaint was in two counts, one for a declaratory judgment and the other for a judgment for damages because of plaintiffs' alleged eviction from the plant. In the first two complaints plaintiffs alleged that one Oswald was at all times the owner of the plant and its premises and that he evicted the plaintiffs on May 5, 1941. In the last amended complaint, however, plaintiffs alleged that it was Producers which evicted them, without any showing therein as to the reason for this material change in allegation.

The contract under which the plaintiffs claim is in the form of a letter from the Gem Packing Company to the plaintiffs under date of February 2, 1941, which was "accepted" by the signature of the plaintiff Caldwell but without the signature of plaintiff Himmelfarb. For our purposes we shall assume, without deciding, that this acceptance was sufficient to make a binding contract notwithstanding the claim made to the contrary by the respondent. The letter recites that plaintiffs on their part are to deliver not less than 100 head of livestock monthly to be slaughtered by Gem within 24 hours of the receipt thereof, and for which plaintiffs are to pay Gem a certain price per head depending upon the type of animals, whether sheep or cattle. The letter recites that Gem shall supply all necessary labor and equipment and that it is to furnish not only refrigeration for the livestock killed but in addition cooler space suitable for display and office space for plaintiffs. The letter closes with the statement that the arrangement as narrated is to continue for a period of three years. Both counts of the complaint are predicted on the theory that the letter constituted a lease, and on that theory the first count seeks a declaration of the rights and duties of the parties under the alleged lease, and the second count seeks damages for eviction along with incidental damages alleged to have been suffered because of Producers' breach of the terms of the lease.

[1, 2] *Declaratory Relief.* As it is discretionary with the trial court to refuse to entertain an action for declaratory judgment where it concludes its declaration or determination is not necessary or proper at the time and under all the circumstances, we are without power to review its action denying such a declaration except where an abuse of discretion is shown. Monahan v. Department of Water & Power, 48 Cal. App.2d 746, 120 P.2d 730. There is no showing here that such discretion was abused. Moreover, it is plain on this record that there was no basis for declaratory relief against Producers. Accordingly, the demurrer of Producers to the count seeking declaratory relief was rightly sustained.

Damages for Eviction. With the view of stating a cause of action in damages for eviction plaintiffs alleged that they were in the "exclusive right and possession" of an office space approximately 10 by 12 feet within the main office of the plant and of two designated rails in the "main cooler"; that on May 5, 1941, while plaintiffs were thus in possession Gem transferred its right, title and possession of the plant and premises to Producers; that Producers evicted the plaintiffs "under title paramount to defendant Gem Packing Company; that plaintiffs * * * were compelled to and did rent office space and refrigeration, labor and cooler space suitable for the plaintiffs' business, and which the plaintiffs * * * are informed and believe will be to their damage in an amount unknown to plaintiffs at this time, and when the same are ascertained plaintiffs * * * will ask leave of court to amend this complaint to set forth the true amount thereof."

[3-8] If, as alleged, Gem transferred its interest in the plant to Producers and the latter evicted plaintiffs not by virtue of such transfer but under a "title paramount," it is self-evident that plaintiffs by so pleading exonerate Producers from liability to them. Liability against Producers could be spelled out only by showing that Producers received title from Gem subject to an estate of possession in favor of plaintiffs. By the allegation in question plaintiffs not only failed to show a superior right of possession in themselves, good against Producers, but they introduced such uncertainty into their complaint so as not only to warrant but to require the court to sustain the demurrer on that ground. But quite apart from this defect of pleading, it is obvious that no cause of action for eviction was or could be stated in view of the terms of the letter contract. This for the reason that its terms control as to its meaning and character and not the conclusions which the pleader chose to place upon it by his allegations. To sustain a cause of action for eviction it is essential that the contract relied upon be a a lease or a contract for a lease. The letter contract here involved clearly is neither. By it no rent is reserved as such, and much less is there any indication from its language that Gem intended to divest itself of the possession of any part of its property and place such interest or exclusive possession in the appellants. A mere permission by the owner to another to use an unidentified part of his premises is a mere license, where the owner retains dominion over it. Tips v. United States, 5 Cir., 70 F. 2d 525. A permissive occupation of premises conferring a legal estate, and possession thereof, is essential to the relation of landlord and tenant.

In its essence the contract in question is one to slaughter livestock at so much per head, with incidental provisions for refrigeration and display of the dressed meats, along with a limited office space, without any separate rental for the use of the facilities provided. The contract contemplates that these incidental facilities are to be supplied only if one hundred head of livestock are slaughtered per month. Accordingly the contract is one for a service to be rendered, with the privilege of the use of the specified facilities, and not one of a lease of premises or any part thereof. Moreover, as no rent is reserved the consideration payable may not be apportioned so as to disclose a rent. As the terms of contract will not sustain a cause of action for damages for eviction, the demurrer to that count, so far as it is based on the theory of eviction, was rightly sustained.

[9-13] We come then to the further allegations of the count which endeavor to plead a cause of action for breach of contract. With respect to these allegations it is sufficient to say that the pleader alleged, by way of conclusion and not by any statement of ultimate facts, that Gem and Producers conspired to have the assets of Gem transferred to Producers without a consideration and for the purpose of depriving plaintiffs of their rights under the letter contract; that Gem is not in a position to respond to plaintiffs for the damages which they have sustained by the eviction on the breach of the contract, and that unless it be enforced against Producers plaintiffs will suffer great loss. Parenthetically, it may here be observed that if there was no adequate consideration for the transfer of Gem's assets to Producers an adequate remedy for plaintiffs lay in having execution issue against the property transferred upon any judgment recovered against Gem. However, if there was an adequate consideration for the transfer we know of no principle of law which would make Producers liable to plaintiffs merely because it sought to and did purchase its assets knowing that the effect thereof would be to cause Gem to breach its contract. Even if the motive of Producers involved this supposed evil intent, motives are not actionable. But apart from this, the conclusions were not admitted by the demurrer and so must be regarded as not having been alleged. Aside from the allegations as narrated, and certain allegations to the effect that certain expense and damage had been sustained by plaintiffs, the only other allegation is that two stockholders of each corporation controlled both corporations and were fully cognizant of plaintiffs' contract with Gem. This fact, as we have already indicated, is of no materiality and is wholly inadequate to warrant piercing the corporate veil of either corporation and classing both as one. In passing we might observe that the allegation by the plaintiffs, made upon information and belief, that they have been damaged and that when the damage is ascertained they will ask permission to amend, created no issue. If plaintiffs were no more certain of their damage they had nothing to present to the court in vindication of their alleged rights.

The demurrer was rightly sustained, for the reason indicated and others which we have not taken time to state.

Judgment affirmed.

McCOMB, J., concurred.

W. J. WOOD, Acting P. J., concurred in the judgment.

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52 Cal.App.2d 178

HARRISON et al. v. GAMATERO et al.

Civ. 13072.

District Court of Appeal, Second District, Division 3, California.

May 21, 1942.

Rehearing Denied June 20, 1942.

Hearing Denied July 16, 1942.

1. Automobiles ⇨244(36)

In seven year old child's action against motorist for injuries received when struck by second motorist while recrossing street to defendant's automobile after mailing letter for defendant, evidence established that defendant's negligence in double parking across street from mail box was the "proximate cause" of plaintiff's injury. Vehicle Code, § 586(h), St.1935, p. 192.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

2. Negligence ⇨134(11)

All that is necessary to establish negligence as a "proximate cause" of an injury is evidence which may reasonably and fairly prove that the injury was one that should reasonably have been anticipated as a natural and probable consequence, and as immediate result of the negligence.

3. Automobiles ⇨246(51)
Trial ⇨350(5)

In child's action against motorist with whom child had been riding for injuries sustained when struck by second motorist, where evidence showed defendant's negligence in double parking across street from mail box at intersection and directing child to mail defendant's letter, trial court did not err in giving an instruction on law against double parking and submitting special interrogatory whether double parking of defendant contributed proximately to plaintiff's injury. Vehicle Code, § 586(h), St.1935, p. 192.

4. Automobiles ⚷181(2)

Where motorist struck child while child was recrossing street to defendant's double-parked automobile after having mailed letter for defendant, child was not a "guest" at time of injury within statute relieving defendant motorist from liability for injuries to guest not caused by motorist's intoxication or wilful misconduct. Vehicle Code, § 403, St.1935, p. 154; § 586(h), St.1935, p. 192.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest".

5. Automobiles ⚷245(8, 44)

In child's action against motorist for injuries when struck while recrossing street to another motorist's parked automobile in which child had been riding, evidence that child was struck some 15 feet north of a crosswalk, and that defendant motorist was driving at some 20 miles per hour, raised question for jury whether defendant's speed and manner of driving squared with his duty to exercise ordinary care.

6. Automobiles ⚷162(5)

Where motorist struck child while child was recrossing street to motorist's parked automobile in which child had been riding, it was defendant motorist's duty to use such care and caution as the circumstances demanded, and careful driving of an automobile under such circumstances required alert observation of the dangers laying, or apparent, in defendant's path, and sufficient concentration immediately to apprise defendant of the movements of vehicles or pedestrians.

7. Automobiles ⚷162(1)

The presence of a child in a particularly hazardous position with relation to a moving vehicle is a warning of danger, and a driver who fails to take into account fact that children act impulsively and swiftly, and who anticipates only that they will act as adults under similar circumstances, fails in his duty to exercise care commensurate with the apparent danger, and slight or momentary inattention may constitute negligence where the danger is close at hand.

8. Automobiles ⚷244(7)

In child's action against motorist for injuries when struck while recrossing street to another motorist's parked automobile after having mailed letter for parked motorist, evidence sustained verdict for plaintiff on issue of defendant's negligence of failing to do everything possible to avoid accident, and failing to see plaintiff sooner. Vehicle Code, § 403, St.1935, p. 154; § 586(h), St.1935, p. 192.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Myrna Jean Harrison, a minor, etc., and others against August Tamayo Gamatero and others for injuries from an automobile accident and for expenses of medical care. Verdict and judgment for plaintiffs, and defendants appeal.

Affirmed.

Hearing denied: CURTIS and EDMONDS, JJ., dissenting.

Nourse & Jones, Betts & Garrison, John A. Loomis, and Balter, Landis & Balter, all of Los Angeles, for appellants.

Lasher B. Gallagher, of Los Angeles, for respondents.

SHINN, Justice.

Plaintiff Myrna Jean Harrison, a child aged seven and one-half years, recovered a judgment for personal injuries sustained in an automobile accident, and her father, Benjamin Harrison, recovered a judgment for expenses of medical care, after verdict by a jury, against defendants Gamatero, King, and Schartenberg, who appeal from the judgment.

Defendant Geraldine Schartenberg took Myrna Jean Harrison (herein referred to as plaintiff) into her automobile one afternoon, drove westerly on Sunset Boulevard to Doheny Drive (between Hollywood and Beverly Hills), turned to the right into Doheny and double-parked her car on the east half of Doheny north of the north cross walk on Sunset and sent plaintiff across the street to the northwest corner of the intersection to mail a letter for her, while she remained in her car. Plaintiff walked south to the cross walk, crossed Doheny Drive to the northwest corner with the traffic signal, which was open for east and west traffic, mailed the letter, and during her attempted return to the Schartenberg car and while crossing Doheny Drive at a point ten feet or more north of the cross walk, and while still in the westerly half of Doheny Drive, was struck by an automobile being driven in a southerly direction on Doheny by defendant Gamatero, who was employed by, and at the time of the accident was in the service of, defendant King.

None of the witnesses testified to having seen plaintiff leave the curb to recross the street. Defendant Gamatero made conflicting statements as to whether he saw her before his car struck her; plaintiff was unable to recall what occurred after she left the mail box and before the accident happened, and none of the witnesses testified to what her actions were during that interval.

All of the defendants pleaded contributory negligence of plaintiff as a defense to the action, but this defense is not relied upon by any of them upon their several appeals.

We shall first discuss the evidence which is relied upon to show negligence in the conduct of defendant Schartenberg. There was testimony to the effect that her car was parked several car lengths north of the cross walk on Sunset and about one and one-half feet from the left side of cars parked at the easterly curb. As she sat in her car Miss Schartenberg looked back to the south and watched plaintiff walk down to and across the street in the cross walk and proceed to two mail boxes, one for letters and the other for packages, that were on Doheny slightly north of the corner. There was at least one automobile parked on the west side of Doheny a short distance north of the mail boxes. Miss Schartenberg lost sight of plaintiff as she reached the mail boxes, at which time she observed Gamatero's car about one and one-half car lengths in front of her own and she did not thereafter see plaintiff before the latter was struck and knocked down.

[1, 2] Admitting that the double parking of her car was in violation of section 586(h) of the Vehicle Code, St.1935, p. 192, she contends that it could not have been a proximate cause of the accident. The argument in substance is that the implied finding of the jury on that issue is untenable as having no reasonable basis in fact. It is contended that the accident to plaintiff was one that could not have been reasonably anticipated as a natural or probable result of the double parking of the car and that it would have as readily occurred if the car had been parked at the curb in a lawful manner. We do not agree with this contention but upon the contrary we observe in these facts a direct connection between the double parking of the car and its position in the street and the actions of plaintiff in the course of carrying out Miss Schartenberg's instructions and which resulted in the casualty. Miss Schartenberg remained in her car because she was unable to find room to park it at the curb, and sent plaintiff across the street to mail the letter which she probably would have mailed herself had her car been properly parked. The circumstance that the car was parked in an unusual place and that Miss Schartenberg was waiting therein for plaintiff to finish her errand may well have tended to hurry plaintiff upon her errand and in returning to the automobile, and this desire for haste upon the plaintiff's part may also have caused her to start across the street at a point away from the cross walk and along a more dangerous route. It would be reasonable to believe that had the car been properly parked at the curb, even though Miss Schartenberg had remained in it, plaintiff would have felt less necessity for haste and would have proceeded more cautiously. The desire not to keep others waiting is a natural one and induces hurried or precipitate action. "Cutting corners" or taking a diagonal course is not infrequently induced by a desire to make haste. Again, while she was sending plaintiff on a hazardous errand, for both Doheny Drive and Sunset are busy streets, Miss Schartenberg remained in a position from which plaintiff was not visible after she reached the mail box, and she was therefore not in a position to warn plaintiff of danger from traffic as she recrossed the street. The double parking of the car was an unlawful act and constituted an act of negligence imposing liability for injuries proximately caused thereby. The stationing of the car at a forbidden location was only one of a series of acts of defendant Schartenberg and it cannot be isolated from the remainder of her plan and purpose to send plaintiff across the street to mail the letter while she remained in the car awaiting plaintiff's return. Certainly it cannot be said as a matter of law that plaintiff's acts after she left the Schartenberg car and

until she was struck by the other car were not influenced directly by the location of the Schartenberg car and by the other circumstances which we have related. These considerations, we think, reasonably lead to the belief that there was a direct connection between Miss Schartenberg's acts of negligence in sending plaintiff on the errand under the circumstances in evidence and plaintiff's resulting injury. If Miss Schartenberg was negligent, her negligence was continuous and an active factor contributing proximately to the result. All that is necessary to establish negligence as a proximate cause of an injury is evidence which may reasonably and fairly be said to prove that the injury was one that should reasonably have been anticipated as a natural and probable consequence and as an immediate, as distinguished from a remote or improbable, result of the negligence. Plaintiff's evidence met that requirement.

[3] The jury was instructed as to the law against double parking and answered in the affirmative a special interrogatory whether the double parking of Miss Schartenberg's car contributed proximately to the injuries and damage sustained by plaintiff. It follows from the views we have stated on that subject that there was no error in the giving of the instruction or the submission of the special interrogatory.

[4] Defendant Schartenberg invokes the guest law, § 403 of the Vehicle Code, and seeks to place plaintiff in the position of a guest and as such having no right to recover for injuries which were not caused by intoxication or wilful misconduct. The injury to a guest for which he may not recover unless it has proximately resulted from the intoxication or wilful misconduct of his driver host with whom he has accepted a ride is one which occurs "during such ride." Certainly plaintiff was not riding in the automobile within the meaning of said section 403 at the time of her injury. Moreas v. Ferry, 1933, 135 Cal.App. 202, 204, 26 P.2d 886; Prager v. Isreal, 1940, 15 Cal.2d 89, 94, 98 P.2d 729.

On the appeal of Gamatero and King the contention is that the former was driving carefully; that plaintiff suddenly darted out from behind an automobile directly into the path of the car; that Gamatero did everything possible to avoid the accident after he saw plaintiff, and that he was not negligent in failing to see her sooner. Of course if the jury had entertained this view of the facts defendants Gamatero and King would have been exonerated from liability. However, there was testimony that Gamatero was looking at Miss Schartenberg as he approached and at least until he had passed her car; he admitted to one of plaintiff's witnesses that he had seen plaintiff get out of the Schartenberg car and cross the street in the cross walk, and there was testimony that he was driving as fast as 20 miles an hour as he approached the cross walk. At the trial he denied having seen plaintiff before she was struck and also testified to having seen her running toward his car and only a few feet away. He denied having admitted seeing her leave Miss Schartenberg's car and cross the street.

[5-8] There was uncertainty as to the location of Miss Schartenberg's car and the point where plaintiff was struck with relation to the cross walk but the uncertainty does not weaken plaintiff's case against Gamatero and King. There was testimony that plaintiff was struck approximately 15 feet north of the cross walk. If that was so and if it was believed that Gamatero was driving at about 20 miles per hour, it was for the jury to decide whether his speed and manner of driving, in view of all of the surrounding circumstances that were known or should have been known to him, squared with his duty to exercise ordinary care. There was testimony that plaintiff was struck down five or ten feet south of the Schartenberg car. If that was so, the jury might have inferred negligence from the testimony that Gamatero was not looking ahead but was looking to the east and at Miss Schartenberg as he passed her car. In either event if he had seen plaintiff leave Miss Schartenberg's car and cross the street the jury may have considered that it would have been the part of ordinary prudence to anticipate that plaintiff might hurry back to the double-parked car and to be correspondingly careful to observe whether she did so. It was his duty to use such care and caution as the circumstances of the situation demanded and it would not have been unreasonable for the jury to find that he was inattentive to his duty and careless in looking away from and failing to observe plaintiff's actions. The careful driving of an automobile under the circumstances in evidence required alert and constant ob-

servation of what dangers lay or might appear in the path of the car and a concentration upon the business of driving sufficient to immediately apprise the driver of the movements of vehicles or pedestrians. The presence of a child in a potentially hazardous position with relation to a moving vehicle is a warning of danger and a driver who fails to take into account the fact that children act impulsively and swiftly, and who anticipates only that they will act as adults would under similar circumstances, fails in his duty to exercise care commensurate with the apparent danger. Slight or even momentary inattention may constitute negligence where the danger is close at hand. Gamatero, if he had seen plaintiff leave the waiting car, would not have been justified in relying upon her using the cross walk in returning to the car, to the extent that would have been permissible had she been an adult. Upon any of several factual situations, deducible from the evidence, there was reason to believe that by the use of ordinary care Gamatero could and would have avoided the accident.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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52 Cal.App.2d 126

In re NEWMAN'S ESTATE.

NEWMAN v. RILEY, State Controller.

Civ. 3034

District Court of Appeal, Fourth District, California.

May 15, 1942.

Hearing Denied July 13, 1942.

1. Taxation 🔑879(1)

The phrase "contemplation of death", in Inheritance Tax Act, refers to expectancy of death which actuates a person's mind in execution of his will, rather than general expectation of death which all men have, but is not limited to expectation that death is imminent or likely to occur within few years. Gen.Laws 1937, Act 8495, § 2(4).

See Words and Phrases, Permanent Edition, for all other definitions of "Contemplation of Death".

2. Taxation 🔑879(1)

Whether gift is made in "contemplation of death", within Inheritance Tax Act, is essentially question whether gift was in nature of distribution of donor's property or intended merely as lifetime favor to donee. Gen.Laws 1937, Act 8495, § 2(3) (a), (4).

3. Taxation 🔑879(1)

Where contemplation of death was one of motives for, or important moving cause of, property transfer, which would not otherwise have been made, transfer is taxable, though other substantial motives contributed to result. Gen.Laws 1937, Act 8495, § 2(3) (a), (4).

4. Taxation 🔑879(1)

If one purpose of donor's transfer of property is distribution of his property as substitute for testamentary or similar disposition thereof, thereby merely hastening or anticipating effects of what would otherwise be such a disposition, the transfer is taxable. Gen.Laws 1937, Act 8495, § 2(3) (a), (4).

5. Taxation 🔑879(1)

A donor's desires to see donee have present use of property transferred by donor to donee and to establish donee with separate competency are not necessarily inconsistent with transfer of property in "contemplation of death" within Inheritance Tax Act. Gen.Laws 1937, Act 8495, § 2(3) (a), (4).

6. Taxation 🔑879(1)

Where exclusive motive for donor's transfer of property to donee is one associated with donor's continued life, rather than his death, transfer is not taxable, but where such motive, though present, is not exclusive, transfer may be taxable. Gen.Laws 1937, Act 8495, § 2(3), (a), (4).

7. Taxation 🔑879(1)

Evidence *held* sufficient to sustain Superior Court's finding that husband's transfers of his home, all of his remaining real estate, and certain securities, constituting about 73 per cent. of value of all his property, to his wife about five, four, and three years, respectively, before his death, were made in "contemplation of death" within Inheritance Tax Act. Gen.Laws 1937, Act 8495, § 2(3) (a), (4).

8. Evidence ⟹14

It is matter of common knowledge that most men do not divest themselves of their whole estates, or a large proportion thereof, except as result of that contemplation of death which actuates mind of person in execution of his will.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

In the matter of the estate of David Lavine Newman, deceased. From an order fixing inheritance taxes claimed by Harry B. Riley, as State Controller, Neva H. Newman, individually and as executrix of deceased's estate, appeals.

Affirmed.

Joseph C. Kimble, Howard B. Thomas, William N. Snell, Oliver M. Jamison, and Kimble & Thomas, all of Fresno, for appellant.

James W. Hickey and Alvin P. Jacobs, all of Sacramento, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order fixing inheritance taxes under the Inheritance Tax Act of 1935, as amended, Deering Gen.Laws, 1937, Act 8495. The controversy is as to whether three transfers of property made by the decedent to his wife were transfers in contemplation of death within the meaning of the statute.

Mr. Newman and the appellant were married in 1924, he being 53 years of age and she 37. He was then engaged in business and she owned a gift shop which she continued to operate after the marriage, with encouragement and some assistance from him. In 1925, feeling that he had sufficient means and desiring to travel, he retired from business. Between that time and 1936, he made three trips around the world and numerous trips within this country. In 1930, he became a partner in the Penny-Newman Grain Company. From 1932, until April 25, 1939, when he died as a result of a heart attack suffered the previous day, he took an active part in this business and was in the habit of working long hours each day. The business was successful and his income therefrom averaged between $6,000 and $7,000 a year.

In the meantime and about February, 1934, the depression forced the appellant to discontinue her gift shop business. In July, 1934, Mr. Newman conveyed his home, appraised at $13,500, to the appellant. In August, 1935, he conveyed to her all of his remaining real estate, consisting of rental properties appraised at $23,000. In May, 1936, he transferred to her certain securities appraised at $21,097. These three transfers, totaling $57,597, constituted about 73 per cent of the value of all of his property and the only property he retained was his interest in the Penny-Newman Grain Company, which interest was appraised at $21,417. At some time prior to the making of the first of these transfers, the exact date not being disclosed, the deceased had made a will leaving all of his property to the appellant with the exception of small bequests to two nieces and two nephews. In June, 1936, and about a month after the last transfer in question, he made a new will eliminating the bequests to the nieces and nephews and leaving everything to the appellant. This will was made shortly before his last trip to Europe.

It is conceded that Mr. Newman was a generous man, that he had a cheerful disposition, and that about a week before his fatal heart attack he and his wife made a trip to Southern California and selected a lot on which they planned to build their future residence. It is admitted that at the time of the transfers he was in good health for a man of his years, that he worked long hours, and that he enjoyed rather strenuous automobile trips during vacations and at weekends. The appellant testified that her husband had expressed a desire to have her continue in some business which would enable her to use her artistic talents and her knowledge of interior decoration but which would not be so confining as the retail business; that he had felt that if each of them were established with separate financial competencies any business reverses suffered by one would not affect the other and that this could best be accomplished by segregating his business and non-business properties; that he suggested that she take over the ownership and management of the home and any rental property; that in July, 1934, he transferred the home to her and she became actively engaged in the management of the real properties; that about a year later, he transferred the remainder of his real property to her; that she collected the rents and arranged for any improvements, and later purchased some lots and built two homes for sale; that the improvements on the rental properties came from the rentals as "I continued to do as Mr. Newman had done in the past"; that in May, 1936, her husband transferred his securities to her so that she could finance the building of new homes; and that she sold some of the stocks and used the proceeds for the purpose of financing a third house which she built.

The inheritance tax appraiser filed a report in which he found that these three transfers were all made in contemplation of death within the purview of section 2, (3) (a), (4) of the Inheritance Tax Act. The appellant filed objections to this portion of the report. After a hearing, the court found that the decedent had made these transfers without valuable or adequate consideration and in contemplation of his death, and entered an order overruling the appellant's objections and fixing the inheritance tax on these transfers, including the property covered by the will, at $1,612.37. This appeal followed.

The appellant contends that the evidence is not sufficient to support the court's finding to the effect that these transfers were made in contemplation of death. The questions involved have been ably and exhaustively briefed on both sides. While the parties agree that the determining factor in such a case is the motive which actuates the transferor in making the gift they disagree somewhat as to the proper test that should be applied. The appellant argues that the test lies in the dominant and impelling motive of the transferor and that where that motive is associated with his continued life, rather than with his death, the transfer is not in contemplation of death. It is then argued that it must be here held that the evidence is not sufficient to support the essential finding since it here appears that the deceased was in good health for a man of his years, that he was active in business and on pleasure trips, that he was making definite plans for the future, that there is direct evidence that two motives in making the transfers were to see the appellant reestablished in a business wherein she might use her artistic talents and to establish her with an independent financial competency which would be a protection to both of them, and that there is no direct testimony of any other motives on the part of the deceased which might be construed as being associated with his death.

The respondent argues that in order to make such a transfer taxable under the statute contemplation of death need not be the sole or even the dominant motive provided it is one of the impelling motives; that such a transfer is taxable if contemplation of death was a motive without which the transfer probably would not have been made, even though other motives existed; and that under the rule established in this state such transfers are taxable if they are "gifts in lieu of testamentary disposition or transfers made by a person because of the general expectancy of death which actuates the mind of a person on the execution of his will."

[1] It rather clearly appears from the wording of our statute, Subd. (4), § 2, Inheritance Tax Act, that the words "contemplation of death" refer to that expectancy of death which actuates the mind of a person in the execution of his will rather than to that general expectation of death which all men have. It is well settled in this state, however, that the phrase in question is not limited to an expectation that death is imminent or that it is likely to occur within a few years. The controlling rules and principles have been sufficiently established in this state and it is unnecessary to consider or analyze the varying viewpoints in the many decisions which have been cited from other states and from federal courts. It may also be observed that in several particulars views expressed in some of the earlier decisions in this state have been somewhat modified or changed, in effect, by later decisions.

In Re Reynolds' Estate, 169 Cal. 600, 147 P. 268, 270, where an elderly man, who must have known that he had not long to live, made large gifts to his wife and to his son, an order taxing the gifts was affirmed. The court there said: "Nothing in our law compels us to adopt the restricted construction put by the courts of New York upon their own statute, and everything in our law directs that a liberal construction should be placed upon it to the end that its provisions be not evaded." In Spreckels v. State, 30 Cal.App. 363, 158 P. 549, 551, an elderly woman who suffered from heart trouble but did not expect immediate death, transferred large properties to her children, there being evidence that she had said that her income from other sources was larger than she needed and that she desired to distribute a part of her belongings to her children so that they might use and enjoy the same during her lifetime. A finding that the transfers were not made in contemplation of death was affirmed, the court there saying: "A reasonable and just view of the law in question is that it is only where the transfer of property by gift is immediately and directly prompted by the expectation of death, that the property so transferred becomes amenable to the burden" and that "'It is only when contemplation of death is the motive without which the conveyance would not be made that a transfer may be subjected to the tax.' That is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer." The court stated that the evidence justified the inference that there was no thought of immediate death in the donor's mind and that the direct and impelling motive for the transfers was not that of the contemplation of her death. And, after pointing out that the evidence would also have justified a contrary conclusion, the court said, "each case arising under the statute in question * * * must rest upon its own peculiar facts, and the adjudicated cases can, as a rule, do little, if any, more than to illustrate the application of the law to the particular facts of particular cases." In McDougald v. Wulzen, 34 Cal.App. 21, 166 P. 1033, an order refusing to tax a transfer was affirmed. The grantor was 83 years old and in reasonably good health. There was evidence that he transferred the property to his wife because it annoyed him to take care of it. The court held the evidence sufficient to sustain the findings although contrary findings, if made, would have had to be sustained. In Re Minor's Estate, 180 Cal. 291, 180 P. 813, 4 A.L.R. 456, an order fixing a tax was reversed since the asserted gift was made pursuant to an antenuptial agreement and the court held that marriage was the primary and controlling consideration which necessarily excluded any idea that a desire to make a testamentary disposition was any substantial cause of the transfer.

In Re Pauson's Estate, 186 Cal. 358, 199 P. 331, 334, an order fixing a tax was affirmed. The donor, who was 78 years old and in vigorous health, transferred some $600,000 to a corporation practically all of the stock of which he gave to his children. He was voted a salary of $20,000 a year to cover his expenses and died in less than a year from a sudden illness. The court stated that the question of whether or not a gift is made in contemplation of death is a question of fact and that if the evidence justifies an inference that the transfer was or was not made in contemplation of death the finding cannot be disturbed on appeal even though the appellate court might draw a contrary inference from the same evidence. In discussing the provisions of the 1911 act, which are now found in subdivision (4) of section 2 of the Inheritance Tax Act, the court said that it saw no particular difficulty in interpreting these provisions in the light of the express purpose of the Legislature "to tax any and all transfers * * * which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws," and in the light of the litigation pending when the definition was placed in the statute. The court then said:

"In other words, the taxing of transfers was purely ancillary to and in aid of taxes imposed upon the right of succession; the purpose of such ancillary legislation being to tax transfers which were made in lieu of succession or testamentary disposition. That the object of such imposition of taxes upon transfers made in contemplation of death is to prevent the evasion of laws imposing a tax upon the right to succeed to an estate at death is conceded in all the cases. It is obvious that this purpose is not achieved when the phrase 'transfers made in contemplation of death' is limited, as in New York, to gifts causa mortis. This court, in Re Reynolds' Estate, supra, declined to follow this narrow view. It is equally obvious that the legislative intent will be frustrated if the transfer, in order to be taxable, must be made with a sense of impending death, for under this view no tax can be collected where a donor in expectation of death and for the purpose of vesting title in his heirs makes a transfer inter vivos with no contemplation of death other than that involved in arranging his affairs so that when the contemplated event occurs the property will be distributed or vested in accordance with his wishes in that event. * * *

"It is equally clear that our Legislature of 1911 intended to define the phrase 'in contemplation of death' so as to cover, among other things, all dispositions of property 'without valuable and adequate consideration,' substantially testamentary in character (see § 27, supra, Stats.1911, c. 395, p. 726), or, to use the language of the statute, to tax 'all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws.' The statutory definition of the phrase, contemplation of death, includes: First, 'that expectancy of death which actuates the mind of a person upon the execution of a will'; and, second, is in no wise to 'be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift causa mortis'; and, third, 'it is hereby declared to be the intent and purpose of this act to tax any and all transfers (and this includes transfers in contemplation of death) which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws.' The phrase 'all transfers' in this clause certainly includes transfers made 'in contemplation of death.' It is clear from a consideration of this definition that it was thereby intended to cover transfers made by a donor in lieu of a transfer by will. * * *

"If the donor in that frame of mind decides that he will make a gift in lieu and instead of making a will and to accomplish substantially the same purpose he would accomplish by a will, such a transfer clearly comes within the scope of the statute in question."

The court then pointed out that there was nothing in Re Minor's Estate, supra, which was inconsistent with this view and then distinguished Spreckels v. State, supra, and McDougald v. Wulzen, supra, also saying that in the last two cases it was conceded that judgment would have been affirmed had a contrary conclusion been reached by the trial court.

In Re Snyder's Estate, 71 Cal.App. 324, 235 P. 54, 56, an order fixing a tax upon a building transferred by a mother to her son was affirmed. The son contended that the impelling motive for the transfer was his mother's desire to have him manage her affairs in accordance with a contract between them, and not her contemplation of death. The court there said: "But it is not necessary that the decedent should have made a direct statement of her motives. If the circumstances shown are such as in the mind of a reasonable man might justify the inference that, in coming to an agreement with her son, as well as in making said deed, she was actuated by the contemplation of death, that will be sufficient to sustain the court's finding to that effect."

After observing that "If it sufficiently appears that interests having relation to the ordinary affairs of life, rather than death, constituted the primary and controlling consideration for the making and ultimate consummation of an agreement to transfer property, the transfer will not be subject to the tax," the court then held that the evidence in that case justified the inference that the probability of the mother's death in the near future "was an important moving cause" of the transfer.

In Chambers v. Larronde, 196 Cal. 100, 235 P. 1024, 41 A.L.R. 980, an order fixing a tax on a large amount of property transferred by a woman 84 years old to her children was affirmed. It was held that the phrase "in contemplation of death" as used in the 1911 statutes imports "a transfer of property; the transferor having in mind the general expectancy of death which ordinarily actuates one in the execution of his will" and that these words are sufficiently broad "to cover any and all transfers of property * * * from one person to another in anticipation of death or in lieu of testamentary disposition." The court also said that the fact that there had been no discussion or mention of death in connection with making the transfers "would not necessarily be opposed to a conclusion that decedent acted under an undisclosed intent * * *."

In Re Boole's Estate, 98 Cal.App. 714, 277 P. 759, 763, an order fixing a tax was affirmed. The donor died at the age of 63 and five years after making the transfer in question. While his health had been seriously impaired over a period of five years there was evidence that he had no fear or expectation of immediate death. After stating that the latter fact did not negative the existence of that contemplation of death which is defined in the statute, the court said: "The state's burden of proof is to show the motive or motives of the decedent which actuated the transfers. From the very nature of this burden, a case capable of direct proof of the issue will seldom arise. The motive will usually have to be inferred from other facts such as the acts of the decedent, the surrounding circumstances, and the nature of the transfer. For these reasons the question is one which is peculiarly within the province of the trial court."

[2-6] The question whether or not a gift is one made in contemplation of death is essentially a question as to whether such gift was one in the nature of a distribution of the donor's property or was one which

was intended merely as a lifetime favor to the donee. While the solution may depend upon an impelling and inducing motive or motives it does not always depend upon any single motive which controls to the exclusion of all others. Where a contemplation of death is one of the motives, an important moving cause of the transfer, and one without which the transfer would not be made, the transfer is taxable even though other substantial motives may have contributed to the result. If one purpose of the transfer is a distribution of the donor's property as a substitute for testamentary or similar disposition, with the effect of merely hastening or anticipating the effects of what would otherwise be a testamentary or similar disposition, the transfer is taxable. A desire to see a donee have a present use of the property and to have the donee established with a separate competency are not necessarily inconsistent with a transfer of the property in contemplation of death within the meaning of the statute. Such desires and motives may well accompany an intention to make an advanced delivery to a donee of property which the donor intends shall ultimately go to him, that is to say, an intention to make a present distribution of property in lieu of a testamentary or similar distribution. Where the exclusive motive for the transfer is one associated with the continued life of the donor rather than with his death the transfer is not taxable under this statute. But where such a motive, although present, is not exclusive the transfer may be taxable.

[7, 8] In view of the principles above set forth it must be held that the evidence here is sufficient to sustain the finding that all of these transfers were made by the decedent in contemplation of death, within the meaning of the statute. The evidence relied upon by the appellant is not sufficient to compel a finding contrary to that made by the court. The existence of the motives thus indicated and relied upon by the appellant does not establish, as a matter of law, the absence of the other motive, "contemplation of death," which is essential here. And there is other evidence which justifies an inference that a contemplation of death at some time in the future was an important moving cause of each of these transfers. The decedent transferred to the appellant over $57,000 worth of property, constituting about 73 per cent of all he had. As the court said in Re Schweinler's Estate, 117 N.J.Eq. 67, 175 A. 71, 78: "As a matter of common knowledge, most men do not divest themselves of their whole estates or a large proportion thereof except as the result of that contemplation of death already discussed. When such a gift is made, therefore, it is more probable than not that it was made as the result of such contemplation."

The transfer included all of the property owned by the decedent except his interest in the partnership through which he was engaged in business, which was valued at about $21,000. The transfers were made to his wife, who was 16 years younger than he was. She was not only the natural object of his bounty but she was given the bulk of his estate in his first will and all of it in the second will. The first of these wills was executed before any of the transfers were made and the other within a month after the last transfer. The fact that the deceased devised and bequeathed practically all of his property to the appellant, then transferred about three-fourths of it to her outright and then, within a month, made a new will giving her all of his estate, is significant and indicates that throughout all of these transactions he had in mind that expectancy of death at sometime in the future which actuates the mind of a person in the execution of his will, and that one of his motives in making the transfer was to make in advance a partial distribution of his property without waiting for the time when his will should take effect. The question was one of fact for the trial court and, assuming that a contrary finding would have been supported by the evidence, it cannot be held as a matter of law that the evidence and the reasonable inferences that may be drawn therefrom are not sufficient to support the finding made.

The respondent relies upon subdivision 2 of section 16 of the Inheritance Tax Act, which provides that on the hearing of objections to the report of the appraiser "the report of the inheritance tax appraiser shall be presumed to be correct and it shall be the duty of the objector or objectors to proceed in support of said objection or objections." It is argued that this statutory provision placed the burden of proof upon the appellant, rather than the respondent, and that since the inheritance tax appraiser here included in his report a finding that these transfers were made in contemplation of death the statute creates a presumption to this effect, which presumption is additional evidence which supports the finding made. This contention is vigorously attacked by the appellant. It is unnecessary to consider the question of the existence or of the effect of such a presumption under our view that the finding is sufficiently supported by the evidence whether or not any such presumption exists.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

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52 Cal.App.2d 115

WEDDLE v. LOGES et al.

Civ. 11382.

District Court of Appeal, First District, Division 1, California.

May 15, 1942.

Rehearing Denied June 13, 1942.

Hearing Denied July 13, 1942.

1. Trial 🔑335

In action against two joint tort-feasors, verdict assessing compensatory damages against tort-feasors in the sum of $5,000, with assessment of $4,250 against one of them and assessment of $750 against the other, was not in proper form, since the liability of joint tort-feasors for compensatory damages, as distinguished from punitive damages, cannot be segregated.

2. Trial 🔑336

Portion of jury's verdict attempting to assess $4,250 of $5,000 verdict against one joint tort-feasor and $750 against other joint tort-feasor would be treated as "surplusage".

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

3. Trial 🔑343

Reasonable inferences may be drawn from a verdict so as to support rather than defeat a judgment.

4. New trial 🔑58

Trial court erred in granting defendants a new trial because verdict against defendants contained surplusage whereby jury improperly attempted to apportion the amount of the verdict between the defendants.

5. Appeal and error 🔑854(6)

On appeal by plaintiff from an order granting defendants a new trial, defendants had a right to rely on possible grounds of alleged errors of law other than ground that verdict for plaintiff was invalid after the District Court of Appeal determined that verdict was not invalid on such ground.

6. Appeal and error 🔑933(1)

On appeal, presumption is that order granting a new trial is valid.

7. Appeal and error 🔑785

If requisite papers are not furnished on appeal, the penalty falls on the party at fault, and appeal may be dismissed. Code Civ.Proc. § 954.

8. Automobiles 🔑244(15, 56)
Master and servant 🔑278(17), 281(8)

In action by employee against his employer and an automobile mechanic, for injuries sustained by employee when employer's truck, which was being towed by automobile driven by mechanic, and which was driven by the employer, and in which the employee was riding, went out of control when given sudden jerk by towing automobile about time employer was allegedly reaching into tool box for a bottle of whisky, evidence supported jury's implied finding that employer and mechanic were negligent and that employee was not contributorily negligent.

9. Automobiles 🔑181(1), 244(20)

Where employer's truck, which was being towed on Sunday by automobile driven by mechanic, which was driven by the employer, and in which the employee was riding, went out of control when given sudden jerk by towing automobile about time employer was allegedly reaching into tool box for a bottle of whisky, evidence supported conclusion that employee's status was not that of a "guest" so that it was not essential for employee to establish intoxication or willful misconduct on the part of either the employer or the mechanic in order to recover for injuries sustained.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest".

10. Master and servant 🔑173

In action by employee against his employer and automobile mechanic for injuries sustained by employee while riding in employer's truck which was being towed by automobile driven by mechanic, employer's knowledge of mechanic's reputation as an allegedly reckless driver was relevant.

11. Appeal and error 🔑1060(2)

In action by employee against employer and automobile mechanic for injuries sustained by employee while riding in employer's truck which was being towed by automobile driven by mechanic, question, which indicated that mechanic had been charged with or convicted of driving while intoxicated, was improper, but the asking of such question did not result in a "miscarriage of justice" requiring a reversal, where attorneys of employer and mechanic interposed sufficient objection, trial court indicated its view of the inadmissibility of such testimony, and the matter was dropped.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

12. Automobiles 🔑245(50), 246(57)
Master and servant 🔑285(11), 291(5)

Where employee was injured when truck collided with a tree when tow rope broke, whether use of horn would have avoided accident, whether truck dangerously swerved from side to side or failed to follow substantially in path of automobile, whether additional connection between automobile and truck would have prevented accident, and whether red flag would have been of assistance to employer in determining tautness of towing rope, were fact questions and it was proper for trial court to instruct jury on the law relative to the proximate cause of the accident. Vehicle Code, §§ 671, 701, St.1937, pp. 169, 1994.

13. Automobiles 🔑174(1)

The towing of one vehicle by means of another is not "negligence per se", but the towing must be done with due consideration for the safety of others.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

14. Automobiles 🔑242(2)
Master and servant 🔑265(5)

In action for injuries sustained by employee while riding in employer's truck, which was being towed by automobile driven by mechanic and which collided with tree when tow rope broke, doctrine of "res ipsa loquitur" was applicable, where accident was one which would not in ordinary course of things have occurred if the employer and the mechanic had used proper care, and employee was unable to explain the cause of the swerve of the truck into the tree or the reason for the breaking of the tow rope, and the evidence tended to show relationship of principal and agent between employer and mechanic.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

15. Negligence 🔑121(2)

The doctrine of "res ipsa loquitur" may not be invoked where there is a divided responsibility, and the negligence is in part that of a third person over whom the defendant has no control.

16. Automobiles 🔑246(60)
Master and servant 🔑291(11)

In action by employee against his employer and automobile mechanic for injuries sustained by employee while riding in employer's truck which was being towed by automobile driven by mechanic and which collided with tree when tow rope broke, wherein evidence tended to show relationship of principal and agent between employer and mechanic, and, if special findings had been submitted, jury could have found that employer was solely responsible for the accident, that mechanic was solely responsible therefor, that mechanic, as agent or employee of employer, was negligent, and that accident was caused by the concurring negligence of mechanic and employer as employee and employer, trial court was justified in submitting a "res ipsa loquitur" instruction.

17. Workmen's compensation 🔑2090

Where there was testimony, in action by employee against employer who was employee's brother-in-law, that, on Sunday when automobile accident occurred, employee was not working as an employee in employer's cleaning establishment but had agreed to assist employer in work on automobile, employee was not precluded from bringing a personal injury action against the employer, on ground that the Industrial Accident Commission had sole jurisdiction.

◆

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action for personal injuries by Hugh Weddle against F. E. Loges and Delbert

Starr. From orders vacating and setting aside judgment and granting a new trial for plaintiff, the plaintiff appeals.

Orders reversed.

Hearing denied; EDMONDS, J., dissenting.

C. M. Walter, of Oakland, Georgia C. Montgomery, of Pittsburg, and Elson L. Jones, of Oakland, for appellant.

Hoge, Pelton & Gunther, of San Francisco, Hoey, Hamilton & Turner, of Concord, and A. Dal Thomson, of San Francisco, for respondents.

WARD, Justice.

An appeal by plaintiff from an order granting a new trial and from a subsequent order wherein the first order was "corrected, altered and amended." The submission of this cause was set aside to permit further argument on designated questions and it was agreed that an additional transcript should be filed. Further briefs also were filed pertaining to questions raised by the additional transcript, and it has been stipulated that the brief filed by defendant Loges shall for all purposes of the appeal be considered as the brief of defendant Starr.

In an action for personal injuries against defendants Loges and Starr, a jury returned a verdict as follows: "We, the Jury in this case, find for Plaintiff and assess his damages against the defendants F. E. Loges and Delbert Starr, in the sum of $5,000. Defendant Loges assessed $4,250.00. Defendant Starr assessed $750.00." No request was made by any of the parties to the action to have the jury correct or amend its verdict, and judgment, quoting the verdict, was entered thereon, ordering, adjudging and decreeing "that said Plaintiff Hugh Weddle do have and recover of and from said defendants F. E. Loges and Delbert Starr the sum of $5,000.00, together with all his said plaintiff's costs" etc. Each defendant separately moved for a new trial on all of the statutory grounds. The court ruled upon each motion and on November 28, 1939, signed an order granting a new trial on all of the issues involved in the cause, including the insufficiency of the evidence. On the following day, there was filed a "Memorandum and Corrected Order Granting Motion for a New Trial," which incorporated the order of the previous day and read in part as follows: "In the ordinary case this order [the first] might have been entirely proper but for the foregoing reasons I now feel that the specific and exact ground for my granting a new trial in this case should be set forth. It is accordingly the order and judgment of this court that the verdict of the jury and the judgment entered therein in the above entitled case be and the same are hereby vacated and set aside and a new trial is hereby granted because the jury in returning its verdict added to the regular form of verdict as submitted by the Court these words: 'defendant Loges assessed $4250.00. Defendant Starr assessed $750.00.' It is further ordered and decreed that said order of November 28, 1939, be and it is hereby corrected, altered and amended accordingly."

Plaintiff appealed "from that certain Order of November 28, 1939, and from said Order as corrected, altered and amended by that certain Order of November 29, 1939, vacating the verdict of the Jury and the Judgment entered in the above entitled cause and granting a new trial in said action." The validity or force of an order correcting, altering or amending a previous order depends upon the specific language of the two orders. The second purported order herein recited that the first was an inadvertence and mistake and contrary to the intention of the court as relates to the reasons for the granting of a new trial; that it was solely the defective form of the verdict upon which the judgment was entered that caused the court to grant a new trial.

[1-4] That the verdict is not in proper form may be readily acknowledged. The liability of joint tort feasors for compensatory damages, as distinguished from punitive damages, cannot be segregated (Thomson v. Catalina, 205 Cal. 402, 271 P. 198, 62 A.L.R. 235; Oldham v. Ætna Ins. Co., 17 Cal.App. 2d 144, 61 P.2d 503), though recovery may be limited by statutory provision. Phipps v. Superior Court, 32 Cal.App.2d 371, 89 P. 2d 698. The form of a verdict is important in ascertaining whether a proper judgment may be entered thereon. In the present case the members of the jury made it certain and definite that upon the issues presented they found for the plaintiff, fixing damages to which he was entitled in the sum of $5,000; their effort to assess a greater amount against one defendant than another may be treated as mere surplusage. Though it may not be true as to all verdicts, the one in the instant case in favor of plaintiff and against two joint tort feasors in different amounts is not incomprehensible. Hallinan v. Prindle, 220 Cal. 46, 29 P.2d 202. While it is true that in some other jurisdictions a stricter rule is followed (Rathbone v. De-

troit United Ry., 187 Mich. 586, 154 N.W. 143; Mooney v. McCarthy, 107 Vt. 425, 181 A. 117), in California the rule is that reasonable inferences may be drawn which will support rather than defeat a judgment. Snodgrass v. Hand, 220 Cal. 446, 31 P.2d 198; Ochoa v. McCush, 213 Cal. 426, 2 P.2d 357. The reasonable inference in this case is that the jury intended the plaintiff should receive $5,000. Who was to pay the damages assessed was of no concern to the jury. The judgment for the $5,000 was properly entered. In granting a new trial upon the ground of the jury's abortive attempt to apportion the damages, the trial court was in error. Brown v. Regan, 10 Cal.2d 519, 75 P.2d 1063; Curtis v. San Pedro Transp. Co., 10 Cal.App.2d 547, 52 P.2d 528; Milburn v. Foster, 8 Cal.App.2d 478, 47 P.2d 1106; Rogers v. Foppiano, 23 Cal.App.2d 87, 72 P.2d 239; Phipps v. Superior Court, supra.

[5] Under either order, assuming as we have the impropriety of granting a new trial upon the ground that the form of a verdict is invalid, the defendants on appeal have a right to rely upon other possible grounds of alleged errors of law. Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124; River Farms Co. v. Superior Court, 131 Cal.App. 365, 21 P.2d 643; Condon v. Ansaldi, 203 Cal. 180, 263 P. 198; Gordon v. Roberts, 162 Cal. 506, 123 P. 288; White v. Merrill, 82 Cal. 14, 22 P. 1129; Gray v. Robinson, 33 Cal.App.2d 177, 91 P.2d 194; People v. Simpson, 134 Cal.App. 646, 25 P.2d 1008; Vertson v. City of Los Angeles, 116 Cal.App. 114, 2 P.2d 411; Charles Lomori & Son v. Glove Laboratories, 35 Cal.App.2d 248, 95 P.2d 173; Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 451, 168 P. 1033; Phillips v. Powell, 210 Cal. 39, 290 P. 441.

[6, 7] An appellant, on appeal from an order granting a new trial, must furnish the judgment roll and bill of exceptions, or a typewritten transcript. Code Civil Procedure, §§ 952, 953a. On appeal, the presumption is that the order is valid. In other words, it could be assumed that the order granting a new trial was valid in the absence of a record indicating the contrary. If the requisite papers are not furnished, the penalty falls upon the party at fault and the appeal may be dismissed. Code Civ. Proc. § 954; 2 Cal.Jur., 761, § 443. In this case, to obviate the possibility of such action it was suggested by the court, and stipulated by the parties hereto, that the complete transcript should be filed.

A consideration of the additional points raised by defendants on motion for a new trial necessitates a recital of the facts of the case. Plaintiff was an employee of his brother-in-law Loges in a cleaning plant, with his hours of work from Monday to Saturday inclusive. On a Saturday, he was asked by Loges to assist the following day in removing the closed-in body from a Chevrolet truck belonging to the latter, and in substituting another body. On Sunday morning, Loges and Starr, the latter also a brother-in-law of both Loges and plaintiff, and regularly employed as an automobile mechanic, had gone to Loges' cleaning establishment for the purpose of commencing the work. They found there was no place to put the removed body so decided to take the car to Starr's premises. Another employee of Loges helped roll the Chevrolet into the street and offered to go after Weddle who had not yet arrived. Starr, with a towrope regularly carried by him for such purpose, coupled the Chevrolet to his Ford. The length of the rope so joining the cars was from 12 to 18 feet. The battery had been removed from the Chevrolet, and while it could be steered it could not be otherwise operated, nor could the horn be sounded. The brakes remained in their usual condition. The floor had been taken out and there was nothing left for the accommodation of passengers except a single seat for the driver and an uncovered tool box, directly behind the driver's seat, extending nearly all the way across the car. Starr drove his own car, and Loges steered the towed Chevrolet. In the meantime, Weddle and the employee who had gone after him, finding that Loges and Starr had left the cleaning plant, overtook them on the way to Starr's premises. Weddle stepped upon the running board of the Chevrolet and, at Loges' invitation, got into the car. He claims he took a seat on a loose board, about a foot wide, extending across the car in back of the tool box; that he crouched "down on my feet and leaned up against the side of the car."

It is plaintiff's claim that as they were thus being towed, Loges offered him a drink and that it was while the latter was driving with one hand and fumbling in the tool box with the other for a bottle of whisky, which he had purchased earlier in the day, that the accident occurred. He makes no claim of excessive speed, stating in this regard that they were traveling on the level at about 10 or 15 miles an hour at the time of the accident; that just prior thereto he felt a slight jerk and was thrown toward the front of the car and into "the gear shift and machinery" by reason of the absence of the car's flooring.

There was testimony that just prior to the accident the cars came down a slight grade, Starr feeling no pull of the Chevrolet at this time; that when they were again on the level, Starr increased his speed to about 20 miles an hour; the towrope suddenly tightened; there was a jerk and the Chevrolet jumped the curb and collided with a tree.

Loges claims that he handed the bottle of whisky to plaintiff while they were still about two and a half blocks from the place of the accident. He testified that when Weddle arrived the cars were momentarily slowed down, and that at such time the slackened towrope became fouled with the steering mechanism of the Chevrolet. While he testified that he had no certain knowledge of this condition until Starr suddenly increased his speed as above stated, and the car swerved and jerked out of his hands, there was further testimony that he "thought back at the service station" that such was the case.

[8, 9] Respondents concede that inasmuch as insufficiency of the evidence was not specified in the final order as a ground for granting a new trial, the order is not sustainable by a mere showing of conflict in the evidence; but they contend that the evidence is insufficient as a matter of law to support the verdict. In this regard they argue: (1) That it was established that plaintiff was a guest and not a passenger, and that there was an entire absence of evidence showing intoxication and wilful misconduct; (2) that it failed to show any negligence on the part of the defendants; and (3) that it established that plaintiff was guilty of contributory negligence. We are satisfied that the evidence is legally sufficient to support the implied findings of the jury on the second and third issues above mentioned. Regarding the first issue, it appears that the jury was instructed as to the law by which it was to be governed in determining from the facts whether the plaintiff was riding as a guest or as one giving compensation for the ride; and it is our opinion that under the law as laid down in McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909, the facts are such as will support the conclusion that plaintiff's status was not that of a guest, and that being so it was not essential for plaintiff to establish intoxication or wilful misconduct on the part of either of the defendants. This leaves as the possible basis for the order granting a new trial, "prejudicial misconduct in repeatedly asking questions upon a wholly immaterial subject," and errors in instructions.

[10, 11] In respect to misconduct, defendant Loges was asked: "* * * did you know that Starr was a reckless driver?" It was vital to know whether Loges had secured a careful driver to tow the Chevrolet car. The error, if any, was not in asking the above question, but in reframing it, after objections and arguments, in a form to indicate that Starr had been "charged and convicted of driving while intoxicated." The question was improper; the defendants' attorneys interposed a sufficient objection, and the trial court indicated its view on the inadmissibility of such testimony, but there the matter was dropped, subject to further argument "in the absence of the jury." The record does not disclose that the question, or defendants' assignment of misconduct, was further pressed, nor does it appear from the "Memorandum and Corrected Order" that the point was urged on the motion for a new trial. Under the circumstances, while condemning the question, but admitting that Loges' knowledge of Starr's reputation as a driver was relevant to the issues involved, we are unable to hold that the incident resulted in a miscarriage of justice.

[12] The trial court instructed the jury in the exact language of Vehicle Code sections 671 and 701, St.1935, pp. 223, 229, as amended by St.1937, pp. 169, 1994, i. e., "Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than two hundred feet." "(a) When one vehicle is towing another the drawbar or other connection shall not exceed fifteen feet from one vehicle to the other. (b) When one vehicle is towing another, there shall be an additional connection between said vehicles sufficient to hold the vehicle being towed in the event the drawbar or other regular connection should break or become disconnected. (c) When one vehicle is towing another and the con-

nection consists of a chain, rope or cable, there shall be displayed upon such connection a red flag or cloth not less than twelve inches square. (d) The foregoing provisions of this section shall not apply to the drawbar or other connection between a motor vehicle and a pole or pipe dolly or to any lawful trailer used as a pole or pipe dolly. (e) No person shall operate a train of vehicles when any trailer, semitrailer or other vehicle being towed whips or swerves from side to side dangerously or unreasonably or fails to follow substantially in the path of the towing vehicle." Whether the use of a horn under the conditions obtaining herein would have avoided the accident; whether the towed car dangerously swerved from side to side or failed to follow substantially in the path of the towing vehicle; whether an additional connection between the cars would have prevented the accident, and whether a red flag would have been of assistance to the driver of the Chevrolet in determining the tautness or looseness of the towing rope are questions of fact. If any of those conditions appeared from the evidence it was proper to instruct the jury upon the law relative to the proximate cause of the accident. The court instructed: "I instruct you that any violation of a motor vehicle law, ordinance, or code upon the part of any party is not material unless such violation of such ordinance proximately contributed to the accident or injury alleged."

[13, 14] As stated, the accident occurred as the result of an impact between the towed car and a tree. It is not negligence per se to tow one vehicle by means of another (Steinberger v. California Electric Garage Co., 176 Cal. 386, 168 P. 570), but the towing must be done with due consideration for the safety of others. The evidence shows that the towrope broke, of which the exact cause was a matter the defendants were in a better position to explain than plaintiff. There was some evidence that the towrope had become fouled with the steering mechanism of the Chevrolet; that its length was greater than is legally permitted; that just prior to the accident defendant Loges was engaged in reaching for the bottle of whisky, and that plaintiff was sitting on his "haunches," not looking in the direction "the way the car was going." But the operation of the two cars being under the exclusive direction and management of defendant Loges and his agent or employee Starr, and the accident being one which would not in the ordinary course of things occur if those having the management and control of the instrumentality use proper care, and with the plaintiff unable to explain the cause of the swerve of the car into the tree, or the reason for the breaking of the rope, the doctrine of res ipsa loquitur was applicable.

[15] It has been held that the doctrine of res ipsa loquitur may not be invoked where there is a divided responsibility and the negligence is in part that of a third party over whom the defendant has no control. Speidel v. Lacer, 2 Cal.App.2d 528, 38 P.2d 477. In the Speidel case the divided responsibility was of defendant, an independent contractor, and plaintiff's employer; the control of the mechanical device not resting with defendant. In the present case the evidence tends to show relationship of principal and agent between Loges and Starr. The court did not, as respondents contend, instruct the jury that the evidence was sufficient to establish that Starr was the agent of Loges. The jury was instructed that if agency was established an inference might be drawn that the automobile was operated within the scope of such agency.

[16] If specific findings had been submitted, the jury could have found that defendant Starr was solely responsible for the accident; that Loges was solely responsible therefor; that Starr, as the agent or employee of Loges, was negligent; that the accident was caused by the concurring negligence of Loges and Starr as employer and employee. The trial court was justified in submitting a res ipsa loquitur instruction upon the last three theories. Formosa v. Yellow Cab Co., 31 Cal.App.2d 77, 87 P.2d 716; Hyman v. Market Street Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485.

[17] Respondents contend that if appellant maintains that his employment in the cleaning establishment obligated him to assist in the work on the Chevrolet, the Industrial Accident Commission would have sole jurisdiction of the cause of action against Loges. Freire v. Matson Navigation Co., 19 Cal.2d 8, 118 P.2d 809. There is testimony that on the day in question Weddle was not working as an employee of the cleaning establishment but had agreed to assist in work on the automobile and expected compensation in the form of "a favor." This indicates that he intended, and Loges expected, that Weddle would fulfill "the object of the journey." McCann v. Hoffman, supra; Haney v. Takakura, 2 Cal.

App.2d 1, 37 P.2d 170; Lerma v. Flores, 16 Cal.App.2d 128, 60 P.2d 546; Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53.

The orders vacating and setting aside the judgment and granting a new trial are and each of them is reversed.

PETERS, P. J., and KNIGHT, J., concurred.

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52 Cal.App.2d 98

WILLIAMSON v. KINNEY.

Civ. 12102.

District Court of Appeal, First District, Division 2, California.

May 13, 1942.

1. Appeal and error ⇨996

The intention of the parties to a deed of community property can be shown by circumstantial as well as direct evidence and the inferences to be drawn from the evidence are for the trier of facts to determine so long as those inferences find reasonable support in the evidence.

2. Husband and wife ⇨264

In action by deceased wife's executrix to quiet title, evidence supported finding that the parties did not intend by husband's deed to wife of community property of which he was record owner, and wife's deed to third party and third party's deed to husband and wife, to change community character of property conveyed.

3. Appeal and error ⇨1010(1)

The trial court's determination that presumption that property conveyed to wife is her separate property has been rebutted is conclusive on appellate court unless it is manifestly without sufficient support in the evidence. Civ.Code, § 164.

4. Husband and wife ⇨264

While continued and exclusive management by husband of property conveyed to wife standing alone might not be sufficient to overcome statutory presumption that property so conveyed is wife's separate property, taken in connection with other evidence tending to show the community character of the property, it is entitled to some weight. Civ.Code, § 164.

5. Husband and wife ⇨263

In determining whether property was separate property of wife or community property, trial court was entitled to consider situation of the parties and husband's motive at time of husband's conveyance of community property of which he was record owner to wife.

6. Equity ⇨65(1)

If the fraudulent grantee reconveys the property, grantor's subsequent grantee is not precluded by the doctrine of "clean hands" from asserting the fraudulent character of the original conveyance.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

7. Fraudulent conveyances ⇨174(5)

While a fraudulent grantee is under no legal obligation to reconvey, he is under a moral obligation to do so, the moral obligation being a valuable and sufficient "consideration" for a reconveyance, and a reconveyance is binding on the grantee and if the rights of no innocent third person have intervened, the fraudulent grantor will become revested with title, and grantee will be "estopped" from setting up any claim to the property.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration" and "Estop".

8. Husband and wife ⇨266

Where trial court found that realty of which husband was record owner remained the community property of the parties after conveyance by husband to wife, the transfer through a third party to husband and wife, which was found not to change community character of the property, was not subject to statutory presumption of lack of consideration or undue influence as a transaction between husband and wife, since the parties' actual interest remained the same. Civ. Code, §§ 158, 2235.

9. Husband and wife ⇨273(1)
Wills ⇨6

Where community property had been originally acquired in 1909, the wife was powerless to dispose of it by will, and when she predeceased husband, full title vested in husband so as to render immaterial her prior deed to husband.

10. Appeal and error ⚷**1050(1)**

In action by deceased wife's executrix to quiet title, where trial court found that property at time of conveyance by husband, the holder of record title, to wife and at all times thereafter retained its status as community property, reception of opinion evidence that wife did not appear to act under undue influence at time of wife's subsequent conveyances to husband and wife through a third party and to husband was harmless. Civ.Code, §§ 158, 164, 2235.

11. Evidence ⚷**121(9)**

Under statute providing that a declaration forming part of a transaction constituting a fact in dispute is evidence as part of the transaction, evidence of parties' conversations at time of conveyance by husband holding record title of community property to wife and subsequent conveyance through a third party to husband and wife was properly admitted as "part of the transaction" to establish that the parties did not intend to change the community character of the property. Code Civ.Proc. § 1850. Civ.Code, §§ 158, 164, 2235.

See Words and Phrases, Permanent Edition, for all other definitions of "Part of the Transaction".

12. Husband and wife ⚷**254**

Property acquired during the marriage in the name of either husband or wife or in names of both is "community property".

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

13. Husband and wife ⚷**256**

It is only where a deed expressly conveys property to the wife as her separate property that wife takes legal title in trust for the community, where the consideration is paid from community funds.

◆

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Mary A. Williamson, as executrix of the last will of Agnes Kinney, deceased, against Frances Davis Kinney, to cancel certain deeds from plaintiff's decedent and to quiet title in plaintiff as such executrix to the real property described therein, wherein defendant filed a cross-complaint to quiet title in herself. From a judgment for defendant and cross-complainant quieting her title, plaintiff appeals.

Affirmed.

T. L. Chamberlain and Gerald Beatty Wallace, both of Auburn, for appellant.

F. H. Bowers, of Roseville, for respondent.

DOOLING, Justice pro tem.

This is a suit by the executrix of the last will of Agnes Kinney, deceased, against the distributee of certain property from the estate of L. J. Kinney, deceased, to cancel certain deeds from Agnes Kinney and to quiet title in the plaintiff, as such executrix, to the real property described in such deeds. Defendant answered and filed a cross-complaint seeking to quiet title in herself. From a judgment for defendant and cross-complainant quieting her title plaintiff prosecutes this appeal.

L. J. Kinney and Agnes Kinney were married in California in 1892 and continuously thereafter lived together in this state as husband and wife until June 25, 1930, when Agnes Kinney died. Her husband, L. J. Kinney, survived her and in his turn died on September 5, 1936. On March 10, 1909, the real property here in suit was acquired by deed naming L. J. Kinney as grantee. From that time until the death of the wife in 1930 the Kinneys resided on said property and made it their home. At the time the property was originally acquired in 1909 it was admittedly community property.

On January 22, 1915, L. J. Kinney executed and delivered a deed of the property to Agnes Kinney, his wife. On July 18, 1923, Agnes Kinney executed a deed of the same property to one Brennan and on the same day and as a part of the same transaction Brennan deeded the property to L. J. Kinney and Agnes Kinney. On April 24, 1928, Agnes Kinney executed a deed of the property to L. J. Kinney which was not recorded until January 11, 1932.

Plaintiff introduced the deeds constituting the record title commencing with the deed to Mrs. Kinney in 1915 and rested, relying on the presumption that by the deed to Mrs. Kinney in 1915 the property became her separate property, § 164, Civ. Code, and the further presumption that her deeds of 1923 and 1928 were obtained by the husband without consideration and under undue influence. §§ 158 and 2235, Civ.Code.

To rebut these presumptions defendant introduced evidence establishing the community character of the property at the time of its original acquisition in 1909; evidence showing that at the time of the deed to Mrs. Kinney in 1915 Mr. Kinney was liable as guarantor on a lease in Sacramento in a sum aggregating possibly $15,000, and that Mr. and Mrs. Kinney had discussed that fact in front of the witness Brennan and Mr. Kinney had agreed to convey the property to Mrs. Kinney "to protect her home"; that prior to the deed to Brennan in 1923 the Sacramento liability had been satisfactorily worked out and terminated; and that L. J. Kinney at all times from the date of the acquisition of the property (which was a fruit orchard) to his death had managed and operated it and sold the fruit to the exclusion of his wife.

Specifically Brennan testified as to the 1915 transaction:

"Q. Did you understand from the conversation that you had with them at that time * * * that he was giving the property to her, turning it over to her, was he deeding it to her for the benefit of the community or the two of them? A. I won't answer that question."

Concerning his conversations with Mr. and Mrs. Kinney at the time of the 1923 transaction Brennan testified:

"Mr. and Mrs. Kinney met me about this time and told me that they wanted to straighten out that property matter, and asked me if they would deed the property to me, if I would re-deed it to them in (sic) jointly, and Mrs. Kinney did deed the property to me and I did deed it to Mr. and Mrs. Kinney. * * *

"Q. Was anything said with relation to the 1915 transaction at that time * * * at the time of these deeds—A. Simply referring to the matter, was all squared out now, the 1915 matter. * * *

"Q. * * * What did she say? A. That she wanted to put the property back as it originally was in Kinney's and her name."

The court found that the property retained its character of community property throughout these several transactions.

[1-4] It is obvious that there was no testimony expressly showing the intention of the parties as to whether the property should retain its character as community property or become the separate property of Mrs. Kinney as a result of the deed to her in 1915. It is appellant's position that there is no evidence in the record to contradict the presumption created by section 164 of the Civil Code that by this conveyance the property became the separate property of Mrs. Kinney. But the intention of the parties can be shown by circumstantial, as well as direct, evidence and the inferences to be drawn from the evidence are for the trier of the facts to determine so long as those inferences find reasonable support in the evidence given. The statements of the parties to the witness Brennan in 1923 that "they wanted to straighten out that property matter," that the 1915 matter "was all squared out now" and that Mrs. Kinney "wanted to put the property back as it originally was," coupled with the other evidence before the court, were sufficient to support the findings that by the deed to Mrs. Kinney in 1915 and the later deeds of 1923 it was not intended by the parties to change the community character of the property conveyed. The determination of the trial court that the presumption raised by section 164 of the Civil Code, that property conveyed to the wife is her separate property, has been rebutted is conclusive on an appellate court unless it is manifestly without sufficient support in the evidence. Fanning v. Green, 156 Cal. 279, 282, 104 P. 308; Fulkerson v. Stiles, 156 Cal. 703, 105 P. 966, 26 L.R.A.,N.S., 181; Hammond v. McCollough, 159 Cal. 639, 115 P. 216; Killian v. Killian, 10 Cal. App. 312, 101 P. 806; Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Estate of Cronvall, 220 Cal. 503, 31 P.2d 372. In this connection it may be noted that while the continued and exclusive management of the property by the husband standing alone might not be sufficient to overcome the presumption (Alexander v. Bosworth, 26 Cal. App. 589, 147 P. 607) taken in connection with the other evidence tending to show the community character of the property it is entitled to some weight. Hammond v. McCollough, supra, 159 Cal. pages 642, 643, 115 P. 216.

[5-7] The court was also entitled to consider the situation of the parties in 1915 and the motive for the conveyance to Mrs. Kinney. Herein appellant argues that the deed was intended as a fraud on the Sacramento creditor and the "clean hands" doctrine precludes defendant from asserting that the conveyance to Mrs. Kinney was to secure the property against liability for the husband's debts. While this might be true if the property had not been reconveyed, the settled rule is otherwise where

there has been a voluntary reconveyance to the fraudulent grantor. "While a fraudulent grantee is under no legal obligation to reconvey, it is said that he is under a moral obligation to do so, and all subsequent acts done by him in execution of this duty should be favorably considered in equity, the moral obligation being a valuable and sufficient consideration for a reconveyance. If in fulfillment of his moral obligation he makes a reconveyance, such act will be binding on him, and if the rights of no innocent third person have intervened, the fraudulent grantor will become revested both in law and in equity with the title previously conveyed to his grantee; and the grantee will be estopped from thereafter setting up any claim to the property." 27 C.J. 658; 24 Am.Jur. 296; 89 A.L.R. 1166, note collecting the cases.

[8] The court having found that the property remained the community property of the parties after the 1915 conveyance, the transfer in 1923 through Brennan to Mr. and Mrs. Kinney, which the court found did not change the community character of the property, was not subject to the presumption of lack of consideration or undue influence. Though the record title changed the actual interests of the parties remained the same throughout its various mutuations. It at all times remained the community property of the parties.

[9] The effect of the 1928 deed need not be inquired into. The community property having been originally acquired in 1909, Mrs. Kinney was powerless to dispose of it by will (3 Cal.Jur. 10-Yr. Supp. 705, 706) and since she predeceased her husband the full title vested in him at the date of her death in any event. McKay v. Lauriston, 204 Cal. 557, 269 P. 519.

[10] The reception of opinion evidence that Mrs. Kinney did not appear to be acting under undue influence at the times of the 1923 and 1928 conveyances becomes immaterial in view of the finding of the court that the property at the time of the conveyance to Mrs. Kinney in 1915 and at all times thereafter retained its status as community property.

[11] The evidence of the conversations of the parties at the times of the 1915 and 1923 transactions was properly admitted under Code Civil Procedure, section 1850, which reads: "Where, also, the declaration, act, or omission forms a part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission, is evidence, as part of the transaction." Sethman v. Bulkley, 9 Cal.2d 21, 24, 68 P.2d 961; Rodriguez v. Rodriguez, 69 Cal.App. 399, 402, 231 P. 375; Lewis v. Burns, 106 Cal. 381, 384, 39 P. 778.

[12, 13] The parties devote a portion of their briefs to a discussion of whether defendant sufficiently pleaded that after the conveyance to her in 1915 Mrs. Kinney held the property "in trust for the community." The pleading of a trust for the community, and the argument thereon, both result from a misconception of the law of community property. Property acquired during their marriage in the name of either the husband or the wife, or in the names of both, may be community property. There is no question of holding in trust, but rather a question of the nature of the estate or tenure. The matter is fully discussed and the earlier cases reviewed in Mitchell v. Moses, 16 Cal.App. 594, 117 P. 685. The court in that case summarizes the applicable rule of law in one sentence on page 598 of 16 Cal.App., page 687 of 117 P.: "The title to property may be vested in the marital community by a conveyance to either spouse." The court concludes on page 600 of 16 Cal.App. page 687 of 117 P.: "It is only where the deed expressly conveys the property to the wife 'as her separate property' that it may be said that she takes the legal title in trust for the community, where the consideration is paid from community funds. * * * In the case at bar the conveyance was not in terms to the wife as her separate property, but was in the usual form of a grant, bargain and sale deed." In the case before us the deed of 1915 to Mrs. Kinney was likewise not in terms to her "as her separate property." Cf. the later cases of Salveter v. Salveter, 206 Cal. 657, 660, 275 P. 801; Siberell v. Siberell, 214 Cal. 767, 770, 7 P.2d 1003; Caputo v. Fusco, 54 Cal.App. 191, 201 P. 604.

The judgment appealed from is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

52 Cal.App.2d 142

KALLMEYER v. POORE et al. (three cases).

Civ. 13257, 13267, 13338.

District Court of Appeal, Second District, Division 2, California.

May 19, 1942.

Hearing Denied July 16, 1942.

1. Appeal and error 🔑1011(1)

The trial court's findings as to matters on which testimony was substantially conflicting may not be disturbed on appeal.

2. Trusts 🔑371(2)

A complaint *held* to state cause of action to declare one defendant a resulting trustee for codefendant, with whose money first defendant purchased mortgaged land from mortgagee, which had purchased it at foreclosure sale, and to declare codefendant a constructive trustee of plaintiff's interest therein because of fraudulent conspiracy to deprive plaintiff of such interest after breach of codefendant's contractual obligation to pay plaintiff's mortgage note in part consideration for sale to codefendant of part of land by plaintiff.

3. Trusts 🔑362

A vendee, whose fraud in purchasing realty through another from mortgagee, which purchased it at foreclosure sale after vendee's breach of contractual obligation to pay vendor's mortgage note, involved vendee's loss of title to and possession of land to such nominal purchaser as vendee's secret trustee, is in no position to take advantage of fact that he was not in possession thereof at time of such trustee's purchase in vendor's suit to declare vendee a constructive trustee of plaintiff's interest in land.

4. Limitation of actions 🔑100(1)

The limitation period applicable to fraud action begins to run only on discovery of fraud by aggrieved party. Code Civ. Proc. § 338, subd. 4.

5. Appeal and error 🔑1011(1)

In fraud action, claimed by defendants to be barred by statute of limitations, trial court's fact finding on conflicting evidence as to when fraud was discovered by plaintiff will not be disturbed on appeal. Code Civ.Proc. § 338, subd. 4.

6. Judgment 🔑443(1)

In vendor's suit to declare defaulting purchaser of land a constructive trustee of plaintiff's interest therein because of such purchaser's fraud in purchasing land through secret trustee from mortgagee, which had purchased it at foreclosure sale, a direct attack in complaint against judgments quieting such secret trustee's title to land as against plaintiff was within purview of equity on proper showing.

7. Appeal and error 🔑1073(1)

In vendor's action to declare defendant purchaser of land a constructive trustee of plaintiff's interest therein because of fraud in purchasing it through secret trustee from mortgagee, which purchased it at foreclosure sale, after breach of such defendant's contractual obligation to pay plaintiff's mortgage note, such secret trustee, who held bare legal title for defendant, was not harmed by trial court's determination that judgments quieting trustee's title were of no effect as to plaintiff's rights.

8. Trusts 🔑348

Any benefit claimed by a purchaser of land through action, brought by one acting as such purchaser's secret trustee in purchasing it from mortgagee, which had purchased it at foreclosure sale, after beneficiary's breach of contractual obligation to pay vendor's mortgage note, to quiet title thereto in trustee, must be held by beneficiary as constructive trustee for vendor.

9. Appeal and error 🔑1033(8)

In vendor's action against purchaser of land and one purchasing it as secret trustee for codefendant from mortgagee, which purchased it at foreclosure sale after codefendant's breach of contractual obligation to pay plaintiff's mortgage note, for recovery of damages on ground of conspiracy to defraud plaintiff, such trustee cannot complain on appeal of improper severance of damages against defendants as joint tort-feasors by failure to render judgment against codefendant on count of complaint for damage to plaintiff's personalty, because of illegal ouster and for unlawful withholding of possession of realty and loss of rents, issues, and profits thereof.

10. Torts 🔑22

Where there are two or more joint tort-feasors, injured person may proceed against one or more of them.

11. Appeal and error 🔑717

On appeals from orders granting respondent's motion for leave to file cost bill,

approving it, and denying appellants' motion to disallow respondent's costs and strike memorandum of costs after final judgment, judge's memorandum of opinion, brought up in clerk's transcript may be considered as indicating basis of ruling, though not strictly part of record, particularly where it shows that court made no ruling on motion for relief under statute. Code Civ.Proc. § 473.

12. Appeal and error 🔑1175(1)

Where memorandum of judge's opinion on granting leave to file cost bill after final judgment shows conclusively that no ruling was made on motion for relief under statute, but such ruling would be made wholly on affidavits and records before appellate court, such court has jurisdiction to take action thereon, instead of sending case back to trial court. Code Civ.Proc. §§ 473, 956a; Const. art. 6, § 4¾.

13. Evidence 🔑82

A notice of entry of judgment is presumed to have been correctly dated, in absence of contrary evidence. Code Civ.Proc. § 1963, subd. 23.

14. Evidence 🔑20(1)

It is matter of common knowledge that stepping of lawyer from private practice into public office is conducive to oversight as to many details of his law business by him without being guilty of negligence.

15. Appeal and error 🔑854(1)

A judgment will be affirmed on appeal, if result reached by lower court can be sustained on any ground, though not the one on which such result was based.

16. Appeal and error 🔑984(1)

Evidence that plaintiff's counsel, having actual notice of entry of judgment for plaintiff without allowance of costs, had just been elected member of city council, with result that his law office suffered complete realignment, his associates made other arrangements, and new attorney was associated in part of his practice, justified granting of relief under statute, so that orders granting plaintiff's motion after judgment to file cost bill and denying defendants' motion to strike plaintiff's memorandum of costs will not be disturbed on appeal. Code Civ.Proc. §§ 473, 1033.

Appeals from Superior Court, Los Angeles County; Goodwin J. Knight and Clarence M. Hanson, Judges.

Action by Cornelius Kallmeyer against Alvin H. Poore and others for declarations of resulting and constructive trusts in realty. From a judgment determining the parties' obligations and orders refusing to strike plaintiff's cost bill and allowing him costs, defendants appeal.

Affirmed.

Hector Baida, of Santa Monica, and B. W. Burkhead and Claude A. Shutt, both of Los Angeles, for appellants.

Arthur E. Briggs, of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

The present action is another step in a series of actions between various of the parties here involved, all affecting the same real property and which have occupied the attention of the courts for years. Eight superior court actions in addition to the present one, directly or indirectly relating to this property and the rights of some or all of the parties therein, are mentioned in the briefs, and in one of the latter a witness is quoted as saying that there had been more than 30 lawsuits filed. In the present proceeding there are 4 separate appeals, with 3 sets of briefs. Two of the appeals are from orders affecting costs and are briefed together.

The history of the transactions leading up to the extensive litigation between the parties herein is set forth in considerable detail in the decision of the Supreme Court in the case of Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478. That decision resulted from three appeals brought up together from the judgments in three separate actions that had been consolidated for trial in the superior court. All of the parties herein participated in the trial and appeals in those actions except the respondent (plaintiff) herein. The general facts are as follows:

Plaintiff Kallmeyer was the owner of a tract of land containing 10 acres and designated as lots A, B, C and D. It was subject to a trust deed to one Hunt to secure Kallmeyer's note for $5,000. This note, with its trust deed security, later became the property of the Warren estate. Plaintiff contracted to sell 5 acres to defendant Watson for $10,000, the consideration consisting of $5,000 cash and an agreement by Watson to pay the above trust deed note, which, if carried out, would clear the entire tract of indebtedness. Watson entered into an agreement with the Lefflers to sell 2 acres to the latter for $6,500, of which $1,500 was cash and the balance to be paid at a date prior to the maturity of the above note. The Lefflers did not pay Watson and the latter did not pay the trust deed note. The Warren estate foreclosed pursuant to the trust deed and purchased the entire tract at trustee's sale. Later Poore purchased the 10 acres from the estate, paying $1,000 cash and giving a note and trust deed for $5,500, and took title in his own name.

Thereafter the Lefflers brought an action (Superior Court No. 371276) in declaratory relief and to declare a trust, naming Poore and Watson as defendants and alleging a conspiracy between them to cheat and defraud the Lefflers. Poore brought an ejectment action (Superior Court No. 394767) against the Lefflers alleging title in himself. Watson then brought an action (Superior Court No. 412182) against Poore and wife, alleging that Poore purchased the property from the Warren estate with funds furnished by Watson under an agreement to take title in Poore and hold it for Watson. These three actions were consolidated for trial and appeals were taken therefrom, resulting in the decision by the Supreme Court in 18 Cal. 2d 302, 115 P.2d 478, supra.

After the disclosures made in Watson's complaint and in a deposition of Watson in that action, Kallmeyer filed the action which is the basis of the appeals now under consideration. In this action he makes all the other parties defendants, as well as numerous John Does, and charges a conspiracy between Poore and Watson to defraud him out of his interest in the property. The complaint contains 12 separately stated causes of action, relief being sought upon various theories.

While the appeal in the three actions above referred to (involving the parties other than Kallmeyer, plaintiff herein) was pending, the present action was tried and judgment rendered which undertakes to determine all the obligations of the various parties toward each other in connection with the 10-acre tract involved therein. Pending this appeal therefrom the Supreme Court has handed down the decision above referred to, which determines various rights of the parties involved in the said three actions, which had been consolidated, and remands the case for further hearing as to certain designated matters.

It may be noted that while Poore had the title in his name there were several other actions between some of the parties, in two of which there were judgments (which were not appealed) which purported to quiet title in Poore against Kallmeyer. These are attacked directly in the present complaint on grounds of extrinsic fraud and lack of jurisdiction, and were declared void as to Kallmeyer by the judgment under consideration on this appeal.

[1] All of the matters presented in the voluminous briefs of counsel, including those of appellants Poore, have been given careful consideration, but it should be here pointed out, as it was in the decision of the Supreme Court above cited (and as determined by the trial court herein), that the Poores now have only a bare legal title, and they hold the property only as security for moneys expended on behalf of Watson, which have not been repaid. The real parties in interest before us in this appeal are, therefore, appellants Watson and Lefflers on the one hand and respondent Kallmeyer on the other. However, the points made in the two appeals from the judgment are substantially the same, except the point made by the Poores that the evidence does not support the findings, and except, also, of course, the attack upon the portion of the judgment awarding damages against the Poores. An examination of the record discloses substantial conflict in the testimony upon each of the matters presented, and therefore the findings of the trial court may not be disturbed.

[2] The principal attack is directed to the contention that the complaint does not state a cause of action. Accepting appellants' statement that "although designated as separate causes, those portions of the complaint numbered as separate causes of action state but one cause of action, even though plaintiff sought several forms of relief," we may examine the complaint as a whole, and if when so considered a cause of action has been stated the objection has been met. Simply stated, the basic facts alleged are that plaintiff Kallmeyer owned the 10-acre tract subject to a trust deed for $5,000; that he sold 5 acres to Watson and as part of the consideration the latter agreed to pay the trust deed note

when it became due and thus protect plaintiff's remaining 5 acres; that Watson failed to do this, but assured plaintiff that he had arranged to borrow sufficient money from Poore to buy the property at the foreclosure sale and protect both of their interests; that both attended the sale, plaintiff relying upon this assurance, but that Watson, although he had the funds with which to do so, declined to bid, and plaintiff was helpless to bid, having made no financial arrangement therefor; that the property was bid in by the creditor, the Warren estate; that (as plaintiff later discovered) Watson and Poore had in the meantime secretly conspired together to defraud plaintiff and deprive him of his interest in the property by allowing the property to be bid in by the estate, then having Poore purchase the entire property in his own name but with Watson's money, and later, after plaintiff had been safely eliminated, to divide the property between them; that they had, prior to the sale, discussed the matter of purchase with the executor of the will in the Warren estate, including terms, and that this secret plan was carried out. The prayer of the complaint is that Poore be held to be a resulting trustee for Watson, having purchased with the latter's money, and that Watson be declared by reason of his fraud to be a constructive trustee of plaintiff's interest in the property. It should be here noted that no impropriety is charged against the executor. Moreover, the sale would in any event be subject to approval by the probate court.

It can hardly be doubted that upon this statement of facts plaintiff has a cause of action. Equity would not permit Watson to thus deliberately violate his contractual obligation and then profit by his own breach, at the expense of the person to whom he was obligated and who had a right to rely upon his performance in good faith. There are, of course, many complications and side excursions from the main issue that are omitted from the foregoing statement and these will be noticed hereafter, but they do not change the basic facts as above related and which, we believe, are sufficiently set forth in the complaint to meet the objection of a general demurrer.

[3] It will not be necessary to enter into a discussion of the various theories of plaintiff's complaint, such as enforcement of a vendor's lien, specific performance of resulting trust, because we believe the facts in this case are sufficient to establish an involuntary or constructive trust. McMillen v. Olmsted, 85 Cal.App. 656, 259 P. 1104; Urquhart v. Belloni, 57 Or. 314, 111 P. 692; Garvey v. Lashells, 151 Cal. 526, 91 P. 498. The case of First National Bank of Seattle v. Mapson, 181 Wash. 196, 42 P.2d 782, bears a remarkable similarity to the present case. Appellant therein went into possession under a purchase contract by the terms of which, in addition to other payments to seller, he was to keep up the payments on an outstanding mortgage. He failed to pay upon the mortgage indebtedness (or upon a subsequent mortgage which had been substituted for the first one) and foreclosure followed. The mortgagee purchased at the sale, and after expiration of the redemption period appellant purchased from him and thereafter claimed title free from any obligation to pay further to his vendor. The court rejected this contention and said that "the prior foreclosure action was brought about and occasioned, as the court found, solely by reason of appellants' failure to keep up the payments which they were required to make on the mortgage. Regardless of the superior right which the Washington Mutual Savings Bank had in the property by virtue of its lien, *appellants cannot assert that right against their own vendors. They cannot take advantage of a title which was made possible by their own breach* of covenant and default." (Italics ours.) Appellants argue that this principle applies only to the case of a vendee in possession; that Watson was ousted of possession of lots B, C and D and was never in possession of lot A, and that therefore the rule under discussion would not prevent Watson's purchasing the property.

The case of Slocum v. Peterson, 131 Wash. 61, 229 P. 20, 23, 40 A.L.R. 1071, is strongly relied upon to support this position. However, that decision states that "If a purchaser who has been let into possession by his vendor buys in a paramount outstanding title, he cannot set it up against the vendor, *unless he first makes a bona fide surrender of the possession.*" (Italics ours.) In the present case the very fraud itself involved Watson's losing title and possession to Poore, his secret trustee. Therefore he is in no position to take advantage of the claimed fact that he was not in possession at the time of Poore's purchase. It would be a strange rule of equity that would see only the incident of change of possession and overlook the fraud of which that was a part; and it would be still more extraordinary if equity accorded Watson an advantage because he not only took the land he was buying, without performing his contract for its purchase, but also took all the rest of his vendor's land concerning which he had no contractual rights whatever but which he was obligated to protect for his vendor.

[4, 5] Appellants urge that the action is barred by the statute of limitations. This being a fraud action, the limitation period began to run only upon discovery of the fraud by the aggrieved party. Code Civ. Proc., § 338, subd. 4. It is alleged in the complaint and found by the trial court that this discovery was in November, 1936. The complaint was filed in August of 1937. This being a question of fact, the finding of the court upon conflicting evidence will not be disturbed.

[6-8] Extensive argument is presented upon the matter of the two judgments obtained by Poore while he held title and which were held to be of no effect so far as plaintiff's rights are concerned. The attack made upon them is a direct attack and therefore within the purview of equity, upon a proper showing. We think the complaint, considered as a whole, fairly states a case of extrinsic fraud in connection with these judgments, and these allegations were found by the trial court to be true. Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Stenderup v. Broadway State Bank, 219 Cal. 593, 28 P. 2d 14. In any event, as stated by the Supreme Court (18 Cal.2d 302, 115 P.2d 478), the Poores are not hurt by this determination of the court, as they hold the bare legal title for Watson, anyway. So far as Watson is concerned, being a party to the extrinsic fraud, he is in no better position than Poore. And in any event, any benefit which Watson might claim through action brought by Poore in his pretended individual capacity must be held by him as constructive trustee for Kallmeyer. Whatever feeds Watson's title passes on to his beneficiary.

Separate appeals were perfected on behalf of the Poores, on the one hand, and Watson, the Lefflers and Burkhead on the other. The former brought up the reporter's transcript but the other appellants did not, and the former declined to stipulate that this record could be considered upon the latter's appeal. Watson and his co-appellants concede that under these circumstances their appeal can only be upon the judgment roll alone. The Poores hold only as bare trustees except for a possible lien for moneys expended in connection with the property. However, we are satisfied that the evidence supports the findings and that the latter are sufficient to support the judgment. Appellants Burkhead and the Leflers join with Watson in the briefs and rely upon the same matters. The Lefflers were vendees of Watson and of course their rights are derived through him. Burkhead is attorney of record for Watson, and the court held that he took with notice, both actual and constructive, and that he holds only as security for attorney's fees and for his client. The rights of the Lefflers as well as Burkhead are protected under the judgment, and the latter finds sufficient support in the findings.

What has been said above concerning the interest of the Poores upon this appeal does not, of course, apply to the separate item in the judgment which awards damages against them.

[9, 10] Objection is made by appellants Poore on the ground that there is an improper severance of damages against themselves and Watson as joint tort-feasors. As to the judgment against the Poores for $5,895, this was based upon causes of action numbers, sixth, seventh and eighth, having to do with damage to plaintiff's personal property by reason of improper and illegal ouster and for unlawful withholding of possession of the real property and loss of rents, issues and profits thereof. The complaint does not charge Watson in these matters and seeks no judgment against him therefor. Assuming that he could have been held liable upon these counts, appellants cannot complain. Where there are two or more joint tort-feasors plaintiff may proceed against one or more of them. Griswold v. Morrison, 53 Cal.App. 93, 200 P. 62; Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365. As to the separate items of $500, which Watson is required to pay before he receives title to his portion of the property, and $347.33, for which both Watson and the Poores are held responsible, the former is a matter of accounting

for money paid by the receiver on behalf of Watson, and the latter is for unpaid taxes upon lot A which the Poores and Watson failed to pay while they were in possession and receiving the rents thereof.

A somewhat complicated situation arises from the fact that the present judgment determines that the title of the property is in plaintiff (respondent) Kallmeyer subject to certain rights in and obligations upon Watson and the Lefflers and Burkhead, such rights and obligations being set forth in detail in the decree. It appears, therefore, to settle all rights as between respondent Kallmeyer and the other parties, and also the rights of all the parties as to the 10-acre tract or any portion thereof or interest therein. On the other hand, upon the appeal in the case of Watson v. Poore (Superior Court No. 412182), in which Kallmeyer was not a party, the Supreme Court (18 Cal.2d 302, 320, 115 P.2d 478, [487]) reversed that part of the judgment having to do with the financial accounting between Watson and Poore and directed the trial court "to take such further proceedings as may be necessary to determine the amount of any indebtedness which may exist between appellants and respondent Watson and enter judgment accordingly. In the event the trial court determines that respondent Watson is indebted to appellants in any sum whatever arising out of the transaction for the purchase of said ten acre tract, such indebtedness shall be a lien upon said tract." Inasmuch as all of the parties to the above actions were before the trial court in the instant case, and since the issues involved the same property and the interests therein of all those parties and also of Kallmeyer, plaintiff in the present action, it appears that all questions, insofar as they have to do with any interests, including liens, in the 10-acre tract, are now settled. However, in order that there may be an end to this litigation it is altogether probable that in the event there are further proceedings in the case of Watson v. Poore, as authorized by the above mentioned decision of the Supreme Court, the trial court may order that Kallmeyer, respondent herein, be made a party pursuant to Code of Civil Procedure, section 389. The trial court may then determine what issues have been settled, and if any are found still undetermined they may be finally passed upon.

[11, 12] Separate appeals were also perfected by Watson and the Poores from the special orders made after final judgment herein, whereby the court granted plaintiff's motion for leave to file and approved plaintiff's cost bill and denied the motions of defendants Poore and Watson to disallow plaintiff's costs and to strike the memorandum of costs on file. It appears from the record before us that judgment was entered on October 11, 1939. On October 13, 1939, counsel for plaintiff signed and dated a notice of such entry of judgment, but this notice was not served or filed on that date nor until October 26, 1939, when together with a memorandum of costs it was served by plaintiff and filed on October 28, 1939. Thereupon the above referred to motions were made. Plaintiff's counsel then asked and obtained leave to file a motion and affidavits for relief under section 473 of the Code of Civil Procedure. When this motion came before the law and motion department of the court the judge sitting therein granted leave to file the cost bill and filed a short memorandum of opinion. While this memorandum is not strictly a part of the record, it has been brought up in the clerk's transcript and may be considered for the purpose of indicating the basis of the court's ruling; particularly where it shows, as it does in this case, that the court made no ruling at all upon the motion presented under Code of Civil Procedure, section 473. Coakley v. Ajuria, 209 Cal. 745, 290 P. 33; Estate of Felton, 176 Cal. 663, 169 P. 392. In this memorandum, after briefly stating the record as he understood it, this statement is made: "Under the circumstances it seems to me that on this record section 473 of the Code of Civil Procedure is not involved at all and that the leave to file cost bill must be granted. So ordered." A careful examination of the record and of this memorandum discloses that the notice of entry of judgment was not clearly brought to the court's attention, and because of the coincidence that defendants' notice of intention to move for new trial was dated on the same day (October 13, 1939) the court thought this was the one relied upon and very properly held that it was not effective for such purpose. The important thing, however, is that the memorandum shows conclusively that no ruling was ever made upon the motion presented pursuant to section 473 of the

Code of Civil Procedure. This would logically require sending it back to the trial court for appropriate action on the motion. However, such ruling would be based wholly upon the affidavits and records, all of which are now before us. Under such circumstances this court has jurisdiction to take action thereon and eliminate the cumbersome and unnecessary procedure of sending it back to the trial court. Constitution of California, Art. VI, § 4¾; Code of Civ.Proc., § 956a.

[13-16] There is, we think, no escape from the fact that counsel for plaintiff had actual notice of the entry of judgment on October 13, 1939. The notice which he admittedly signed was clearly dated on that day, and he does not deny, but rather tacitly admits, that it was correctly dated. In the absence of contrary evidence the law presumes that it was correctly dated. Code Civ.Proc., § 1963, subd. 23. Actual notice is sufficient under section 1033 of the Code of Civil Procedure. Did counsel, then, make a sufficient showing to justify relief under Code of Civil Procedure, section 473? It appears that he had just been elected a member of the Los Angeles city council, and (without intimating that this was sufficient in itself to upset one's equilibrium) it further appears that as a result his law office suffered a complete realignment, his associates made other arrangements, a new attorney was associated in part of his practice and even his secretary took other employment. The situation appears very similar to that presented in Soda v. Marriott, 130 Cal.App. 589, 20 P.2d 758, in which relief granted by the trial court was sustained. While a harsh viewpoint might suggest that the facts, when boiled down, amount only to a neglect to comply with the statute, on the other hand it is a matter of common knowledge, at least to all who have stepped from private practice into public office, that such a situation is conducive to oversight as to many details, without the person involved being guilty of negligence. In such a situation the courts should lean to liberality (no merits being involved), particularly when it is remembered that the client is the one who would be punished. If the result reached by the lower court can be sustained on any ground, even though not the one upon which such result was based, it is sufficient. As we feel that the showing herein justifies the granting of relief under Code of Civil Procedure section 473, the action of the trial court in granting respondent's motion to file cost bill and in denying appellants' motion to strike respondent's memorandum of costs will not be disturbed.

The judgment and orders appealed from are, and each is, affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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52 Cal.App.2d 164

SHELL OIL CO., Inc., et al. v. RICHTER (POOLE, Intervener).

Civ. 3019.

District Court of Appeal, Fourth District, California.

May 20, 1942.

Hearing Denied July 16, 1942.

1. Mines and minerals 🔑81

An oil lessee was not legally responsible for wrongful acts of sublessee who trespassed on adjoining oil leasehold by whipstocking an oil well.

2. Injunction 🔑1

Relief by "injunction" is a remedy and not, in itself, a cause of action, and the cause of action must exist before injunctive relief can be granted.

See Words and Phrases, Permanent Edition, for all other definitions of "Injunction".

3. Constitutional law 🔑48

Where a statute would bear any other reasonable construction than one under which it would be unconstitutional, such other construction should be adopted.

4. Mines and minerals 🔑125

Words "any such act", in statute limiting time for filing action for trespass arising from whipstocking of oil well and providing that there should be but one cause of action for any such act, means the existing trespass and includes both the presence of the well and the removing of oil by means thereof. Code Civ.Proc. § 349¾.

See Words and Phrases, Permanent Edition, for all other definitions of "Any Such Act".

5. Mines and minerals 🔑125

The statute providing that there should be but one cause of action for trespass arising from whipstocking of oil well applies to original trespass and to persons committing such trespass or claiming under persons committing such trespass, and not to future trespasses by new and different trespassers not involved in the original trespass and not bound by the judgment in original proceeding against original trespasser. Code Civ. Proc. § 349¾.

6. Mines and minerals 🔑125

The statute providing that there should be but one cause of action for trespass arising from whipstocking of oil well did not bar action by owners of oil lease to enjoin owner of adjoining oil lease from operating well which trespassed by whipstocking, notwithstanding that owners of oil lease had theretofore obtained injunction against sublessee's operation of the same well. Code Civ.Proc. § 349¾.

7. Mines and minerals 🔑125

The statute providing that there should be but one cause of action for trespass arising from whipstocking of oil well was not intended to make a judgment against trespassing party binding on one who claims adversely to the trespassing party and who later succeeds through foreclosure, cancellation, or other adverse action to original rights of trespassing party, and does not invite other and different trespasses by other parties after final adjudication that well constituted a trespass and could not be operated. Code Civ.Proc. § 349¾.

8. Mines and minerals 🔑125

In action against oil lessee by adjoining oil lessees to enjoin lessee's operation of oil well which trespassed on adjoining oil leasehold by whipstocking, evidence was sufficient to show that well was placed in operation by lessee and not by sublessee's receiver in official capacity.

9. Mines and minerals 🔑125

A judgment enjoining operation of oil well would not interfere with operations of receiver appointed for sublessee, where receiver was not in possession of well, and was not authorized to operate well and had no such right in view of injunction restraining sublessee from operating well, and receiver was not named as defendant in instant action against lessee, but had merely voluntarily appeared and been permitted to intervene without filing complaint in intervention or other pleading.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action to enjoin the operation of an oil well, by Shell Oil Company, Incorporated, and others, against Edward R. Richter, wherein W. B. Poole, as receiver, etc., intervened. From a judgment granting the injunction, the defendant and the intervener appeal.

Affirmed.

Roy Daily, of San Francisco, and Benjamin D. Frantz, of Sacramento, for appellants.

Mortimer Kline, of Los Angeles, and McCutchen, Olney, Mannon & Greene and George Harnagel, Jr., all of San Francisco, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment enjoining the operation of an oil well.

The appellant Richter owned an oil lease on lands which adjoined leasehold lands held by the respondents. In 1933, he drilled at a point about 21 feet from the respondents' lands, but not encroaching thereon. He went down 1,900 feet but found no oil. Thereafter, he subleased to one Adams who, with his associates, drilled a well by using the top 100 feet of the dry hole drilled by Richter and then whipstocking so that the well trespassed on the respondents' properties. When completed, this well was 1,780 feet deep and all but the top 230 feet thereof was under and within the respondents' lands. This well was placed on production in April, 1934, and it produced 223,000 barrels of oil between then and January 27, 1937, when production was stopped. In June, 1934, Richter brought a suit against Adams to terminate his interest in the sublease on the ground that the required payments had not been made, and recorded a lis pendens. Two judgments in that case have been reversed. (Richter v. Adams, 19 Cal.App.2d 572, 66 P.2d 226; Richter v. Adams, 43 Cal.App.2d 184, 110 P.2d 486) and, so far as here appears, Richter's right to the possession of the land upon which the well is surfaced has not yet been finally determined.

On September 15, 1935, section 349¾ of the Code of Civil Procedure became effective. On March 3, 1936, these respondents commenced separate actions against Adams and his associates to enjoin the operation of this well insofar as it trespassed upon their lands. These actions were consolidated for trial and on March 20, 1937, a judgment was entered perpetually enjoining Adams and his associates from operating this well below a measured depth of 233 feet. This judgment became final and on January 27, 1937, the well was closed down and any operation thereof ceased.

The well remained closed down for some 20 months and on September 26, 1938, Richter again placed the well on production and began to operate the same. On October 4, 1938, the respondents brought the present action to enjoin Richter and his agents from the further operation or production of said well within the boundaries of their properties and from the further taking of oil or similar substances from their properties through or by means of said well. The court found in all respects in favor of the respondents and this appeal followed.

The main question presented is whether this action was barred by the provisions of section 349¾ of the Code of Civil Procedure, which limit the time within which actions may be begun which are based upon trespasses arising from the whipstocking of oil wells. This section provides, in part:

> "* * * as to wells heretofore * * drilled, the cause of action shall be deemed to have accrued ten days after the time when the well which is the subject of the cause of action was first placed on production.
>
> "Notwithstanding the continuing character of any such act, there shall be but one cause of action for any such act, and the cause of action shall accrue as aforesaid."

It clearly appears that the producing portion of this well lies entirely within the respondents' lands and the appellants make no contention to the contrary. It also clearly appears that Richter had nothing to do with the operation of this well, directly or indirectly, until September 26, 1938, and that prior to that time he had committed no act of trespass in connection with the respondents' lands. He bases his entire claim upon the contention that there can be but one continuing trespass so long as this oil well remains as an invasion upon respondents' lands, that section 349¾ of the Code of Civil Procedure permits but one action on account of such a trespass, that since one action has already been prosecuted without making him a party thereto any further action is barred by this statute, and that it is beyond the power of the courts to interfere with his taking oil from within respondents' lands so long as he takes it through this well.

[1, 2] In effect, Richter contends that respondents' cause of action as against him was barred by this statute several years before it arose. Richter was not legally responsible for the wrongful acts of his lessee, Adams, which were involved in the prior injunction suit. O'Leary v. Herbert, 5 Cal.2d 416, 55 P.2d 834. Richter did nothing which gave the respondents a cause of action against him until long after a judgment in the former injunction action had become final and long after 180 days had expired after the effective date of this statute. While it may be conceded that the respondents should have made Richter a party to their action against Adams if they had then had a cause of action against Richter, they had no such cause of action at that time. Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted. Williams v. Southern Pac. R. R. Co., 150 Cal. 624, 89 P. 599.

The appellants contend that the installation of oil well casings upon the respondents' lands is an injury or trespass of a permanent nature and exactly similar to the building of railroad tracks over the lands of another and operating trains thereon, which was considered in Williams v. Southern Pac. R. R. Co., supra. So far as the interference with land is concerned there is a great difference between the construction of railroad tracks over the surface thereof and the continuous operation of trains thereon, and the placing of one string of oil casing underneath a parcel of land. In the latter case, so far as material here, the only substantial injury comes from the use of the well in drawing oil from the land. In this case, the well was thus used by Adams and this use ceased when Adams was enjoined from continuing the trespass. In fact, Adams was ordered to plug up the hole so that it could not be further thus used but this was never done. Later, Richter, who was not affected by that injunction, again put the well on production. We have no hesitation in holding that this was a separate act of trespass which could be enjoined unless this is prevented by the provisions of section 349¾.

[3] The respondents' cause of action against Richter did not arise until September 26, 1938. Under appellants' contention, that cause of action was barred long before it arose. If section 349¾ must be construed in accordance with appellants' contentions it would have to be held to be unconstitutional insofar as its application to this case is concerned. Feeney v. Hinckley, 134 Cal. 467, 66 P. 580, 86 Am.St.Rep. 290; Callet v. Alioto, 210 Cal. 65, 290 P. 438. It is well settled, however, that where a statute would bear any other reasonable construction than one under which it would be unconstitutional such other construction should be adopted. Geimann v. Board of Police Commissioners, 158 Cal. 748, 112 P. 553.

[4-7] Section 349¾ does not create a cause of action but merely limits the time within which a suit may be started upon an existing cause of action. It provides a limit of 180 days, after the cause accrues, for filing an action for relief based upon the whipstocking of an oil well whether the relief asked be in the nature of abatement or compensation for oil removed. It is then provided that notwithstanding the continuing character of "any such act," which means the existing trespass and includes both the presence of the well and the removing of oil by means thereof, there shall be but one cause of action for "such act." That means that there shall be but one suit for the cause of action then existing and arising from "such act" of trespass, including the original unlawful entry and the continuing presence of the well and removal of oil. It is then provided that this one cause of action, for such act of continuing trespass, shall be deemed to accrue 10 days after the well is first placed on production. This can only mean 10 days after the well is placed on production in such a manner as to give rise to a cause of action on account of the removal of oil as this is specifically made a part of the continuing trespass, the relief of which is limited to the one action. All of this relates to the continuing trespass, including the removal of oil, which gives rise to that cause of action which then exists and which accrues 10 days after first production. The only cause of action then existing is one against those parties who have committed and are committing "such act" of trespass. It is this act, trespass and cause of action, to which the section relates.

This is the reasonable construction of section 349¾ and this is in line with the purpose expressly stated in the statute adopting that section. Stats.1935, p. 2285. That purpose is to secure a speedy determination of the rights of parties, where wells trespass upon adjoining lands, in order to subserve the public interest in the use and conservation of oil and to prevent a multiplicity of unnecessary suits. The purpose was to speedily determine whether those in charge of such wells had a right to operate them in the manner in which they were drilled, and not to settle any controversy as to which persons are entitled to possession of such wells or how long they might remain in possession. It follows that when it is determined that the parties in charge of the well had no right to operate it, it could not have been intended either to give someone else a right to operate such a well or to forbid another action brought to prevent another and different party from committing a new trespass by again operating the well, the operation of which had already been enjoined.

The time limit provided by the portion of this statute which is involved here is placed upon and based upon an existing cause of action and it in no way appears that it was intended to bar any future cause of action which did not then exist. It was intended to apply to those persons who were then guilty of a trespass which gave rise to a cause of action, which would usually be those who then owned or were operating the well. Doubtless the judgment rendered in the one action allowed for that trespass would be binding on all persons claiming under the parties to such action. But nothing in this statute purports to make such a judgment binding on one who claims adversely to the trespassing party and who later succeeds, through foreclosure, cancellation or other adverse action, to the original rights of the trespassing party, through which he was enabled to commit the trespass. And it was never intended to permit a new and different trespasser who was not involved in and not bound by the original proceeding to come in and render that judgment ineffective by a new and different act of trespass which should be beyond the reach of, and even sanctioned and protected by the law.

The purpose and intent of the statute is to cover and relate to an action for what may be called the original trespass, though that be a continuing one, and to parties whose acts in connection with that trespass have given rise to a cause of action in which it may be determined whether or not the well in question constituted an underground trespass on the land of another. But when such an action has been filed and it has been finally adjudicated therein that the well constitutes a trespass and may not be operated, and the well has been shut down pursuant to that judgment, it was not intended to authorize and invite other and different trespasses by other parties. It was never intended by the statute to permit someone who was not bound by the judgment and against whom no cause of action had then existed to reopen a well which had been ordered closed, and to take with impunity from the land of another oil to which he had never been and to which he could not otherwise be entitled. Such an act constitutes a new trespass which was not within the purview of the statutory provisions relating to the original trespass, and gives rise to a new cause of action which did not previously exist and which was not within the statutory limitation that there shall be but one cause of action for "any such act" as was covered by the statute. In such a new trespass by Richter this well "was first placed on production," insofar as a cause of action against him is concerned, on September 26, 1938, and the present action was begun less than 10 days thereafter. It follows that this action was not barred by the provisions of section 349¾, as properly construed.

[8, 9] Most of the other points raised by the appellants require no consideration in view of our decision on the main issue presented. Some contention is made that there is no evidence to support the court's finding that Richter again placed the well on production on September 26, 1938, it being contended that the evidence shows that the well was then placed on production by W. B. Poole, acting as a receiver, having been appointed as such in the action brought by Richter against Adams. Poole was Richter's brother-in-law and the evidence amply supports the finding that the well was again placed on production by Richter, and fully justifies the inference that anything done in that connection by Poole was done in his personal capacity and with the purpose of aiding and assisting Richter. It is further argued that the court erred in denying a motion to dismiss the action, which motion was based on the ground that any judgment entered would interfere with the operations of Poole as the receiver appointed in Richter v. Adams, and on the ground that no permission had been sought or obtained to bring the action against Poole, as receiver. The same court had appointed Poole as receiver in the other action, there is nothing in this record to show that Poole was authorized as such receiver to operate the well, and the record would indicate that he had no such right especially in view of the existing injunction. In any event, Poole, as receiver, was not named as a defendant in this action as filed. He voluntarily appeared and asked for and received permission to intervene. However, he filed no complaint in intervention or other pleading, although he joined in the motion to dismiss the action and in the notice of appeal. Moreover, the court found that Poole, as receiver, was not in possession of said well at any time subsequent to September 21, 1938, and that he was not then authorized to operate said well or produce therefrom. Insofar as shown by the record, there was no interference with a receiver and no reversible error appears in this connection.

The judgment is affirmed.

MARKS, and GRIFFIN, JJ., concurred.

AUSTIN et al. v. HALLMARK OIL CO. et al. *

Civ. 3020.

District Court of Appeal, Fourth District, California.

May 15, 1942.

Rehearing Denied June 10, 1942.

Hearing Granted July 14, 1942.

1. Joint adventures 🔑4(1)

Associates in a common enterprise, under whatever guise, have a duty to each other to make full disclosure of any preference or profit not common to all of the associates.

2. Corporations 🔑30(2)

A promoter of a corporation occupies a "fiduciary relation" to subscribers, and he is bound to declare truthfully to his associates any personal interest that he has in the matter, and without such disclosure he cannot legally profit at the expense of his associates.

See Words and Phrases, Permanent Edition, for all other definitions of "Fiduciary Relation".

3. Corporations 🔑30(2)

Where a promoter of a corporation is guilty of any misrepresentation of facts or expression of truth in relation to his personal interest in a proposed transaction, the corporation may set aside the transaction or recover compensation for any loss which it has suffered.

4. Joint adventures 🔑4(1)

Joint adventures are governed by the same rules as partnerships, and the joint adventurers owe the same duties to each other as do partners.

5. Notice 🔑5

Constructive notice may be a matter of general inference presumed in support of a judgment or it may be an ultimate fact found by the trial court who, under the circumstances, is the best judge of what the actors at the time believed or ought to have believed and then knew or ought to have known. Civ.Code, § 19.

6. Corporations 🔑428(3)

The rule that a principal is bound by the knowledge of his agent acquired in the course of his agency is applicable to corporations.

7. Corporations 🔑428(1)

It is the duty of an agent to communicate to his corporation facts learned by him, and whether agent performs that duty or not the corporation is bound, since it is presumed that the agent will communicate the facts to the corporation.

8. Mines and minerals 🔑106

In promoter's action to be decreed the owner of an interest in oil lease and for other relief, evidence was sufficient to support finding that corporation and other parties interested in lease had knowledge of so-called secret agreement whereby party to drilling contract with corporation assigned to promoter one-half of all income under terms of contract.

9. Mines and minerals 🔑74

Where party who assigned oil lease to corporation assigned to promoter 50 per cent. of interest retained, promoter acquired no greater interest in lease than that held or retained by assignor, and that interest was subject to the same conditions of breach and forfeiture as was assignor's interest.

10. Mines and minerals 🔑74

Where party who assigned oil lease to corporation assigned to promoter 50 per cent. of interest retained by him, any prior oral agreement or arrangement was merged into the final written assignment, and any right that promoter had was required to be measured by that assignment and by terms of contract from which proceeds were to come. Civ.Code, § 1625.

11. Appeal and error 🔑901

The duty of pointing out evidence to support trial court's finding that a certain agreement was not entered into in good faith and for a consideration rested on parties relying on finding and not on the appellate court.

12. Mines and minerals 🔑84

Evidence that party to oil drilling contract with corporation left leased property and did no further drilling under contract indicated an "abandonment" of contract and leasehold.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

13. Mines and minerals 🔑84

Where assignor of part of interest in oil lease abandoned drilling contract, left lease and failed to carry out terms of contract, and even executed a written relinquishment and quitclaim of all his interest in leasehold, assignee's rights were likewise terminated to the same extent, and it could not be contended that because assignment was an "interest in real property" it could not be canceled by abandonment or violation of contract by assignor.

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* Subsequent opinion 134 P.2d 777.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest in Real Property".

14. Licenses 🔑18½

Where party to drilling contract with newly formed corporation assigned to promoter part of interest retained in oil lease, assignment did not constitute the "sale of a security" within the Corporate Securities Act forbidding the sale of securities without a permit. St.1933, p. 2308.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale of a Security".

15. Mines and minerals 🔑106

Where party to drilling contract with newly formed corporation assigned to promoter portion of interest retained in oil lease, and promoter subsequently assigned part of that interest, corporation and other parties interested in lease could not claim benefits of promoter's assignment and also contend that agreement whereby interest was assigned to promoter was void in its entirety. Civ.Code, § 3517.

Appeal from Superior Court, Kern County; Herbert S. Gans, Judge.

Action by John W. Austin and others against the Hallmark Oil Company and others to be decreed the owners of an interest in a certain oil lease and of certain shares of stock, for the issuance and delivery of the stock, and for an accounting. From the judgment, defendants appeal.

Judgment affirmed in part, and reversed in part, with directions.

Luce, Forward, Lee & Kunzel, of San Diego, Borton, Petrini, Conron & Borton, of Bakersfield, and Schell & Delamer and L. W. Frankley, all of Los Angeles, for appellants.

Charles C. Crouch, of San Diego, and George W. Crouch, of Los Angeles, for respondents.

GRIFFIN, Justice.

The pleadings in this case were heretofore presented and considered by this court. Austin v. Turrentine, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178. The nature of the action is there fully set forth. We will not repeat it here. Suffice it to say, after trial, and upon the pleadings therein discussed, the court found generally in accordance with the allegations of the respondents' complaint with certain exceptions which, so far as material here, will be hereinafter noted. Appellants' statement of facts as to what the evidence showed and the conclusions to be drawn therefrom is quite at variance with respondents' statement. Resort by this court to an 1,800-page transcript of the evidence, voluminous depositions, and several hundred exhibits, was made necessary to properly differentiate the interpretation given the evidence by the respective parties. We will tersely review the evidence.

Plaintiff and respondent John W. Austin, hereinafter referred to as Austin, in June, 1934, was a promoter and was interested with one John K. Porter in the acquisition and sale of oil leases and lands near Bakersfield. Austin was a resident of that city. He had had some limited experience in drilling for oil and in the operation of an oil well. The defendant and appellant Charles H. Forward, hereinafter referred to as Forward, was an attorney at law, residing in San Diego. His brother, appellant James D. Forward, and Reuben E. Harrison resided in San Diego. They had little, if any, experience in the drilling of oil wells or acquiring oil leases. Appellant Frank D. Carroll was a friend of Austin, not known to the other appellants prior to the time he entered into the transaction here involved, and resided in Los Angeles. He was also inexperienced in such oil drilling operations. The property involved in this action and in which an interest was acquired by the appellants through a lease, and upon which leased property oil was finally developed, comprises about thirty acres and is situated in Kern County, near Taft. The property was owned by Julius Fried and the Merritt Annex Oil Company, a corporation. Although Austin and appellants were formerly acquainted, Austin's first contact with Harrison in reference to the leasing of oil lands was in July, 1934, when he entered into an agreement with Harrison concerning the proposed purchase of other oil leases, by which agreement Austin was to furnish his services in managing the oil drilling operations. Harrison was to raise the money to buy the property and bring it into production. Austin was to receive a 50 per cent interest in it after Harrison obtained his money back from the production of oil therefrom. Harrison put up $500 with Austin for this purpose but the deal did not go through. During the course of Austin's efforts he contacted Porter, who directed Austin's attention to an oil lease that is in no way involved in this litigation. Austin inspected the property and rejected it. As a result, however, of the negotiations that had thus taken place between Austin and Porter, Porter suggested to Austin that he obtain three or four people to put in $100 apiece and allow Porter to make use of the money to scout for leases over a wide territory. In pursuance thereof an agreement between them was drawn up and Austin gave Porter his check for $100. Austin was unsuccessful in interesting anyone else. He communicated this inability to Porter who then said to him "that he would use the $100 as far as it would go to look up leases on the west side," with the understanding that they should each have a common share.

Austin testified that the lease in the present action grew out of Austin's and Porter's activities in the performance of that agreement; that during the course of Porter's investigations he reported to Austin that a man named Campbell had a lease on the property here in controversy; that Austin went to Los Angeles and talked to Fried, the owner of the property and learned that he would be willing to make a lease with Austin and Porter, provided they were ready to go ahead with drilling at once; that he secured the promise of a lease of the property on a one-sixth royalty basis. Austin then testified that he had previously contacted appellant Harrison and told him that Porter was an oil man; that he was looking up leases for him; that he advanced him $100 for that purpose; that they were sharing on a fifty-fifty basis; that he and Porter had the lease and explained the basis upon which it could be obtained; that he had told him that he had investigated the property and considered it promising; that he intended to organize a company and drill on the property; and that he and Porter had a plan to turn the lease over to a corporation with the understanding that those who invested money should first have their money returned with interest and thereafter 50 per cent of the profits should flow to Austin and Porter. The record shows that on September 2, 1934, Austin wrote Harrison telling him that Porter was then out after leases. However, the record also shows that at this particular time Porter had a lease in his own name which included the thirty acres here involved from Julius Fried and the Merritt Annex Oil Company, dated June 22, 1934, but very little development work had been done under it. Harrison, after an examination of the property here involved, manifested considerable interest in it. Austin at once went to attorney Fred Welsh, at Bakersfield, and arranged with him to organize a California corporation to handle the project in a way that would carry out their intentions. Harrison brought appellant Charles Forward, his personal attorney, to Austin's office in Los Angeles to meet Porter and look over the lease. Austin explained to Forward the steps he had taken and Forward at once denounced the plan as adopted by Austin's attorney as impracticable and declared that a Nevada corporation should be organized to handle the whole situation. Forward was then asked by Austin if he desired to put any money in the venture and his reply was that he did not wish to. On September 22, 1934, Austin, at a meeting in Los Angeles, proposed to Harrison and Forward that they join with him and acquire a lease on the property above mentioned and that other persons mutually agreeable be induced to contribute and that they associate Porter with them, who would receive for his services as expert oil driller one-half of the net proceeds from oil developed on the property.

Appellants testified that at this meeting it was agreed that Harrison and Austin would each contribute $2,500 and that other persons acceptable to them would be induced to contribute a like amount each, up to the sum of $16,000. Respondent Austin's testimony in this respect is not clear and is more or less evasive as to whether he agreed to put up any money or buy any stock at that particular time. He testified that "I never represented that I would put any amount of money into the venture with anybody—in the beginning of the venture." On December 16, 1934, Austin wrote to

Forward that "I will take $1,000 of the $3,850 yet to be subscribed." And on October 31, 1934, Austin wrote to Harrison that he (Austin) and one Carroll would put in at least $5,000. The evidence is most convincing that he agreed to take at least $2,500 worth of stock and put that amount into the corporation.

The trial court found in this respect that "* * * subsequent to the organization of said Hallmark Oil Company, to wit, on or about the 5th day of November, 1934, and at other times the plaintiff John W. Austin agreed with the said Hallmark Oil Company, Inc., its officers and agents, to subscribe for $2,500 worth of the capital stock of the said corporation at the par value thereof and pay for the same with his own money or with moneys which he was authorized to use for that purpose. That he paid the said corporation only the sum of $1,300 on account thereof * * *."

Austin did not at that meeting suggest that he had any interest in the lease between Porter and the Hallmark Oil Company. Forward agreed to incorporate the corporation for a $100 interest. He later advanced $185 to pay the costs of incorporation and the further sum of $50. A few weeks later he joined with others and advanced a total sum of $1,000. It was further agreed at the meeting that a lease should be obtained immediately and that the lease should be taken in the name of John K. Porter and should thereafter be assigned by Porter to the corporation which was to be formed as agreed.

On September 24, 1934, they entered into a written lease of the premises. The term of the lease was twenty years from its date and so long thereafter as oil was produced in paying quantities. There were other provisions in the lease respecting the time to commence the drilling, together with certain provisions in reference to default and quitclaim. It also provided for landowner's royalty of one-sixth of the proceeds received from the sale of oil and other substances extracted; that the lessee must drill four wells; that upon the failure of the lessee to commence the drilling of any well within the time specified, the lease and agreement should "ipso facto and without notice cease and terminate." Immediately upon the execution of the lease, Harrison advanced and paid Austin the sum of $500 to be used for the installation of drilling equipment upon the premises. Porter commenced the installation of equipment for drilling for oil. It was agreed that Austin would give his personal attention to the enterprise; that he would receive and disburse the moneys contributed to the venture by the appellants and would pay out such money as would be necessary for the conduct of drilling operations. Porter also agreed to devote all his time to the drilling operations and to supply his expert skill, knowledge and experience. Austin received sums of money from Forward and Harrison between the 25th day of September, 1934, and about the month of March, 1935, and from other persons who thereafter became associated with them, equaling approximately $18,000, which Austin claimed he paid out to, or on bills contracted by, Porter.

In pursuance of the agreement entered into on September 22, 1934, the appellant Charles H. Forward, on October 3, 1934, requested one McNamee, an attorney at law at Las Vegas, Nevada, to organize a corporation in Nevada with a capital stock of $50,000, divided into 5,000 shares of the par value of $10 each. The details of the organization were placed in the hands of McNamee. The Hallmark Oil Company, Inc., was there incorporated on October 13, 1934. The original directors and officers were local and named by McNamee. On October 30, 1934, Hallmark Oil Company Inc., as party of the first part, entered into a contract and agreement with Porter. In this agreement the lease between Porter and Fried, et al., is recited. Porter agreed to cause the leasehold and all of his rights thereunder to be assigned to the company. The company agreed to pay, in connection with the drilling of wells on the leasehold, amounts necessary to pay the bills incurred by Porter in connection with the drilling of wells, not to exceed the sum of $16,000 (later increased to $18,000), and that out of the proceeds of the lease, sale of oil, etc., additional sums would be paid for the drilling of wells. It was further agreed that the sum of $18,000 should be repaid to the corporation with interest thereon at the rate of 7 per cent per annum whenever the drilling operations were fully completed, from the income from said leasehold; that Porter would perform all of the agreements on his part to be performed as provided in the lease between himself and Fried, et al., provided the money to be supplied by the company was made available; that in the event of the failure of Porter to faithfully fulfill and perform the obligations to be performed by him as provided in said lease, the company would have the right to terminate all the rights of Porter under the agreement; that Porter should be then entitled only to a one-half interest in and to the proceeds to be thereafter received from the production of oil, gas or other substances which may have been theretofore brought into production after all payments had been made as provided for in the agreement. Bills greatly exceeding the $18,000 agreed upon were contracted and considerable correspondence ensued in regard to them and also as to further advances to be made in carrying on the drilling operations. Just before oil was struck, considerable excitement was manifested by all parties concerned. Additional appropriations were made quite freely by appellants. The thrilling anticipation of becoming potential millionaires overnight was reflected in the correspondence. At the request of Forward, Austin on several occasions forwarded to McNamee in Las Vegas, a statement of the amount of advances claimed to have been made from time to time by the several parties interested and suggested that stock of the corporation be issued in the several amounts. On March 11, 1935, Austin wrote to McNamee as follows:

"You have cancelled checks to the amount of $11,252.43, being money that was advanced for the purpose of drilling the oil well, by the following contributors, and in the following amounts:

Charles H. Forward	$ 3,500.00
James D. Forward	1,500.00
Florence R. Sebastian	2,750.00
Martha Forward	1,000.00
C. A. Everts	1,000.00
John W. Austin	1,000.00
Helen P. Austin	100.00
Luethel Austin	100.00
John W. Austin	300.00
	$11,250.00

for which please issue stock of the Hallmark Oil Company to each of these individuals to the amount of their contributions, as set forth above."

There was a direction also in the letter to deliver the stock certificates to "bearer, James D. Forward." Stock certificates were issued by McNamee and turned over to James D. Forward as requested, which included stock certificates to John W. Austin for $1,000 and $300 respectively, to Helen P. Austin for $100, and to Luethel Austin for $100. These stock certificates were ordered canceled and so marked by the corporation and retained by it after they had been returned to the corporation by James D. Forward.

Appellants claim at all times that this stock was retained by the company, not only because Austin had contributed nothing whatever to the company, but because he had paid no consideration for the shares of stock. Plaintiffs' shares above listed are the ones involved in this action.

The evidence shows that on November 2, 1934, Porter, in writing, assigned to John W. Austin one-half of all income, under the terms of the drilling contract dated October 30, 1934, between the company and him, and authorized the company to pay directly to Austin all sums due under that assignment. That assignment was acknowledged on January 22, 1935, and was recorded January 31, 1935, in Kern County. Appellants claim that the assignment was a secret agreement between the parties and that appellants had no knowledge of it until some time after the date of its recordation.

On January 28, 1935, Austin induced one McGuire to contribute $4,000 to pay some of the outstanding bills of the corporation. Austin had Porter assign to McGuire, in consideration therefor, 15 per cent of Porter's interest in the proceeds under his agreement with the corporation. On January 29, 1935, Austin assigned to McGuire a 5 per cent interest. After these purported assignments Austin was then the purported owner of a 20 per cent interest and Porter was the owner of a 10 per cent interest. Subsequent to April 9, 1935, the corporation contracted with McGuire in reference to his claimed 20 per cent interest. He was given an option to purchase stock in the corporation in the sum of $4,000, or the return of the investment. Harrison purchased the option to take the stock and divided it with Forward. The assignment to Austin, it is claimed by appellant, was a secret assignment in violation of the mutual trust relationship, and violative of the provisions of the Corporate Securities Act, St. 1917, p. 673, forbidding the sale of securities without a permit.

On November 4, 1935, appellants undertook the organization and incorporation, under the laws of California, of another corporation named Hallmark Oil Company. Incorporators of the new corporation were Charles H. Forward, James Forward and Reuben E. Harrison, secretary. This corporation was apparently formed without Austin's knowledge or consent, and no mention was made in any of the proceedings of him or respondents' claimed stock in the dissolved corporation.

An application was made for a permit to issue 4,550 shares of the common stock of the California corporation. On February 26, 1936, the permit was issued and allowed the company to deliver to the Hallmark Oil Company, Inc. of Nevada, 1,700 of its shares of stock in consideration of the transfer to it of all the property and assets of that corporation, including the lease on the property herein involved. The California corporation assumed the obligations of the Nevada corporation. Thereafter the Nevada corporation was dissolved. Stock of the California corporation was thereafter issued to the stockholders of the Nevada corporation according to their respective interests. No stock was issued to any of the respondents for the claimed reason that they had advanced nothing to either corporation and had paid no consideration to either corporation for the issuance of any stock to them and were not entitled to the issuance of any stock whatsoever.

The record shows that commencing about January 1, 1935, all parties, including Austin, were dissatisfied with the manner in which Porter was managing the affairs of the company in reference to the payment of bills, and as a result of a conference Austin, in a writing dated January 23, 1935, was designated manager for the corporation. On April 9, 1935, Forward wrote Austin notifying him that he had been ousted as company agent. On March 28, 1935, Porter, in writing, purported to relinquish and abandon all right, title and interest that he had under the agreement between himself and the Hallmark Oil Company dated October 30, 1934. In this agreement it is recited that Porter ceased all efforts to carry out his agreement before the 28th day of March, 1935, and that he fully and completely abandoned all further work and effort and services in respect to the contract and lease. The trial court found that this agreement "was not entered into or executed in good faith or for an adequate or any consideration." Porter was killed in an accident on November 27, 1936. After this action was filed appellants secured from Porter's wife a release of any community interest she may have had in and to the lease or agreement in consideration of the sum of $26,441.67. Seven wells were thereafter financed by the company and drilled by the employees of the Hallmark Oil Company, Inc. The employment of these men and the supervising of the work was done by the appellant Forward who was the president of the corporation. The complaint in this action was not filed until February 2, 1937.

The court specifically found that appellants, and particularly Charles H. Forward, in these several transactions, did not act in pursuance of any fraudulent intent, with certain exceptions, particularly as to the stock transfers; that originally Porter and Austin entered into an agreement to procure the oil lease for the equal benefit of Porter and Austin; that the lease was to be taken in the name of Porter, and Austin was to give his time and efforts toward securing the investment of other persons' funds to be used for the purpose of drilling an oil well upon the land, and that the parties making the investment were to be given a 50 per cent interest in the lease and to have returned to them all moneys by them so invested with interest, when and as the same could be returned and paid to them from the net proceeds of the said lease; that when funds for such purpose were secured Porter should devote his time to the drilling operations upon the property and appellant Austin should devote his time to financial matters and "that they should have equal interests in the said lease and all profits to be realized therefrom."

The court specifically found in respect to the assignment (dated November 2, 1934) to Austin from Porter of one-half of all income and profits due or to become payable to him under the agreement of October 30, 1934, "that said corporation had knowledge thereof at least as early as the early part of January, 1935," and "that at all times subsequent to the organization of the said corporation said corporation knew that the plaintiff John W. Austin owned a portion of said lease"; and "that the defendant Charles H. Forward knew that said plaintiff owned an interest in the said leasehold property prior to the formation of either of said corporations, and had knowledge of said assignment and agreement at least as early as the early part of January, 1935, and that the defendant Reuben E.

Harrison knew of the making of said agreement prior to any of the negotiations with any of the other defendants, and had knowledge of the making of said assignment at least as early as the early part of January, 1935"; that "Austin * * * did not make any secret or any profit in any capacity wherein he bore a fiduciary relationship"; that "the facts and circumstances of which the defendants are shown to have had notice and knowledge were sufficient to put a prudent man upon inquiry as to whether the plaintiff John W. Austin had an interest in said leasehold, and by prosecuting such inquiry," they "might have learned and ascertained that he had such interest and the nature and extent thereof; and because of such facts and circumstances the court finds that the defendants had, in addition to the actual notice as hereinbefore found, constructive notice of said plaintiffs' said interest; that from the very nature of the proposition as first and subsequently submitted by John W. Austin, whereby he was to devote his personal services to the venture over a long period of time without any considerable investment on his part, constructive notice was thereby given that he had an independent interest in the proposed venture."

It was then found that Austin agreed to subscribe for $2,500 of the capital stock of the corporation; that he had paid $1,300 thereon. Prior to March 21, 1935, one McFadden, a worker on an oil well outfit, gave Austin $1,000 to use for the benefit of the corporation in its drilling operations. Austin was authorized to procure, as consideration therefor, 100 shares of the stock of the corporation to be issued in Austin's name. The trial court so determined and found that this was done with the knowledge and approval of the corporation and of Forward and Harrison. The evidence sustains this finding. This sum represents $1,000 of the amount found to have been paid by Austin to the corporation in payment on his subscribed stock. The remaining portion found to have been paid into the corporation by Austin was accounted for as being erroneous overpayments by Austin from his personal funds on bills of the corporation, which erroneous overpayments were discovered in the final audit of the books of the corporation.

As a result of the accounting had before the trial court it was found that the net income from the leasehold, from 1934 to 1940, was $960,588.47; that the dividends on stock in the corporation for the same period amounted to $99.75 per share. The court then concluded and so adjudged that Austin "now is, and during all the times mentioned in the complaint herein was, the equitable owner of a twenty per cent (20%) interest in the leasehold described in the said complaint (i. e. entire leasehold), and in the net profits realized and to be realized therefrom, subject to the provisions of that certain agreement between John K. Porter and Hallmark Oil Company, Inc. * * *" and that the "Hallmark Oil Company holds the title to said lease as trustee for said John W. Austin to the extent of his aforesaid interest therein." It gave judgment in favor of John W. Austin (being his 20 per cent interest) in the sum of $192,117.67, plus interest, "less the deduction therefrom of the sum of $1,200 hereinafter referred to. * * *" It was then concluded by the court that Austin was "entitled to have issued to him and in his name two certificates of the capital stock of the said corporation, one for ten shares, and one for 100 shares (which he apparently holds in trust for McFadden), the said certificates to be dated as of the date of the issuance of stock of the said corporation," and ordered that dividends be paid thereon in the sum of $10,972.50, plus interest, totaling $12,910.43. The court also found that Austin was still obligated to pay to the corporation on account of the balance of the $2,500 worth of stock which he originally agreed to take, and ordered that the balance, i. e. $1,200, be paid, by "deducting the same from the amount to be recovered by said plaintiff" from the 20 per cent above mentioned as found owing to Austin under his assignment from Porter. The trial court then found that Helen P. Austin and Luethel Austin, as of the time of the original issue of stock, were entitled to ten shares each. Judgment for the amount of dividends thereon in the sum of $997.50 each was ordered, plus interest. The evidence clearly supports the conclusion that the last two mentioned respondents each paid $100 into and for the benefit of the corporation and that the appellants concurred or at least acquiesced in the agreement to issue stock to them as of the date found. Stock in the corporation was ordered issued accordingly. Appellants now appeal from this judgment and order.

[1-4] Appellants claim that the findings and judgment are not supported by the evidence mainly in that (1) there is no evidence to support the finding that the defendants had knowledge of the so-called secret agreement or that Austin had any interest in the leasehold. As to the first question the evidence is confusing, vague and uncertain, and is by far an all-important question to be determined on this appeal. It has been uniformly held that associates in a common enterprise under whatever guise, have a duty to each other to make full disclosure of any preference or profit not common to all of the associates and a promoter of a corporation occupies a fiduciary relation to the subscribers and is bound to truthfully declare to his associates any personal interest that he has in the matter. Without such disclosure he cannot legally profit at the expense of his associates, and if he is guilty of any misrepresentation of facts or expression of truth in relation to his personal interest in the proposed transaction, the corporation is entitled to set aside the transaction or recover compensation for any loss which it has suffered. Munson v. Fishburn, 183 Cal. 206, 190 P. 808; Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 97 P. 10, 18 L.R.A.,N.S., 1106. It has been repeatedly stated by the courts of this state that joint adventures are governed by the same rules as partnerships, and the joint adventurers owe the same duties to each other as do partners. Menefee v. Oxnam, 42 Cal.App. 81, 183 P. 379. That Austin occupied such a position can be established by the evidence and the court practically so found. It is alleged in plaintiffs' complaint that prior to the commencement of the drilling operations it was agreed between Austin and the defendants Forward and Harrison and Porter: (1) that this plaintiff should go to Bakersfield, California, and take charge of disbursements of moneys on said project; (2) that the said John K. Porter should devote his time to the physical drilling operations; and (3) that all moneys which might be secured from any source for the purpose of conducting the same drilling operations should be sent to this plaintiff and be by him disbursed and expended for such purpose." The court found all of these allegations to be true and that the oral agreement took place before any corporation had been actually formed.

The so-called secret agreement between Porter and Austin was dated November 2, 1934. This assignment was made just three days after the execution of the agreement between Hallmark Oil Company and Porter. It was acknowledged on January 22, 1935, and not recorded until January 31, 1935. We find no written disclosure of this secret interest or assignment in any letters to appellants or otherwise until mention of it was made in the agreement with McGuire dated January 29, 1935. Austin testified that he thought he sent a copy of the McGuire agreement to Forward and Harrison. However, they both denied receiving it or having any knowledge of the claimed secret assignment until about February 27, 1935. They testified that they suspicioned Austin prior to that time but did not definitely know about the assignment or that Austin had not paid any sums into the corporation until an auditor employed by them discovered that fact, and that it was at that time they accused Austin of having such a secret agreement and that he neither denied nor admitted such an agreement. The voluminous accounts of correspondence between the parties rather indicates that there is much merit to appellants' testimony in this respect. However, a conflict has been created in the evidence because Austin testified that although he did not know the exact date, he did discuss the proposed method of leasing the property here involved with Harrison prior to the time Forward became interested in the deal. His testimony is as follows: "There were no definite arrangements any more than arrangements that I have already related here that we were willing to turn the lease into a corporation and that the corporation should get * * * the investors should get its money back with 7 per cent interest and then the balance of the proceeds or any further production of the lease should be divided fifty-fifty, 50 per cent. to the investors and 50 per cent. to Porter and myself."

At a meeting held about September 22, 1934, in Los Angeles, Austin claims he again discussed these same arrangements with Harrison, at which time Forward was present as Harrison's personal attorney. Austin testified, however, that "the first I remember of telling Mr. Forward and Mr. Carroll of my interests with Mr. Porter was that meeting in the El Tejon Hotel, along in January (1935). * * * At the time we discussed the McGuire transaction. I don't recall any prior discussion." However, he testified that he had previously informed Harrison. Appellants testified that this meeting at the hotel was in March, 1935. The McGuire agreement in which the so-called secret assignment was mentioned was dated January 28, 1935. Mr. Carroll, one of the original subscribers to stock in the corporation, testified in his deposition that on October 23, 1934, he advanced money toward the success of the corporation in pursuance of the original oral agreement had in the latter part of September, 1934, in which conversations Austin told him that "there was a fellow named John Porter who is a very good oil man and had worked for different companies out there. He said he was in with him on the lease * * *;" that at the meeting at the El Tejon Hotel the so-called secret interest of Austin was discussed. He testified that "there was something brought up about that and Forward told me, he says, do you know anything about Austin getting a cut-back, and I says no, and he says him and Porter, that is Austin and Porter, has an arrangement whereby he has a 25 per cent interest in Porter's interest." At the trial this witness, however, contradicted most of this testimony.

Section 19 of the Civil Code provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

[5] Constructive notice may be a matter of general inference presumed in support of the judgment, or it may be an ultimate fact found by the trial court who, under the circumstances, is the best judge of what the actors at the time believed or ought to have believed, and then knew or ought to have known. Barthelmess v. Cavalier, 2 Cal.App.2d 477, 488, 38 P.2d 484; Grant v. Long, 33 Cal.App.2d 725, 92 P.2d 940. If a corporation has full means of knowledge by inquiry, its actual knowledge, like that of an individual under similar circumstances, is immaterial and it is also immaterial that the particular agent or officer did not have it.

[6-8] The familiar rule that a principal is bound by the knowledge of his agent acquired in the course of his agency is applicable to corporations. These rules rest upon the presumption that the agent will communicate to the corporation the facts learned by him, as it is his duty to it, and whether he performs such duty or not, the corporation is bound. Irvine & Muir Lumber Co. v. Holmes, 26 Cal. App. 453, 147 P. 229; First National Finance Corp. v. Five-O Drilling Co., 209 Cal. 569, 289 P. 844; Vol. 6-A Cal.Jur. p. 1166, sec. 663. While the evidence in this case is not entirely satisfactory on the question of knowledge of Harrison or Carroll or the corporation, and particularly Forward, as to the so-called secret agreement, we are unable to hold, as a matter of law, even though the evidence might well support the contrary view, that it does not, in this respect, support the trial court's finding. Dunbar v. Redfield, 7 Cal.2d 515, 522, 61 P.2d 744; South Penn Collieries Co. v. Sproul, 3 Cir., 52 F.2d 557; Victor Oil Co. v. Drum, 184 Cal. 226, 232, 193 P. 243; Sanders v. Magill, 9 Cal.2d 145, 153, 70 P.2d 159.

[9, 10] The next question then presented is what interest Austin was and is entitled to have under the agreement and the evidence above recited. Austin was never made a party to the original lease nor does his interest appear anywhere therein. Any claimed interest he may have had in that lease could have been only the result of some oral agreement with Porter. Porter assigned all of his interest in and to the lease to the corporation with the apparent consent and approval of Austin. The only interest in the lease retained by Porter was by virtue of the written agreement dated October 30, 1934. This agreement specifically provided that if there was any failure of Porter to faithfully fulfill and perform the obligations to be performed by him the company would have the right to terminate all of his rights in the lease and thereafter he was to receive only 50 per cent of the proceeds to be thereafter received from the well or wells brought into production prior to the breach of his obligations after all payments had been made as provided in the agreement. By the assignment of 50 per cent of his interest to Austin, Austin acquired no greater interest in the lease than that held or retained by Porter, which interest would also be subject to the same conditions of breach and forfeiture. Western Oil & Refining Co. v. Venago Oil Corp., 218 Cal. 733, 738, 24 P.2d 971, 88 A.L.R. 1271. By the so-called secret assignment or agreement between Austin and Porter dated November 2, 1934, any prior oral agreement or arrangement must be considered as

merged into the final written agreement between them. Civ.Code § 1625; Oakdale Mercantile Co. v. Baer, 128 Cal.App. 350, 354, 17 P.2d 779. The evidence conclusively shows this and it must be so held. Therefore, any right that Austin has must be measured by the written assignment and by the terms of the contract from which the proceeds were to come. Alpers v. Hunt, 86 Cal. 78, 90, 24 P. 846, 9 L.R.A. 483, 21 Am.St.Rep. 17; First National Bank v. Perris Irrigation District, 107 Cal. 55, 64, 40 P. 45; Suhr v. Metcalfe, 33 Cal.App. 59, 164 P. 407; Becker v. Highboy Coaster Trust, 112 Cal.App. 219, 296 P. 651. There can be no question but that Porter abandoned his contract with the company after well No. 1 was producing, and failed to furnish his personal services in drilling for or causing to be drilled any additional wells as provided for in the lease. The evidence is also clear that he contracted bills greatly in excess of the $18,000 provided for in the agreement, for which appellants became liable and which amount they paid as well as additional amounts to place the well upon a production basis. The lease mentioned in this contract provides that upon completion or abandonment of the first well, in order to keep the lease valid, the lessee shall, within sixty days after the completion, loss or abandonment, begin the actual drilling of another well and that four wells must be drilled with the same intervals between them; that in the event there is a failure to commence the drilling of any well within the times specified, that the lease shall ipso facto and without notice cease and terminate.

From an examination of the lease and the agreement there can be no question but that when Porter left the lease and failed and refused to proceed with the drilling of the second well he breached the terms of his agreement with the Hallmark Oil Company, Inc., and having breached the agreement and having been unable to perform, his rights were fixed accordingly. Porter then would have been entitled only to one-half of the proceeds from any well that had theretofore been brought into production. Porter's rights being thus fixed, there is no possibility, under any theory, of Austin acquiring any greater or other right than Porter was entitled to. The law is clear that Austin's rights must be measured by the rights of Porter.

The evidence is positive and uncontradicted that the only well started before Porter abandoned the contract and the leasehold was the first well known as well No. 1. In addition to the evidence on this subject there was a written abandonment signed by Porter which the trial court, for some reason, found was not entered into in good faith and for a consideration. This agreement recites that the company had performed all of its obligations under the agreement; that Porter was without funds to commence the drilling of a second well as provided in the lease; that the company was threatened with possible loss of its lease and well; that no money was available from the sale of oil or gas for use in drilling additional wells by Porter; that in order to mitigate any damage to the company he renounced all rights he might thereafter have under the agreement; it grants and quitclaims to the company any rights Porter had or which he may hereafter acquire or which may hereafter accrue to him to share in the income of wells hereafter completed, and he acknowledged his inability to meet the requirements of the agreement. This agreement was signed by Porter and the corporation on March 28, 1935. On March 12, 1935, the lessor wrote Forward granting the company an extension of fifteen days in which to start the drilling of the second well. Within that extended time the drilling of that well was commenced under the supervision of Forward. Porter had left the leased property and did no further drilling under the contract.

[11, 12] Under what evidence this agreement was found not to be entered into in good faith and for lack of consideration and was accordingly void, is not pointed out by respondents, and after an examination of the record we are unable to discover any supporting evidence for the finding. Appellants challenge respondents to point out such evidence but they have failed to do so. This duty falls upon respondent and not upon the appellate court. Wantz v. Union Bank & Trust Co., 137 Cal.App. 98, 29 P.2d 882, 31 P.2d 826. We must therefore hold that the evidence does not support the finding in this respect as to that agreement and quitclaim. The evidence itself, notwithstanding the agreement, clearly indicates an abandonment on the part of Porter. Rehart v. Klossner, 48 Cal.App.2d 40, 119 P.2d 145; Hall v. Augur, 82 Cal.App. 594, 256 P. 232.

[13] The contention that notwithstanding Porter's failure to comply and his abandonment of his agreement the assignment of a portion of his interest in and to the oil and gas produced on the leasehold was an interest in real property and therefore could not be canceled by abandonment or violation of the contract on the part of Porter is untenable. La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546; Dutton v. Interstate Investment Corp., 19 Cal.2d 65, 69, 119 P.2d 138; Phillips v. Bruce, 41 Cal.App.2d 404, 106 P.2d 922.

Plaintiffs alleged in their third amended complaint that Porter had assigned to Austin "one-half of all income, profits, monies and credits then or thereafter to become due or payable under the terms of the contract referred to * * *." The court found this allegation to be true, but nevertheless awarded a 20 per cent interest in the entire leasehold and the net profits therefrom.

From what has already been said it is clear that Austin only acquired, by reason of the assignment, a 20 per cent interest in the profits of well No. 1; that the assignee, Austin, acquired no greater rights than his assignor, Porter, and that when Porter abandoned his contract and left the lease and failed to carry out the terms of his contract and even executed a written relinquishment and quitclaim of all his interest in the leasehold, the rights of the assignee were likewise terminated to the same extent. The most, therefore, that Austin could possibly take under his assignment, were the profits in well No. 1.

[14, 15] The assignment of the 25 per cent interest in the Porter contract, under the circumstances here related, did not constitute a sale of a security within the meaning of the Corporate Securities Act, Stats. 1933, p. 2308, chap. 898. In view of the findings, the entire transaction, in this respect, may have been considered as a preorganization agreement of which appellants had notice and participated. It is a fundamental maxim that "No one can take advantage of his own wrong." § 3517, Civ. Code. This is but a recast of the doctrine abundantly supported by authorities and applied in cases similar to this one. See Julian v. Schwartz, 16 Cal.App.2d 310, 322, 60 P.2d 887; Pollak v. Staunton, 210 Cal. 656, 293 P. 26; Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418; Braunstein v. Title Guarantee & Trust Co., 216 Cal. 780, 17 P.2d 104; Security-First National Bank v. J. C. Ruddle Properties, Inc., 218 Cal. 435, 23 P.2d 1016; Western Oil & Refining Co. v. Venago Oil Corp., supra; Hale v. Harbor Petroleum Corp., 139 Cal.App. 455, 33 P.2d 1039; Staples v. Leidecker, 216 Cal. 604, 15 P.2d 514. Appellants cannot rightfully claim the benefits of a 5 per cent interest assignment of the Austin agreement under the McGuire purchase, and then also claim Austin's agreement void in its entirety. We are therefore of the opinion that under the circumstances the defense that no permit was given to assign the proportionate interest of Porter to Austin cannot avail appellants.

Many other arguments are presented and cases cited insisting that respondents have no place or standing in court because they did not come into court with clean hands. The trial court's finding in this respect was not in favor of appellants. We cannot hold otherwise as a matter of law.

We next approach the last finding complained of, i. e., that respondent Austin is entitled to have 2,500 shares of stock of the corporation issued to him by virtue of his subscription. The evidence is clear that Austin paid $1,000 to the corporation for its benefit. These funds were apparently held in trust by him to be invested for the benefit of McFadden. Stock should have been issued to Austin in this amount. The question of any trust agreement in relation thereto is a matter purely between the trustor and trustee of the stock. The evidence in respect to the accounting might support the fact that an additional $300 was paid in to the corporation by Austin from his private funds, even though one of the auditors reported that Austin failed to account for nearly $1,800 of the funds turned over to him. The trial court's findings in respect to the amount of stock available to Austin are ambiguous and hopelessly in conflict with the judgment and conclusions of law reached by the trial court, and we are unable to determine which finding the court intended to follow to support its judgment and conclusions. Although neither appellants nor respondents have raised the point, the mathematical calculations in respect to the amount of stock Austin is entitled to receive and the amount remaining due thereon must be in error. We have endeavored to analyze and harmonize the findings and judgment without avail. The trial judge in a memoranda opinion stated that "Austin did agree, at some time during the proceedings, to put up or invest $2,500, and he must pay in enough to make up that sum or amount on any settlement; * * * McFadden's $1,000 should be recognized with stock to Austin. How he and McFadden deal with this is their own affair. Perhaps this may be part of the $2,500 he was to invest; if so, with his $300 he would have $1,200 to put up; otherwise $1,500." Then in finding XLVI it was specifically found that "* * * Austin agreed with the said Hallmark Oil Company, Inc., its officers and agents, to subscribe for $2,500 worth of the capital stock of the said corporation at the par value thereof * * * that he has paid said corporation only the sum of $1,300 on account thereof * * *." In finding XIII it is found to the contrary, that is, "that it is not true that the said stock was issued in consideration of the sum of $300 theretofore paid to the said corporation by the said plaintiff. The court finds, however, that $100 of the said sum had been theretofore paid said corporation by said plaintiff, and that said stock was duly and regularly issued only to the extent of 10 shares thereof." The judgment then orders the appellant corporation to issue to Austin "* * * three certificates of its capital stock as follows: one for ten shares to be dated as of the date of the first issuance of stock by said corporation; one for 100 shares to be dated the same date; and one for 120 shares to be dated as of the date of the entry of judgment herein." According to our calculations this amounts to 230 shares or $2,300 in stock in all. The conclusions of law recite that Austin is obligated to pay $1,200 balance due on the $2,500 worth of stock which he agreed to purchase. If Austin paid in $1,100 on his total subscription of $2,500 it appears to us there would be $1,400 remaining due thereon and he would be entitled to 140 more shares. If he has paid in $1,300, he would be entitled to have issued as of that date 130 shares rather than 110 shares as indicated in the judgment.

The trial court should correct and clarify the findings in this respect and enter judgment accordingly. The judgment in favor of John W. Austin finding that he is entitled to a 20 per cent interest in the entire leasehold and in the net profits realized and to be realized thereon should be reversed and the trial court ordered to make findings and enter judgment not inconsistent with the conclusions here reached.

We therefore hold that that portion of the judgment awarding John W. Austin a 20 per cent interest in the entire leasehold and in the net profits realized and to be realized thereon is reversed and the trial court is directed to take further evidence, if necessary on the question of the net amount due appellant John W. Austin from well No. 1 only, make findings and enter judgment in an amount supported by the evidence and in accordance with the agreement between Hallmark Oil Company and John K. Porter dated October 30, 1934, as modified, and the conclusions here reached. The portion of the judgment ordering the appellant corporation to issue to John W. Austin as part of his $2,500 subscription of capital stock, 100 shares at the par value of $10 per share, totaling $1,000, and that portion of the judgment holding that he is entitled to have issued to him 10 shares at $10 per share, totaling $100 are affirmed. That portion of the judgment fixing the amount of stock yet available to Austin on the total subscription of 250 shares and fixing the balance due thereon is reversed and the trial court is directed to make findings and enter judgment in accordance with the evidence produced, and then allow John W. Austin a reasonable time after the judgment of the trial court becomes final in which to pay for the balance of stock to which he is found to be entitled. The judgment in favor of Helen P. Austin and Luethel Austin is affirmed. Respondents Helen P. Austin and Luethel Austin to recover their costs. Neither respondent John W. Austin nor appellants to recover costs.

BARNARD, P. J., and MARKS, J., concurred.

52 Cal.App.2d 199

POTTS v. WHITSON et al.

Civ. 12932.

District Court of Appeal, Second District,
Division 3, California.

May 22, 1942.

1. Associations 🔑20(1)

When two or more persons are associated in a business which they transact under a common name, the association is held to be a "separate entity," and an action against it is regarded as an action against a single defendant, even though, if the individuals are joined as defendants, a judgment in their favor, at least if satisfied, would bar further proceedings against the association. Code Civ.Proc. § 388.

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Entity".

2. Parties 🔑71

Where caption of complaint and summons listed two individuals as defendants and stated that they constituted a copartnership, and complaint, which alleged negligence on part of defendants contained allegation that defendants were copartners conducting business under a certain trade-name, such allegation was "descriptio personae", and the action was against the individuals and not against the partnership as a separate entity. Code Civ.Proc. § 388.

See Words and Phrases, Permanent Edition, for all other definitions of "Descriptio Personae".

3. Judgment 🔑106(1)

Where complaint and summons disclosed that action was brought against two individuals as defendants who were doing business as copartners under a firm name, and not against the partnership as a separate entity, answer which was labeled an answer on behalf of the individuals, constituting a copartnership, was construable as an answer for the individual defendants and not for the partnership, which was a stranger to the action, and therefore default judgment could not properly be entered against the individuals on ground that the only answer on file was an answer on behalf of the partnership, and that the individuals were in default for failure to answer. Code Civ.Proc. § 388.

4. Clerks of courts 🔑66

The clerk of the trial court was not authorized to consider judicially and determine sufficiency of answer which was filed by defendants.

5. Judgment 🔑107, 153(1)

Where defendants' answer was on file, the purported entry of their default by clerk of trial court was unauthorized, and was void and subject to expungement at any time. Code Civ.Proc. § 585.

6. Appeal and error 🔑518(1)

Although defendants' answer was omitted from judgment roll by the clerk in making up the record, it was a part of the "record" and was deemed to be included therein. Code Civ.Proc. § 670.

See Words and Phrases, Permanent Edition, for all other definitions of "Record".

7. Judgment 🔑518

A motion to set aside judgment on ground that it was taken against the party through his mistake, inadvertence, surprise or excusable neglect constituted a "direct attack" on the judgment. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Attack".

8. Judgment 🔑336

A statute authorizing court to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect is a "remedial statute" and should be so applied as to dispose of cases on their substantial merits, giving to parties claiming in good faith to have a substantial defense, an opportunity to present it. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Remedial Statute".

9. Appeal and error 🔑982(2)

Reviewing courts will scan more closely and are more prone to reverse orders denying relief from judgments on ground of mistake, inadvertence, surprise or excusable neglect than orders granting such relief. Code Civ.Proc. § 473.

10. Judgment 🔑344

Whether to grant relief to party from judgment on ground that it was taken against him through mistake, inadvertence, surprise

or excusable neglect is primarily a question within the discretion of trial court, but the discretion is not capricious or arbitrary, and is an impartial discretion guided and controlled in its exercise by fixed legal principles. Code Civ.Proc. § 473.

11. Judgment ⚷138(3)

Where only material default of defendants was their failure to appear at hearing which resulted in default judgment entered against them subsequent to filing by plaintiff's attorney of a misleading document which was construable as determining the action in defendants' favor, action of trial court in denying relief from the judgment to defendants who had no notice of the hearing, under statute authorizing court to relieve party from judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, constituted an abuse of discretion. Code Civ.Proc. § 473.

12. Appeal and error ⚷790(3)

Where judgment was required to be vacated pursuant to reversal of an order denying motion to recall and quash execution and vacate the judgment, an appeal from the judgment, which was apparently taken too late, became immaterial and was dismissed.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson and Thomas C. Gould, Judges.

Action by Olive B. Potts against R. D. Whitson and others for injuries allegedly sustained by the plaintiff as result of defendants' negligence, while plaintiff was a patron of the defendants' theater. From an adverse judgment, and from an order denying motion to recall and quash execution and vacate judgment and default entry on which it was based, the defendants appeal.

Appeal from judgment dismissed, and order appealed from reversed.

Sidney A. Moss, of Los Angeles, for appellants.

Phil E. Anthony and John C. Campbell, both of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

Counsel for plaintiff procured the default of appealing defendants R. D. Whitson and Herman Lewis to be entered by the clerk in the trial court on the theory that an answer filed by them was not their answer, but was the answer of an independent entity—the Whitson-Lewis Theaters, an association or partnership of which the defendants were members. The fact that the partnership existed was alleged in the body of the complaint but it was not made a party as an entity or sued by its common name as might have been done under section 388 of the Code of Civil Procedure. After so causing the defendants' default to be entered plaintiff's counsel carried on for more than six months seemingly friendly relations with the attorney for defendants, joining in two written and filed stipulations relative to setting for trial and postponing the trial of the action. About nine months after entry of the default *by the clerk* plaintiff's counsel caused judgment to be entered thereon *by the court* and thereafter execution to be levied. The levy of execution was the first notice or knowledge which defendants or their counsel had of the default entry or judgment. On the day following levy of execution defendants served and filed notice of motion to recall and quash the execution and vacate the judgment and the default entry on which it was based. From the order denying such motion this appeal is taken.

Respondent in defense of the judgment obtained without trial, by the method depicted above, contends in effect (1) that the answer filed by defendants was not an answer on their behalf but was only an answer on behalf of a separate, single and fictitious entity, the Whitson-Lewis Theaters, a partnership of which defendants were members. To be sure, plaintiff neglected to sue the partnership by its common name, as was authorized by section 388 of the Code of Civil Procedure, but she claims that she intended to do so and seeks the indulgence of this court to the end that by a liberal construction of the pleadings, as well as of the purposes and intentions of the parties, we may conclude either that the Whitson-Lewis Theaters (the separate entity) was made a party to the action by the complaint, or although not made a party to the action by the complaint or named in the summons, nevertheless the answer filed by defendants was the answer of such entity and the defendants themselves refrained from answering. Plaintiff also contends, in effect, (2) that the clerk of the trial court had judicial power to consider the sufficiency and form of the answer which defendants filed and to determine that it was the answer of the separate entity, not that of the defendants. (3) Plaintiff does not directly claim that defendants in equity and good conscience are estopped to set up the invalidity of the proceedings because they received consideration in the form of plaintiff's forbearance for more than six months after the default entry to cause judgment to be entered or execution thereon levied, but she does contend that even if it was erroneously determined that the answer was not that of defendants, still plaintiff's default judgment cannot now be disturbed because more than six months elapsed after the default of defendants was entered *by the clerk* and before defendants discovered and moved to vacate such default and the subsequently entered judgment assertedly based thereon. Plaintiff further contends (4) that because the clerk did not construe the answer filed by defendants to be an answer for these appealing defendants and did not include it in the judgment roll, such answer should not be considered as a part of the judgment roll, and (5) that since the *judgment* was entered by the *court* (as distinguished from by the *clerk*) it was at worst no more than an error in the exercise of jurisdiction and that since the time for appeal therefrom has expired such judgment has become final and it was not an abuse of discretion for the lower court to deny defendants' motion to vacate the same. The motion to vacate, although presented more than six months *after entry of defendants' default by the clerk* was made within *less than that period after entry of the judgment by the court.*

We conclude that none of respondent's points can be sustained; that upon the face of the record the defendants at all times concerned had on file a sufficient answer; that *the default entry by the clerk* was unauthorized in law and wholly void; and that regardless of whether *the judgment* subsequently entered *by the court* was void, voidable, or only erroneous, the denial of defendants' motion to vacate such judgment was an abuse of discretion for which the order must be reversed.

The complaint is entitled "Olive B. Potts, Plaintiff, vs. R. D. Whitson and Herman Lewis, a co-partnership, Doe and Roe a co-partnership, R. D. Whitson, an individual, Herman Lewis, an individual, Joe Doe, Jane Doe, Doe One Company, a corporation, Defendants." It alleges "That at all times herein mentioned, R. D. Whitson and Herman Lewis were and are co-partners doing business under the trade name and style of Whitson-Lewis Theaters. * * * That on or about the 28th of August, 1938, defendants R. D. Whitson and Herman Lewis were operating a private enterprise for profit, to wit, Los Feliz Theater. * * * That on the evening of the 28th day of August, 1938, plaintiff became a patron of said defendants R. D. Whitson and Herman Lewis at said Los Feliz Theater and paid an admission fee to said defendants and occupied one of the seats owned by said defendants in the said theater. * * * That on said * * * day * * * plaintiff * * * by reason of the negligence of defendants" was damaged as generally and specially alleged.

The summons was directed to "R. D. Whitson and Herman Lewis, a co-partnership," etc., using identically the same language as that used in naming the defendants in the caption of the complaint. It is *not* directed to the "Whitson-Lewis Theaters." It will be noted from the portions of the complaint above quoted that while it describes and identifies the individuals R. D. Whitson and Herman Lewis as "co-partners doing business under the trade name and style of Whitson-Lewis Theaters" it does not allege that the "Whitson-Lewis Theaters" was operating the Los Feliz Theater or that plaintiff was a patron of such entity. The allegations made are that "R. D. Whitson and Herman Lewis were operating * * * Los Feliz Theater" and that "plaintiff became a patron of said defendants R. D. Whitson and Herman Lewis at said Los Feliz Theater and paid an admission fee to said defendants."

Within the time allowed by law an answer verified by R. D. Whitson as "*one* of the answering *defendants*" was served and filed. It is labeled "Answer on behalf of R. D. Whitson and Herman Lewis, a co-partnership." It recites "Come now the defendants, R. D. Whitson and Herman Lewis, a co-partnership, doing business under the firm name and style of Whitson-Lewis Theaters, and for answer to plaintiff's complaint herein, for themselves alone and not for their co-defendants, admit, deny and allege. * * *" Here follow statements expressly admitting the allegations of the complaint describing and identifying the defendants as the *individual* persons who were co-partners doing business under the common name; expressly admitting the above quoted allegations that the *appealing defendants* were operating the Los Feliz Theater and that on the date alleged plaintiff became a patron of and paid an admission fee *to said individual person defendants.* Negligence on the part of the defendants was denied and contributory negligence of the plaintiff alleged. Further indicative of the fact that the answer is not that of a single separate entity, the Whitson-Lewis Theaters, is the fact that in addition to the preamble "Come now the defendants," etc., being in the plural number, paragraph I commences with the words "*These* answering defendant*s* admit"; paragraph II starts with the words "*These* answering defendant*s* deny"; paragraph III begins "*These* answering defendants"; the affirmative defense is prefaced by "* * * *these* answersing (sic) defendant*s* allege"; the prayer recites "Wherefore, *these* defendant*s* * * * pray that *they* may go hence with *their* costs"; and the answer is signed by counsel above the designation "Attorney for Answering Defendant*s*."

Upon the hereinabove recited facts the clerk in entering the default and the trial court in entering the judgment apparently held and plaintiff now contends that the answer was that of the separate entity, the Whitson-Lewis Theaters, and that it did not constitute an appearance for or raise issues on behalf of the defendants R. D. Whitson and Herman Lewis as individuals. As indicated above such position is not tenable.

[1] Section 388 of the Code of Civil Procedure provides that "When two or more persons, associated in any business, transact such business under a common name, whether it comprises the name of such persons or not, the associates may be sued *by such common name.* * * *." (Italics added.) When so sued by the common name the association is held to be a separate entity (Artana v. San Jose Scavenger Co., (1919) 181 Cal. 627, 630, 185 P. 850; Jardine v. Superior Court, (1931) 213 Cal. 301, 309, 2 P.2d 756, 79 A.L.R. 291) and the action against it is regarded as an action against a single defendant (John Bollman Co. v. S. Bachman & Co., (1911) 16 Cal.App. 589, 592, 117 P. 690, 122 P. 835); this has been held to be true even though a judgment in favor of the partners individually, where they are joined as such (at least if paid and satisfied) would bar further proceedings against the separate entity. (Minehan v. Silveria, (1936) 11 Cal.App.2d 266, 267, 53 P.2d 770.)

It will be noted that the Code section quoted, § 388, Code Civ.Proc., does not purport to authorize action against the association as an independent entity otherwise than "by such common name"; obviously it does not create a separate entity capable of being sued otherwise than "by such common name." The courts have heretofore had numerous occasions to pass on the question as to whether in the light of the facts surrounding each particular case the action was to be deemed brought against the entity as such or against the individuals composing it. In the case of Feder v. Epstein, (1886) 69 Cal. 456, 10 P. 785, the Supreme Court had before it the following facts: the complaint was entitled "Moses M. Feder, plaintiff, against Samuel Epstein and Wolf Epstein, partners, under the firm name of Epstein Brothers, defendants," and alleged (much as in the complaint before us) that the defendants "have been and now are partners under the firm name aforesaid." The prayer asked for judgment against "said defendants." It was held that a judgment against the firm (as an entity) was not proper, the court saying "The associates were *not sued by their common name, but by their individual names,* and the case was therefore not within the provisions of section 388 of the Code of Civil Procedure. Davidson v. Knox, [67 Cal. 143], 7 P. 413." (Italics added.) Pertinent language is also found in Ferry v. North Pacific Stages, (1931) 112 Cal.App. 348, 351, 296 P. 679, wherein the court discusses a factual situation not unlike that before us. In that case the complaint named as defendants "North Pacific Stages, a corporation; Seattle-Portland-San Francisco Auto Stage Company, a corporation; *D. M. Shattuck,* John Doe Christie et al., associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Company." In the body of the complaint it was alleged that "D. M. Shattuck, John Doe Christie * * * were at all times * * * and still are associated together and doing business under the firm name and style of Seattle-Portland-San Francisco Auto Stage Co." (This allegation is almost identical with that in the complaint before us.) The summons was returned with an affidavit averring that process had been personally served upon "Seattle-Portland-San Francisco Auto Stage Co., *an association,* * * * by delivering to and leaving with * * * Fred Gordon, a member of said association" a copy of the summons and complaint. (This return is almost identical with the return on the summons before us.) No appearance was made for the alleged association; its default as an *association*, together, subsequently, with a judgment against it, was entered by the clerk. On appeal from an order setting aside such judgment the court said (after referring to the language above quoted from the complaint), "The foregoing language clearly indicates it was the intention of the pleader to constitute these named individuals as party defendants. They are merely identified as doing business in the name of the Seattle-Portland-San Francisco Auto Stage Company. *The company as a separate entity is not made a party defendant. To have included this last-mentioned company as a party defendant, independent of the individuals who are alleged to compose the organization, it should have been specifically named as a defendant.* This was not done. * * * This is not an action pursuant to the provisions of section 388 of the Code of Civil Procedure against the '*common name*' under which individuals are associated and doing business." (Italics added.) See, also Maclay Company v. Meads, (1910) 14 Cal.App. 363, 370–373, 112 P. 195, 113 P. 364.

[2] Language almost identical in form, and entirely so in principles of expression, to that used in the body of the complaint in the case before us, "That at all times herein mentioned, R. D. Whitson and Herman Lewis were and are co-partners doing business under the trade name and style of Whitson-Lewis Theaters," has been consistently held to be descriptio personae (Davidson v. Knox, (1885) 67 Cal. 143, 7 P. 413; Feder v. Epstein, (1886) supra, 69 Cal. 456, 10 P. 785; Billings v. Finn, (1921) 55 Cal.App. 134, 202 P. 938; Craig v. San Fernando Furniture Co., (1928) 89 Cal.App. 167, 174-176, 264 P. 784.)

In John Bollman Co. v. S. Bachman & Co., (1911) 16 Cal.App. 589, 590, 117 P. 690, 691, 122 P. 835, it appears that in a complaint against and a demurrer by "Simon Bachman and Arthur Bachman, Copartners Doing Business Under the Firm Name of S. Bachman & Company" the quoted language was held to designate the partners as individuals and not the firm as an entity. Thus we find that the partnership which plaintiff now claims filed the answer was not sued by its common name; that its name does not appear in the title of the complaint as a party; that the allegations in the body of the complaint serve only to identify and describe the individual defendants, and that the cause of action is specifically stated against the individuals. The import of the statement in Henry v. Willett, (1922) 60 Cal.App. 244, at page 249, 212 P. 698, at page 700, applies equally here: "Although the caption of the complaint states that the defendants do 'business under the firm name of Willett & Burr,' the action is clearly against the defendants individually."

[3-6] In the light of the foregoing discussion it is apparent that the entity Whitson-Lewis Theaters was not made a party to the action and that the answer filed by the defendants R. D. Whitson and Herman Lewis constitutes an answer on their behalf as individuals and not an answer on behalf of a stranger to the action which would have no standing therein. Artana v. San Jose Scavenger Co., (1919) supra, 181 Cal. 627, 629, 185 P. 850. The clerk of the court should not have undertaken to judicially consider and determine the sufficiency of the answer which was filed by the defendants. Rose v. Lelande, (1912) 20 Cal.App. 502, 129 P. 599. The defendants' answer being on file, the entry of their default by the clerk was unauthorized by the statute (§ 585, Code Civ.Proc.; Berry v. Crowell, (1921) 55 Cal.App. 534, 538, 203 P. 835; Warden v. Lamb, (1929) 98 Cal.App. 738, 741, 277 P. 867) and the purported entry was wholly void and subject to expungement *at any time* (Reher v. Reed, (1913) 166 Cal. 525, 528, 137 P. 263, Ann. Cas.1915C, 737; Baird v. Smith, (1932) 216 Cal. 408, 410-413, 14 P.2d 749; Crofton v. Young, (1941) 48 Cal.App.2d 452, 119 P. 2d 1003.) The defendants' answer, although omitted from the judgment roll by the clerk in making up the record, is by law a part thereof, § 670, Code Civ.Proc., and will be deemed to be included therein.

This brings us to a consideration of respondent's last major contention. It is asserted that under the sometimes questioned doctrine of Gray v. Hall (1928) 203 Cal. 306, 265 P. 246, the court had jurisdiction of the parties and the subject matter and that the entry of defendants' default and the judgment against them while their answer was on file and without notice of trial, was only an error in the exercise of jurisdiction and hence that the judgment is not void and since the time for appeal has expired, must stand. We deem it unnecessary to determine whether such judgment was void, voidable, or erroneous, or otherwise to consider possible applicability of the theory of Gray v. Hall.

[7] We have seen that the entry of the default by the clerk was wholly void and subject to expungement at any time. It is still wholly void and can give no support to the judgment. Such judgment then must stand or fall on its own record. The attack on it by motion under section 473 of the Code of Civil Procedure was direct (In re Dahnke's Estate & Guardianship, (1923) 64 Cal.App. 555, 561, 222 P. 381; Shelley v. Casa De Oro, Ltd., (1933) 133 Cal.App. 720, 722, 24 P.2d 900) and was made within six months after it was entered. There is no dispute as to the fact that it is a *default* judgment. The defendants were not represented at the proceeding which resulted in its being entered. They had a sufficient verified answer on file; they were given no notice of the hearing; counsel for plaintiff had theretofore (but after entry of the default) stipulated with counsel for defendants relative to placing the case on the calendar and continuing it. Such stipulations referred to the trial of the issues raised by defendants' answer.

A little more than three months after the default of defendants was entered and at a time when defendants' counsel was insisting that the action be tried and disposed of, plaintiff's attorney filed a document labeled "Dismissal" and reading, after title of court, "Olive B. Potts Plaintiff vs. R. D. Whitson, et al., Defendants. To the Clerk of said court: You will enter the dismissal of the above entitled action, as to the following defendant only, viz.: R. D. Whitson and Herman Lewis, a co-partnership known as Whitson-Lewis Theaters." Had the Whitson-Lewis Theaters as an entity been made a party to the action it is possible that the form of this dismissal might not be misleading, but under the circumstances obtaining when it was filed it is apparent that it was construed by defendants as completely determinative of the action. Based upon such dismissal, a document denominated "Judgment," and purporting to award costs to the defendants was signed and filed. In material part it reads: "* * * and it appearing to the Court that counsel for Plaintiff has entered Dismissal of the within action as against the Defendants, R. D. Whitson and Herman Lewis, a co-partnership;

"Wherefore, It Is Ordered, * * * that the said Defendants have and recover judgment for their costs and disbursements incurred in said action amounting to the sum of $69.70." The cost bill filed in support of this "judgment" is denominated "Memorandum of Costs and Disbursements Claimed by Defendants R. D. Whitson and Herman Lewis." It shows that it was served on counsel for the plaintiff; its claim of costs *for the defendants individually* apparently was allowed to remain unchallenged and the record shows that the "judgment," was paid and satisfied.

[8-11] All of these circumstances tend to show the lack of knowledge of counsel for defendants that a plan was afoot which was to result in obtaining the default judgment against his clients after the expiration of six months from the clerk's entry of their default. But, as has been shown, the clerk's entry of default was wholly void. The only default of defendants therefore, which is material, is their failure to appear before the court for the hearing which resulted in the judgment. Of that hearing defendants had no notice. If counsel for the defendants is to be deemed careless or neglectful for his failure under the circumstances to watch the record and files of the trial court more closely, certainly such carelessness or neglect as appears was manifestly of that excusable type which section 473 of the Code of Civil Procedure is designed to relieve. The provisions of that section are remedial in nature and should be so applied as to dispose of cases upon their substantial merits, giving to parties claiming in good faith to have a substantial defense an opportunity to present it. "Because of this," as was said in Kent v. County Fire Ins. Co., (1938) 27 Cal.App.2d 340, 341, 80 P.2d 1019, 1020, "the reviewing courts will scan more closely orders denying relief and are more prone to reverse orders of denial. They look with disfavor upon a party, who, regardless of the merits of his case, attempts to take advantage of mistake, surprise and inadvertence of his adversary. Brill v. Fox, 211 Cal. 739, 743, 297 P. 25." As pointed out in the case cited in the quotation (Brill v. Fox, 211 Cal. at page 743, 297 P. at page 26), "The question is primarily one within the discretion of the trial court, but this discretion is not capricious or arbitrary, but it is an impartial discretion guided and controlled in its exercise by fixed legal

principles." See, also, Waybright v. Anderson, (1927) 200 Cal. 374, 377, 253 P. 148. Here the trial court in the first instance should have deleted from its records the clerk's void entry of defendants' default; it should have refused to proceed with the hearing leading to entry of the judgment against defendants without notice to them, and, lastly, upon defendants' timely motion to vacate such judgment it should have exercised its powers consistently with the principles above mentioned. Its order denying the motion was not an exercise of its discretion in accordance with the fixed legal principles governing such motions and must be reversed.

[12] The notice of appeal also purports to declare an appeal from the judgment. As such appeal apparently was taken too late and as such judgment must be vacated pursuant to our judgment reversing the order appealed from, the appeal from the judgment becomes immaterial and is dismissed.

The order appealed from is reversed.

SHINN and PARKER WOOD, JJ., concurred.

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PACIFIC LUMBER CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 12113.

District Court of Appeal, First District, Division 2, California.

May 28, 1942.

1. Workmen's compensation 🔑252

A contract providing for the conditional sale of timber to tie-maker at a specified rate to be felled and converted by buyer or his employee with buyer's tools into split products for sale by buyer, without reserving in seller any control except that operations and payments must be completed by designated date, was an ordinary contract for conditional sale of "goods" as defined by statute, and buyer injured while operating thereunder was not an "employee" so as to be entitled to workmen's compensation award against seller. Civ.Code, § 1796.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Goods".

2. Workmen's compensation 🔑1446

Evidence was insufficient to support a finding that tie-maker operating under contract providing for conditional sale to him of timber to be felled and converted into split products for sale by tie-maker was operating under any other agreement establishing the relationship of "employer and employee" between tie-maker and seller so as to entitle tie-maker to workmen's compensation award against seller.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee Relationship".

* * *

Proceeding by the Pacific Lumber Company to review an order of the Industrial Accident Commission awarding to John Turkovich workman's compensation for personal injuries.

Award annulled.

Pillsbury, Madison & Sutro, of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, both of San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks the annulment of an award made by the respondent commission in favor of John Turkovich and against petitioner.

Petitioner denied liability upon the ground that Turkovich was the buyer of timber under a conditional sales contract and was not an employee of petitioner. The commission found that "At the time of aforesaid injury, applicant was working for Pacific Lumber Company under the terms of a 'Conditional Sales Agreement'. The terms of said 'Conditional Sales Agreement' are not sufficient to constitute applicant an independent operator or independent contractor at the time of said injury." The commission therefore found that Turkovich was an employee of petitioner and made an award in his favor.

Under the findings of the commission, the question presented in this proceeding appears to be merely one of law, to-wit: What was the relationship established by the written "Conditional Sales Agreement"? It is appropriate, however, to state certain facts before proceeding to a discussion of said agreement.

Turkovich was a "tie-maker" by occupation. Tie-makers engage in felling trees, cutting them into logs and splitting the logs into ties, fence posts, grape stakes and other so-called split products. It appears that in Humboldt County, where the accident occurred, such tie-makers commonly work either as employees or as independent contractors, manufacturing such products for the owner at a specified rate, or as purchasers, buying the standing and fallen timber from the owners at a specified rate and manufacturing such products for their own account.

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* Subsequent opinion 139 P.2d 892.

Prior to 1937, tie-makers working on petitioner's premises were considered independent contractors manufacturing such products for petitioner at piece rates. In that year, petitioner sought to change the relationship to that of employees and these tie-makers obtained the benefits and accepted the burdens of that relationship. Thereafter petitioner found that it was impracticable to continue that relationship. The tie-makers ordinarily carried on their operations in various isolated portions of the petitioner's properties which could not be logged in petitioner's normal operations. Difficulty was encountered in supervising the work, checking the time and in other matters. Petitioner found itself in the position of having to abandon these operations or of making some different arrangement with the tie-makers. It therefore determined to adopt the arrangement of selling certain standing and fallen timber to the tie-makers under agreements exemplified by the conditional sales contract involved in this case.

Turkovich had completed his operations under two of said agreements prior to the time that he entered into the particular agreement under which he was operating at the time he was injured. At the time of signing each of said agreements, a copy thereof was furnished to him. It appears that said agreements were of the type generally used in Humboldt County by owners in selling timber to tie-makers.

The conditional sales agreement in question was dated March 18, 1941, and designated petitioner as "seller" and Turkovich as "buyer." It recited the ownership of certain described land by the seller with standing or down redwood timber thereon consisting of isolated trees or groups of trees and the marking and numbering of eight of said trees for identification for the purpose of said agreement. It further recited the desire of the buyer to purchase said eight trees for the purpose of cutting the same into redwood split products "for resale by buyer" and the willingness of the seller to sell the same. The seller agreed to sell said eight trees to the buyer "for the price of Seven & 50/100 ($7.50) per thousand board feet on the basis of board measure content of such timber suitable for manufacture by Buyer of such redwood split products (the decision of Seller's representative as to such suitability and measure to be conclusive on both parties hereto.)" Seller granted to the buyer a license for ingress and egress and occupancy of the property for the purpose of cutting said trees and manufacturing said products. The agreement was conditioned upon the buyer beginning to cut on or before March 18, 1941, and completing the cutting, manufacturing and removal from the premises of the redwood split products not later than June 30, 1941. All operations were to be at the sole cost and expense of the buyer; the seller was under no obligation to furnish tools or appliances. Payments by the buyer were to be made to the seller on the 1st and 16th of each month or at such other times as might be mutually agreed upon. The buyer agreed to take all necessary precautions for the prevention of fire; to comply with all laws; to abstain from any wasteful or destructive practices; to permit seller's inspectors at reasonable times to determine whether buyer's operations were wasteful or destructive; and to hold the seller harmless from any liability for damage to property or persons resulting from the buyer's operations. The agreement was not to be "assignable by the Buyer without the consent of the Seller." Title to the trees and split products was to remain in the seller until full payment at the rate specified, except that the buyer was given the right to have title vested in him of portions thereof not less than 1,000 feet, board measure, upon payment of the purchase price of such portions. The entire purchase price was to be paid not later than June 30, 1941. The agreement made time of the essence and other provisions were contained therein similar to those frequently found in conditional sales contracts.

[1] It thus appears that said agreement constituted an ordinary contract for the conditional sale of "goods" as the term "goods" is defined in section 1796 of the Civil Code. It appears equally clear that said contract was devoid of any of the elements necessary to establish the relationship of employer and employee between the parties. We find nothing ambiguous or uncertain in its provisions. Under its terms, Turkovich was essentially a buyer engaging in independent operations consisting of converting specified timber, pur

chased by him from petitioner, into split products with his own tools and upon his own time and for his own account. There is not a single provision in said agreement indicating that petitioner retained any authoritative control over any of said operations or that petitioner retained any other right ordinarily retained by any employer. Turkovich could come and go at any time that suited his convenience, subject only to losing certain rights if his operations were not completed by June 30, 1941. While the contract was not assignable by Turkovich, he could do the work himself or employ others to do it for him. He could sell his manufactured products to anyone and at any price which he could obtain. We therefore conclude that the finding that the parties were operating under said agreement at the time Turkovich was injured is wholly inconsistent and irreconcilable with the finding that he was an employee of petitioner.

[2] The respondent commission makes no attempt to meet the issue thus presented. It states in its answer that the sole question is whether there was any evidence to support the finding that Turkovich was an employee of petitioner at the time of his injury. In other words, the commission now impliedly repudiates its finding that the parties were operating under the unambiguous conditional sales agreement and now takes the position that there was some evidence tending to show that the parties were in fact operating under some other agreement which established the relationship of employer and employee. This position is in line with the claim made by Turkovich before the commission to the effect that the conditional sales agreement was a mere subterfuge and that it was not the true agreement under which the parties were operating. But, as above indicated, the commission found against this claim made by Turkovich and there was abundant evidence to sustain said finding. It would serve no useful purpose to set forth such evidence in view of the finding of the commission but it may be stated in this connection that our review of the record leads us to the conclusion that there was no substantial evidence to support a finding that Turkovich was operating under any other agreement establishing the relationship of employer and employee. See Parsons v. Industrial Accident Commission, 178 Cal. 394, 173 P. 585; Provensano v. Division of Industrial Accident and Safety, 110 Cal. App. 239, 294 P. 71; Bohanon v. James McClatchy Pub. Co., 16 Cal.App.2d 188, 60 P.2d 510; State Compensation Insurance Fund v. Industrial Accident Commission, 216 Cal. 351, 14 P.2d 306.

The respondent commission cites and relies upon S. A. Gerrard Co. v. Industrial Accident Commission, 17 Cal.2d 411, 110 P.2d 377, and Carlson v. Industrial Accident Commission, 213 Cal. 287, 2 P.2d 151, but these authorities may be readily distinguished. In the Gerrard case, the court reviewed the contracts and determined that said contracts gave the alleged employer the right to exercise "complete or authoritative control." On page 414 of 17 Cal.2d, 110 P.2d on page 378, it was said "Under Hanaoka's contracts with the Gerrard Company, he had no right to do anything with the melon crop, from planting to sale, without its consent." In the Carlson case, the agreement was drawn by the parties themselves without legal advice and it was a most unusual one. It resembled a lease but it expressly provided that all work should be done "under the supervision" of the alleged employer and "in strict accordance with her wishes, ideas, and instructions." 213 Cal. at page 291, 2 P.2d at page 153. It further provided that the crops should be delivered at the shipping house "for the account of and in the name of" the alleged employer. On page 294 of 213 Cal., 2 P.2d on page 154, the court said that the alleged employer could not "reserve in a so-called lease the rights of an employer without becoming liable as one." In the present case, no comparable rights were reserved in the agreement under which the commission found that the parties were operating.

The award is annulled.

NOURSE, P. J., and STURTEVANT, J., concurred.

52 Cal.App.2d 289

POWER et al. v. CALIFORNIA STREET CABLE R. CO.

Civ. 11931.

District Court of Appeal, First District, Division 1, California.

May 27, 1942.

1. Appeal and error ⚷1004(1)

The reviewing court cannot disturb an award of damages by jury for personal injuries, though larger than reviewing court might think justified, unless it appears that verdict was result of passion, prejudice or corruption, or that amount was so grossly excessive that ends of justice warrant a reduction.

2. Damages ⚷131(4)

$7,100 damages to woman for severe brain injury and a possible basal fracture of the skull *held* not grossly excessive even though it was not shown that any permanent injuries were received, where total amount of special damages left less than $5,505 as compensation for personal injuries sustained and pain suffered by woman, and as damages to her husband for loss of his wife's services.

3. Appeal and error ⚷989

In passing upon question whether a verdict is excessive, there is no absolute rule, and reviewing court may consider amounts awarded in similar cases involving equally serious injuries.

4. Damages ⚷127

A verdict cannot be held excessive as a matter of law simply because amount may be larger than is allowed ordinarily in such cases.

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Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by M. J. Power and May Dickson Power, husband and wife, against the California Street Cable Railroad Company for injuries sustained by plaintiff wife while riding as a passenger on the defendant's cable car. From a judgment in favor of plaintiffs, the defendant appeals.

Affirmed.

Henry Heidelberg and Theodore Tamba, both of San Francisco, for appellant.

George H. Hauerken, of San Francisco, for respondents.

KNIGHT, Justice.

The defendant California Street Cable Railroad Company appeals from a judgment entered on verdict of a jury, in favor of the plaintiffs, M. J. and May Dickson Power, husband and wife, in an action to recover damages for personal injuries sustained by Mrs. Power while riding as a passenger on a cable car belonging to and operated by the defendant company.

[1] The accident happened September 9, 1940, at the corner of Jones and O'Farrell Streets in San Francisco, wherein more than forty other passengers were injured. At the opening of the trial the company admitted liability for the accident; thus the sole issue presented for determination was the amount of damages, and the jury returned a verdict for $7,100. The company concedes that "a fair and adequate award for damages in this case should be approximately five thousand ($5,000.00) dollars," but contends that $7,100 is excessive, and accordingly that the amount of the award should be reduced to such an amount as to this court may seem reasonable to compensate plaintiffs for the damages sustained. The rule is, however, that even though the award is larger than a reviewing court might think justified, such court is not in a position to disturb it unless it appears that the verdict was the result of passion, prejudice or corruption, or that the amount is so grossly excessive that the ends of justice warrant a reduction (Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26), and there is no reasonable ground upon which it may be so held in the present case.

[2] The company introduced no evidence whatever in the case, but rested on that produced by plaintiffs. It was established thereby that the total amount of special damages alone sustained by plaintiffs was $1,595.70, thus leaving less than $5,505 as compensation for the personal injuries sustained and pain suffered by Mrs. Power, and as damages to her husband for loss of his wife's services. The particular items of special damages were as follows: Mrs. Power was employed at Hale Bros. at $33.60 a week, and lost twenty-three weeks' pay or $772.80. Her doctor bill was $253.50; hospital bill $162.40; trained nurses at the hospital (she had three special nurses up to September 16th

and one until she went home September 29th), $196; she agreed to pay a friend who had nursing experience and who took care of her for six weeks after she came home from the hospital $25 a week, or $150; it was necessary for her to get new glasses, which cost $50; and the ambulance fees were $11.

As a result of the accident Mrs. Power sustained a severe brain injury with a possible basal fracture of the skull. She was thrown from the car and rendered unconscious, but regained consciousness sufficiently to be taken home in a taxicab—she lived only a few blocks away from the scene of the accident. She was assisted into her home by the cab driver, and immediately lapsed into unconsciousness again. Her husband called a brain specialist, who found Mrs. Power had a cut on the back of her head, a black and blue area in the front of her head on the right side; she was suffering from severe shock and given to persistent vomiting, and complained of severe pains in her head. She had definite changes in the reflexes, in that they were greater on the right side than on the left. She was removed immediately to the hospital, where she was given sedatives. The vomiting continued for about four days, and it was necessary to give her fluids by injection into the veins. Her reflexes altered, so that they were stronger on the left side; she developed a weakness in the face on the left side; she could not move her eyes to the right and she had an unsteadiness of her eyes; her sense of taste and smell was impaired. These symptoms were diagnosed as indicating a brain injury, which was confirmed by a spinal puncture made to determine the pressure and character of the fluid in the brain, and the fluid was found to be practically pure blood, which was evidence of bleeding inside the head, and it was twice the normal pressure, indicating pressure within the head caused by hemorrhage. About a week later another spinal puncture was made, which showed the fluid had cleared somewhat and the pressure was lowered. She also developed a black and blue area back of the ear, which is called "Battle's sign," and is presumptive evidence of a basal fracture of the skull; and although the X-rays did not show any fracture, the doctor testified it is not always possible to show such a fracture by X-rays. She remained in the hospital until September 29, then was allowed to go home but was kept in bed for eight or ten days more, and later allowed to sit up and gradually to get up. It was necessary for someone to take care of her for six weeks after she came home from the hospital, and she remained home until February 15, 1941. At the time of trial she was still suffering from severe pains in her head, from dizziness, fatigue, sleeplessness, and disturbance in the sense ot smell and taste. The doctor testified that within approximately a year after the accident she might be free of these symptoms.

In support of its contention that the amount awarded by the jury was excessive, the company contends that no permanent injuries were received; but even so, it would seem that the injuries above enumerated were sufficiently severe and painful to preclude this court from holding as a matter of law that the amount the jury awarded was excessive.

[3, 4] Furthermore and by way of comparison the company calls attention to verdicts rendered in numerous other cases. It is well settled, however, that there is no absolute rule for determining whether a verdict is excessive (Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601), and while in passing upon the question the reviewing court may consider amounts awarded in similar cases involving equally serious injuries (Osrowitz v. Market Investment Co., 40 Cal.App.2d 179, 104 P.2d 681), in the final analysis the question in each case must be determined from its own peculiar facts and circumstances (Kirschbaum v. McCarthy, 5 Cal.2d 191, 54 P.2d 8), and it cannot be held as a matter of law that a verdict is excessive simply because the amount may be larger than is allowed ordinarily in such cases. James v. Oakland Traction Co., 10 Cal.App. 785, 103 P. 1082; see also, Barrett v. Harman, 115 Cal.App. 283, 1 P.2d 458.

For the reasons stated it is our opinion that no legal ground has been shown for interference with the amount of the jury's award. The judgment is therefore affirmed.

PETERS, P. J., and WARD, J., concurred.

52 Cal.App.2d 293

In re OSGOOD'S ESTATE.

OSGOOD v. HOFF.

Civ. 11996.

District Court of Appeal, First District, Division 2, California.

May 27, 1942.

1. **Executors and administrators** ⚷314(12)

A finding by probate court that judgment creditor of beneficiary of testamentary spendthrift trust acquired no interest in any of property of testatrix' estate could not be disturbed.

2. **Executors and administrators** ⚷314(12)

A judgment creditor of beneficiary of testamentary spendthrift trust was not prejudiced by failure of probate court to rule on motion of executrix to strike judgment creditor's evidence relating to invalidity of trust where judgment creditor had not alleged facts showing that trust was invalid.

3. **Executors and administrators** ⚷314(7)

On executrix' petition for distribution wherein a judgment creditor of beneficiary of testamentary spendthrift trust filed objections on ground of invalidity of trust, probate court could not determine validity of trust in absence of pleadings alleging the facts.

4. **Executors and administrators** ⚷314(2)

Generally, probate court has no jurisdiction to determine controversies between third persons and the estate of decedent or his heirs, legatees or devisees, especially the rights of attachment and judgment lien creditors.

5. **Executors and administrators** ⚷314(2)

A judgment creditor of beneficiary of testamentary spendthrift trust was bound to go into court of competent jurisdiction to try issue of alleged invalidity of trust.

6. **Executors and administrators** ⚷314(2)

A probate court, except as provided by law, has no jurisdiction to distribute decedent's estate except to heirs, devisees or legatees.

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

In the matter of the estate of Janie M. Osgood deceased, wherein Eliza A. Osgood, as executrix, etc., filed a final account, report and petition for distribution, to which account and petition Maggie A. Hoff filed objections and exceptions. From an order directing a decree of distribution to be entered, objectant appeals.

Affirmed.

G. V. Weikert, of Los Angeles, for appellant.

Chas. E. Watkinson and William Hazlett, both of Los Angeles, for respondent.

STURTEVANT, Justice.

Janie M. Osgood died testate in Los Angeles. In due time her will was admitted to probate. The decedent left her surviving one heir, a son, Alfred J. Osgood. By the terms of said will the decedent left all of her estate to Eliza A. Osgood in trust for said son, A. J. Osgood. The trust was in form a spendthrift trust. The will named Eliza A. Osgood, wife of decedent's son, as executrix of said will and as trustee of said trust.

On September 21, 1939, Eliza A. Osgood, as executrix, filed her second and final account, report, and petition for distribution. In form it was regular and complete in all respects. However, Maggie A. Hoff filed objections and exceptions to said account and petition. In that pleading she alleged that on December 19, 1934, judgment was entered in her favor against A. J. Osgood for $5,716.70; on April 16, 1935, she caused execution to be issued and served on all the right, title, claim and interest of defendant A. J. Osgood in and to the estate of Janie M. Osgood and under the trust created and established by said will; on April 24, 1935, she caused the interest so attached to be sold by the sheriff; that she purchased such interest for $100 and a certificate of sale was delivered to her which she still holds and which is wholly unsatisfied; on April 30, 1935, she notified Eliza A. Osgood, as executrix, and demanded an account; that said Eliza A. Osgood replied in writing that said objector acquired no right, title or interest; that Alfred J. Osgood died March 6, 1937, and no administration of his estate has been had; that said trust is one for maintenance; that Eliza A. Osgood has made payments contrary to the terms of said will; and that said Eliza A. Osgood failed to report the existence of the attachment of the objector. To those objections and exceptions Eliza A. Osgood, as executrix, filed written opposition. The issues so framed were heard before the probate court. On March 21, 1941, it made findings, including among others the following: That under said levy and sale Maggie A. Hoff acquired no right, title, or interest in or to, or any lien upon any of the property of the estate of Janie M. Osgood, deceased, or any property belonging to the trust created by Janie M. Osgood; that said trust is a spendthrift trust; that Eliza A. Osgood has made no disbursements contrary to the terms of said will or said trust; that said trust is a valid trust; and that at no time since the death of Janie M. Osgood was there any surplus of rents or profits beyond the sum for the support and maintenance of said Alfred J. Osgood, now deceased, and no property in the estate of said Janie M. Osgood or in the trust created by said Janie M. Osgood in her said last will which is or was liable to or for the claims of creditors of said Alfred J. Osgood.

In said order dated March 21, 1941, said court overruled the objections of Maggie A. Hoff, ordered the said account to be settled, and ordered a decree of distribution to be entered as prayed in said petition. From the order so made, including the decree of distribution, the said Maggie A. Hoff has appealed under section 953a of the Code of Civil Procedure.

It will be noted that in her pleading the plaintiff made no claim the trust was invalid in any respect, and that the trial court made no findings on that subject. However, on the hearing, over the objection of the executrix, the plaintiff, subject to a motion to strike, introduced evidence to show the trust was invalid. The trial court made no ruling on the motion to strike.

[1] The plaintiff contends that the probate court erred in denying the plaintiff relief (1) to the income that accrued from the estate between the death of the trustor and the death of the beneficiary, and (2) to the surplus income accruing under the trust. We find no merit in either contention. The plaintiff caused her writ to be levied April 16, 1935. Her rights were fixed as of that date. Neither in the trial court nor in this court has she made any attempt to state either the items or the balance of any account of moneys held by the executrix which was subject to the levy so made by the plaintiff. The trial court made a finding that the plaintiff "* * * acquired no right, title, or interest in or to, or any lien upon, any of the property of the estate of Janie M. Osgood, deceased." That finding may not be disturbed. In all we have said we have assumed that the will of the decedent, including the trust therein created was valid in every respect.

But the plaintiff contends that the trust was invalid in part; and, she goes further and contends it was wholly invalid. Those contentions she predicates on her claim that the beneficiary placed certain of his properties in the hands of his mother, the trustor and had her include such properties in the trust and said trust was to that extent invalid (McColgan v. Walter Magee, Inc., 172 Cal. 182, 155 P. 995, Ann.Cas. 1917D, 1050); that the conveyances were made by the beneficiary fraudulently to hinder and delay his creditors; and that the trust was wholly void because it violated the laws prohibiting certain restraints on alienation and perpetuities. Conceding that such contentions may be heard and determined by a court having jurisdiction thereof (McColgan v. Walter Magee, Inc., supra), it does not follow that the probate court in the instant case had power to hear and determine said questions.

[2] In the trial court such contentions were made. Over the objection of the executrix the plaintiff introduced some evidence subject to a motion to strike. Later that motion was made and taken under advisement, but was not expressly ruled on. As plaintiff had not alleged the facts she was not prejudiced by the omission. 2 Cal. Jur. 1024. Moreover, as will presently appear, the objections should have been sustained.

[3-6] Assuming, solely for the purposes of this decision, that under certain circumstances the trial court could have heard and determined such matters, it could not properly do so in the absence of pleadings alleging the facts. Estate of Crooks, 125 Cal. 459, 462, 58 P. 89. Here the plaintiff made no attempt to plead any of the facts showing, as she contends, that the trust was invalid in any respect. Moreover, it is a general rule that a probate court has no jurisdiction to hear and determine controversies between third persons and the estate of a deceased person or his heirs, legatees, or devisees. Martinovich v. Marsicano, 137 Cal. 354, 356–358, 70 P. 459. And in particular "There

is no provision in the Probate Code for determining the rights of attachment and judgment lien creditors in the heir's or legatee's share of the decedent's estate, and such creditors are not entitled to distribution in the probate proceeding, but may urge their claims in a separate suit. [Citing authorities.]" McGee v. Allen, 7 Cal.2d 468, 471, 60 P.2d 1026, 1028. The plaintiff cites and relies on Estate of Lind, 1 Cal.2d 291, 34 P.2d 486. But in that case the validity of a trust created by a will was not involved. But when the questions above mentioned arose the plaintiff was bound to go into a court of competent jurisdiction, plead the facts as required by well settled rules of law, and try the issues. City of Los Angeles v. Knapp, 22 Cal.App.2d 211, 213, 70 P.2d 643. Except as expressly provided by law, the probate court has no jurisdiction to distribute a decedent's estate except to heirs, devisees, or legatees. 11b Cal.Jur. 777.

We find no error in the record. The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

WESTPHAL et al. v. WESTPHAL et al.

S. F. 16056.

Supreme Court of California.

May 27, 1942.

Rehearing Denied June 25, 1942.

1. Judgment ⇨435, 443(1)

The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired, only if the alleged fraud or mistake is extrinsic rather than intrinsic.

2. Judgment ⇨435, 443(1)

Fraud or mistake is "extrinsic fraud" or "extrinsic mistake" within meaning of the rule that a final judgment can be attacked in equity after time for appeal or direct attack has expired, if alleged fraud or mistake is extrinsic rather than intrinsic, when it deprives the unsuccessful party of an opportunity to present his case to the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud" and "Extrinsic Mistake".

3. Judgment ⇨456(1)

If an unsuccessful party to an action has been kept in ignorance thereof, or has been prevented from fully participating therein, there has been no true "adversary proceeding", and the judgment is open to attack at any time.

See Words and Phrases, Permanent Edition, for all other definitions of "Adversary Proceeding".

4. Judgment ⇨456(1)

A party who has been given proper notice of an action, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary, and hence the judgment cannot be attacked after time for appeal or other direct attack has expired, as fraud perpetrated under such circumstances is "intrinsic fraud", even though the unsuccessful party does not avail himself of the opportunity to appear before the court.

5. Judgment ⇨495(2)

It will be presumed in support of a final judgment of a court of general jurisdiction that proper notice was given to the parties in the absence of an affirmative showing to the contrary.

6. Executors and administrators ⇨315(6)

Where there was no showing that those claiming an interest in trust estate were in any way prevented from appearing in proceedings in probate court for distribution of property devised in trust, or from calling the court's attention to their alleged interest in the trust estate, it would be presumed when decree of distribution was attacked many years later, that proper notice was given to them in accordance with the statutory requirements effective at that time.

7. Executors and administrators ⇨315(6)

In proceeding attacking a decree of distribution rendered many years before, an allegation that defendants concealed from the probate court rendering the decree the existence of plaintiffs and their contingent remainder in the estate was demurrable as not an allegation that plaintiffs did not receive notice but was at best an allegation that proof of such notice was not made to the court.

8. Executors and administrators ⇨315(6)

If those claiming interest in trust estate received notice of probate proceedings for distribution of the estate, failure of adverse parties to make proof to the probate court of such interest of claimants would not deprive the court of jurisdiction or prevent claimants from presenting their case.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Fritz Westphal and others against Theodore Westphal and others to have defendants adjudged involuntary trustees, for an accounting, that plaintiffs be declared owners of certain property, and that defendants be compelled to convey the property to the plaintiffs. From a judgment in favor of the defendants, two of the plaintiffs appeal.

Judgment affirmed.

For prior opinion see 112 P.2d 919.

Frank D. Parker, of King City, James H. Boyer, of Oakland, and Treadwell & Laughlin and Russell E. Barnes, all of San Francisco, for appellants.

Donahue, Richards & Hamlin, of Oakland, for respondents.

TRAYNOR, Justice.

John C. Westphal died testate March 9, 1912, leaving five sons surviving him, Theodore, William, George, Fred and John C., Jr. Under his will Theodore, William and George were each to receive an undivided one-fifth of his estate. The remaining two-fifths was given to Theodore and George in trust to pay the income therefrom to Fred and John C., Jr., for life.

The will provided that "In the event of the death of my said son, John C. Westphal, Jr., after my death, I direct that one-half (½) of said fund and property so held in trust, as aforesaid, (the income of which is directed to be paid as aforesaid) immediately vest in, and I hereby give, devise and bequeath to the widow and children of said John C. Westphal, Jr., share and share alike, a vested remainder in fee in and to one-half (½) of said property so devised in trust, as aforesaid, and, if he leaves no wife surviving him, then said one-half (½) of said trust property shall vest in, and I hereby give, devise and bequeath to the children of said John C. Westphal, Jr., by right of representation, a vested remainder in fee in and to one-half (½) of said property so devised in trust as aforesaid. In the event that said John C. Westphal, Jr., should die leaving no wife surviving him and leaving no children and having no children of a deceased child or children, then I direct that said one-half (½) of the said trust property shall immediately vest in Theodore Westphal, William Westphal, and George Westphal, named hereinabove, share and share alike, and to their heirs respectively, and, in that event, I do hereby give, devise and bequeath to said Theodore Westphal, William Westphal and George Westphal, share and share alike, and to their heirs, respectively, a vested remainder in fee in and to said one-half (½) of said property so devised in trust, as aforesaid, to take effect in possession immediately upon the termination of said trust, as provided in paragraph four of this will." A similar provision governed the interest of Fred Westphal. The will also provided that if any child contested the will, he should take nothing, and the share given to him in trust or otherwise should go to the testator's other children.

In March, 1912, the will was admitted to probate. In March, 1913, John C. Westphal, Jr., and Fred Westphal filed a petition to revoke the probate of the will, and on June 18th of that year dismissed their petition. On June 24, 1913, Theodore and William Westphal filed, as executors of the estate, a verified petition requesting final distribution of the estate to themselves and to George Westphal on the ground that John C. Westphal, Jr., and Fred Westphal, having contested the will, forfeited their interests in the estate. On July 28, 1913, the probate court entered its order for a decree of distribution in accordance with the petition, but made no reference to the interest of the widow and children of John C. Westphal, Jr.

On January 25, 1935, John C. Westphal, Jr., died. His widow and eleven children brought the present action on August 31, 1937, claiming an undivided one-fifth interest in the estate of John C. Westphal. The complaint alleges that the will contest of March, 1913, was instituted pursuant to a conspiracy by all the sons of the testator to defraud plaintiffs of their conditional remainder in the estate, and that the plaintiffs' remainder interest in the estate was concealed from the probate court. Theodore, William and George Westphal, who took equal shares of John C. Westphal, Jr.'s, undivided one-fifth interest under the decree of distribution, are named defendants. Two causes of action are set forth, one based upon extrinsic fraud and the other upon extrinsic mistake. Plaintiffs ask that defendants be adjudged involuntary trustees, that an accounting be had, that plaintiffs be declared owners of the property and that defendants be compelled to convey the property to them.

Defendants demurred on the grounds that the decree of distribution is not now subject to attack because the alleged fraud and mistake were intrinsic and that the action is barred by the Statute of Limitations as set forth in sections 338(4), 338(3), 318 and 343 of the Code of Civil Procedure. The trial court overruled the demurrer as to plaintiffs Raymond C. Westphal and Adele B. Westphal, who were unborn at the time of the alleged fraud and minors at the death of their father, John C. Westphal, Jr., and sustained the demurrer as to the other plaintiffs. The latter have appealed.

[1-4] The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93; In re Griffith's Estate, 84 Cal. 107, 23 P. 528, 24 P. 381; Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159; Olivera v. Grace,

19 Cal.2d 570, 122 P.2d 564. Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98. See 23 Cal.Law Rev. 80; 9 Cal.Law Rev. 156. If an unsuccessful party to an action has been kept in ignorance thereof (Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976) or has been prevented from fully participating therein (Caldwell v. Taylor, supra), there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; Abels v. Frey, 126 Cal.App. 48, 14 P.2d 594; Langdon v. Blackburn, 109 Cal. 19, 41 P. 814. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. Langdon v. Blackburn, 109 Cal. 19, 41 P. 814; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; see Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 P. 24, 48 Am.St.Rep. 110.

[5-8] In the present case plaintiffs allege that after the simulated will contest by Fred Westphal and John C. Westphal, Jr., the defendants obtained a decree of distribution that awarded them the entire estate by concealing from the probate court the existence of the plaintiffs and the latter's contingent remainder in a portion of the estate. There is no allegation, however, that plaintiffs did not receive proper notice of the probate proceedings and the petition for the decree of distribution, or that plaintiffs were in any way prevented from appearing in the proceedings and calling the attention of the court to their interest in the estate. It will be presumed in support of a final judgment of a court of general jurisdiction in California that proper notice was given to the parties in the absence of an affirmative showing to the contrary. Estate of Twombley, 120 Cal. 350, 351, 52 P. 815; Daly v. Pennie, 86 Cal. 552, 25 P. 67, 21 Am.St.Rep. 61; Miller v. Pitman, 180 Cal. 540, 182 P. 50; Abels v. Frey, 126 Cal.App. 48, 14 P.2d 594; Langdon v. Blackburn, supra; Estate of Chapman, 158 Cal. 740, 112 P. 302; In re Griffith, 84 Cal. 107, 23 P. 528, 24 P. 381; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117. The application of this presumption to the decree of distribution under attack in the present case is not affected by Probate Code, section 1242, requiring that the judgment roll in probate proceedings include proof of service upon the parties concerned (Cf. F. H. Dam, The New Judgment Roll in Probate, 8 State Bar Journal 234; see 11A Cal.Jur. § 116), because this decree was rendered long before the enactment of that section. In the absence of an allegation that plaintiffs did not receive proper notice of the proceedings it must be presumed that they received such notice in accordance with the statutory requirements effective at that time. The allegation that defendants concealed from the probate court the existence of plaintiffs and the latter's contingent remainder in a portion of the estate is not an allegation that plaintiffs did not receive notice but is at best an allegation that proof of such notice was not made to the court. So long as plaintiffs received notice, however, a failure to make proof of such notice would not deprive the court of jurisdiction or prevent the plaintiffs from presenting their case. Herman v. Santee, 103 Cal. 519, 37 P. 509, 42 Am.St.Rep. 145, overruling Reinhart v. Lugo, 86 Cal. 395, 24 P. 1089, 21 Am.St.Rep. 52; see, also, Estate of Eikerenkotter, 126 Cal. 54, 58 P. 370, and 15 Cal.Jur. 68, § 150.

Under the presumption of service plaintiffs had notice of the proceedings, and there was nothing to prevent their participating therein. They therefore had an opportunity to present their case and direct the attention of the court to their interest in the estate. It follows that there is no extrinsic fraud or mistake alleged in the present case that is sufficient to constitute the basis for an attack in equity upon the decree of distribution.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, and CARTER, JJ., concurred.

52 Cal.App.2d 338

In re KNOX' ESTATE.

WENDLAND v. KNOX.

Civ. 13555.

District Court of Appeal, Second District, Division 1, California.

May 28, 1942.

Hearing Denied July 23, 1942.

1. Appeal and error 🔑643(5), 795(1)

An appeal, taken on bill of exceptions from order approving accounts of testamentary trustee, would not be dismissed for failure to file proper transcript within time allowed by law, where motion to dismiss and objections to transcript were not properly taken under court rule. Rules for Supreme Court and District Courts of Appeal, rules 5, 15.

2. Appeal and error 🔑162(1)

A beneficiary of testamentary trust was not "estopped" from appealing from order allowing and approving testamentary trustee's accounts by virtue of having accepted from trustee $300 attorney fees, as allowed in the account settled.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

3. Executors and administrators 🔑526

An action will not lie in California to compel an accounting by an executor appointed by sister state, though ancillary administration is had in California, and in such case California court has jurisdiction only over ancillary executor.

4. Executors and administrators 🔑518(1)
Trusts 🔑171

A "general administrator" is legally a person separate from an "ancillary administrator", but a "testamentary trustee" is both legally and in fact the same person in any state.

See Words and Phrases, Permanent Edition, for all other definitions of "Ancillary Administrator", "General Administrator", and "Testamentary Trustee".

5. Courts 🔑12(2)
Executors and administrators 🔑524(1), 525

A "trustee" and an "executor" both take their authority from the will, and both are accountable primarily for execution of their trust to courts where will has been probated, but trustee has in execution of the trust different powers and duties from executor, and a foreign court can more properly assume jurisdiction in action brought by or against trustee than in action brought by or against executor, and trustee can more properly be regarded as an individual rather than an officer of the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Executor" and "Trustee".

6. Courts 🔑12(2)

Where testator died a resident of Illinois, and his will was admitted to probate in Illinois, and ancillary proceedings were commenced in California, and ancillary executor was appointed for California property, and testamentary trust beneficiary residing in California petitioned superior court in California for accounting of entire trust, and testamentary trustee residing in New York appeared by counsel and submitted his accounts, and jurisdiction of Illinois courts was not sought, the superior court, without invoking principle of comity or doctrine of forum nonconveniens, had jurisdiction of accounting by testamentary trustee for entire estate, and not merely accounting for property in California. Probate Code, §§ 1120–1129.

The doctrine of "forum conveniens", which is frequently applied in the matter of compelling a testamentary trustee to account for trust, means the place where the trustee may be reached by process.

See Words and Phrases, Permanent Edition, for all other definitions of "Forum Conveniens".

7. Trusts 🔑298

The superior court, acting under powers granted by statute relating to jurisdiction in the matter of accounting by testamentary trustee, is engaged in the exercise of its special and limited probate jurisdiction as distinguished from its general law and equity jurisdiction. Probate Code, § 1120.

8. Trusts 🔑329

On appeal from superior court order approving testamentary trustee's accounts, appellate court would presume that the matter was taken over by superior court in exercise of its general equity powers, notwithstanding that the parties stated that the proceeding was brought under provision of Probate Code relating to jurisdiction of superior court in the matter of an accounting by testamentary trustee, where there was nothing in record to indicate that superior court did not entertain proceeding for accounting in exercise of its general powers rather than under its special limited powers in probate. Probate Code, § 1120.

9. Tenancy in common ⇨3, 35

Where will created testamentary trust, the income from which was to be paid to beneficiary until she ceased to be married, in which event trust property was to be paid to beneficiary, and provided that remainder of estate was to be divided into three shares, and that one share should be administered in same manner as the trust, and that testamentary trustees should give remaining shares to two individuals, and trustees conveyed undivided one-third interest in certain realty to each of such individuals and continued to hold remaining third in trust for beneficiary, trustees and individuals were thereafter "tenants in common", but beneficiary did not become tenant in common while she remained married, and hence her agreement with trustees to pay rent for use of realty was not terminated by trustees' conveyance of the undivided interests. Civ.Code, § 863.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant in Common".

10. Tenancy in common ⇨28(1)

A testamentary trustee, who was tenant in common of realty with two persons to whom he had conveyed undivided one-third interest pursuant to will, must account to such persons for all rents collected from third persons for the premises.

11. Trusts ⇨280

Rent for realty occupied by testamentary trust beneficiary was deductible from trust income payable to beneficiary, where only one-third of realty was held in trust to provide income for beneficiary.

12. Tenancy in common ⇨49
Trusts ⇨205

Where testamentary trustees, holding undivided one-third interest in realty in trust to provide income for beneficiary, leased realty to beneficiary, change in amount of rent could be made by surviving trustee and beneficiary without necessity of negotiating or dealing with trustee's cotenants owning remaining undivided two-thirds interest.

13. Tenancy in common ⇨55(1)
Trusts ⇨311

A testamentary trustee holding undivided one-third interest in realty in trust to provide income for beneficiary, and leasing realty to beneficiary, could assert claim against beneficiary for rent in accounting proceeding, notwithstanding that persons owning remaining undivided two-thirds interest were tenants in common with trustee, where cotenants were not parties to lease and had no control over terms thereof, and were not concerned with trustee's controversy with beneficiary.

14. Tenancy in common ⇨28(1), 49

Cotenants owning undivided two-thirds interest in realty, in which testamentary trustee held undivided one-third interest in trust to provide income for beneficiary, were not concerned with trustee's lease to beneficiary, and only rights cotenants had would be to compel trustee as tenant in common to account for rents received.

15. Partition ⇨9(1)

Upon partition of premises owned by three tenants in common, lease theretofore executed by one tenant in common would only apply thereafter to the third of such premises held by such tenant in common.

16. Tenancy in common ⇨49

One tenant in common may let the entire premises to a third party, and all a cotenant out of possession is entitled to is to be let into possession with the lessee of his cotenant to enjoy his moiety or to compel his cotenant to account for the rents received.

17. Tenancy in common ⇨28(1)

If testamentary trust beneficiary to whom trustee leases premises became a tenant in common, when trustee conveyed two-thirds undivided interest to two persons pursuant to will, trust estate was chargeable with such persons' share in rent.

18. Trusts ⇨217(3)

Under will directing testamentary trustees to accumulate in cash or negotiable securities the sum of $15,000 and to pay income therefrom to beneficiary, a note secured by mortgage on Illinois realty was not improper investment, as against contention that, under Illinois law, mortgage was not negotiable security, where negotiability of note was not affected under Illinois law by the mortgage, and word "negotiable" in will was employed to keep trust funds in comparatively liquid state.

See Words and Phrases, Permanent Edition, for all other definitions of "Negotiable".

19. Trusts 🔑218(1)

That trustees held an investment in stock of bank which thereafter failed did not show mismanagement of trust.

20. Trusts 🔑325

In proceeding for testamentary trust accounting against trustee who held undivided one-third interest in realty in trust for beneficiary and undivided one-third interest as individual, evidence was insufficient to show that trustee mingled individual properties with trust properties and used trust money to pay individual charges, but rather that each of the parties interested in the common property was credited with his share of the income and that each bore his share of the expense.

21. Trusts 🔑280

Where testamentary trustees were given full power of discretion in management of trust, failure to divide a cash balance immediately upon its accumulation was not an abuse of discretion.

22. Trusts 🔑326

In proceeding for testamentary trust accounting, refusal to permit trustee's deposition to be taken was not abuse of discretion, where trustee was seriously ill at his home in New York, and the evidence was such that the decision of the superior court would not have been any different had such a deposition been allowed.

23. Trusts 🔑330

The allowance of attorney's fees and fees to testamentary trustee was proper, as against contention that some of the items in trust account involved individually owned property, where all of the services were properly chargeable against the trust in view of the method of accounting for the common property.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of Wesley L. Knox, deceased, wherein Edith Knox Wendland, beneficiary of a testamentary trust, filed a petition for an accounting by Charles Edmund Knox, as surviving testamentary trustee, etc. From an order allowing and approving the accounts of the testamentary trustee, Edith Knox Wendland appeals.

Order affirmed.

Joseph D. Taylor, of Los Angeles, and Charles J. Wendland, of Pasadena, for appellant.

Porter & Sutton, of Los Angeles, for respondent.

DORAN, Justice.

[1, 2] This is an appeal by the beneficiary of a testamentary trust from an order of the superior court allowing and approving the accounts of the testamentary trustee. The appeal is taken upon a bill of exceptions. Respondent contends that the bill is not complete and that the appeal should be dismissed for failure to file a proper transcript within the time allowed by law. However, no motion to dismiss the appeal appears to have been taken under rule V of the Rules for the Supreme Court and District Courts of Appeal, nor are the objections to the transcript properly taken under rule XV thereof. Respondent also contends that appellant is estopped to take this appeal because of having accepted from the trustee $300 for attorney fees, as allowed in the account settled. Respondent, however, has failed to point out where or in what manner the record supports this claim of estoppel. Respondent's sole reference to the record on this point is insufficient to support his claim.

Wesley L. Knox, the father of appellant, died a resident of the State of Illinois and his will was admitted to probate in that state. The deceased left certain real property in the county of Los Angeles, State of California, and ancillary proceedings were accordingly commenced here and an ancillary executor appointed. By the will, and a codicil thereto, the remainder of decedent's estate was bequeathed in trust to a son of the deceased, Charles Edmund Knox, of Tupper Lake, New York, and to Arthur B. Wells, of Chicago, Illinois, and the survivor of them. At the time of the instant action Charles Edmund Knox, residing in the State of New York, was acting as surviving trustee. The will and codicil provided that the trustees, by sale of the trust property or otherwise, should accumulate in cash or negotiable securities the sum of $15,000 and set the same aside to hold in trust and pay the net income therefrom to appellant as long as she should remain married, until her death, and upon her death to pay the said net income for the care, maintenance and education of any child or children, or descendants surviving appellant, until such surviving children or descendants should arrive at the age of 21 years. In the event appellant should cease to be married the trust was to terminate and the balance remaining in the hands of the trustees was to be conveyed to appellant absolutely. After the accumulation and setting aside of the above mentioned sum, the remainder of the estate was to be divided by the trustees into three shares; and one of such shares was to be added to the said sum of $15,000 and to be administered in like fashion. The other two shares were to be paid over respectively to Charles Edmund Knox and Arthur H. Knox, as individuals, or to their surviving children or descendants. No accounts were filed by the trustees until the proceedings herein were taken. The Superior Court of Los Angeles County made its order settling the final account of the executor and for distribution of the California property to the trustees. Appellant is a resident of the State of California. In her petition for an accounting herein appellant prayed that the surviving trustee appear and render "a full and true account of all the trust funds held by him as trustee for the benefit of your petitioner and a full account of the property and/or properties distributed to the trustees under and by the decree of distribution made by this court." According to the parties hereto, the proceedings herein were taken under section 1120, et seq., of the Probate Code. At the time of the hearing the surviving trustee was ill at his residence in New York State and the trial proceeded with the understanding that if it became necessary, the beneficiary (appellant) and attorneys for the trustee should have the right to a continuance and the privilege of taking the deposition of the said trustee, in case he sufficiently recovered to give his deposition. The accounts presented by the trustee for settlement in this proceeding included all the property in his hands, whether received through administration in California or in Illinois; and these accounts were allowed and approved.

Appellant contends that the court did not have jurisdiction to settle the accounts of the trustee except as to the California property; that the court erred in allowing the account without requiring the trustee to appear in person as a witness or permitting his deposition to be taken; that the court committed reversible error in settling the accounts with respect to items of rent of certain real property in California; that the judgment should be reversed because of allowance of attorney's fees and fees to the trustee; and that the evidence is insufficient to support the settlement of the accounts.

Respondent concedes that appellant's contention as to jurisdiction would be true except for sections 1120 to 1129 of the Probate Code, the effect of which sections, respondent contends, is to confer upon the probate court a portion of the equity powers vested in the superior court. There is no question but that the probate court is by section 1120, supra, given jurisdiction over the accounts of a testamentary trustee of a trust created by a will probated in this state. The question here presented is whether such jurisdiction should be exercised over the entire accounts of a testamentary trustee, residing in another state, where the will creating the trust was probated in a third state, a portion of the property involved lies in the State of California and the beneficiary is a resident of this state. It is apparent that, granting the scope of jurisdiction given by section 1120, the question involved remains unanswered until the conflict is resolved between the jurisdiction of the probate court of this state and that of the court where the will was originally probated and the trust therefore created. The question is whether an accounting by a testamentary trustee for the entire estate will lie in the court which had jurisdiction over ancillary administration of a portion of the estate.

[3-5] An action will not lie in this state to compel an accounting by an executor appointed by a sister state, though ancillary administration is had here. In such a case the California court has jurisdiction only over the ancillary executor. Philbrook v. Randall, 195 Cal. 95, 102, 103, 231 P. 739. However, a testamentary trustee occupies a different position. A general administrator is legally a person separate and apart from an ancillary administrator; but a testamentary trustee is both legally and in fact the same person in any state. This distinction is based upon the respective powers of a trustee and an executor. "Though both take their authority from the

will, and both are accountable primarily for the execution of their trust to the courts where the will has been probated, yet the trustee has in the execution of his trust different powers and different duties from the executor, and a foreign court can more properly assume jurisdiction in an action brought by or against a trustee than in an action brought by or against an executor, and he can more properly be regarded as an individual rather than an officer of the court." Everhart v. Provident Life & Trust Co. of Philadelphia et al., 118 Misc. 852, 195 N.Y.S. 388, 390.

The provisions of section 1120 of the Probate Code here pertinent are based upon the provisions of former section 1699, Code of Civil Procedure. Dowdall v. Superior Court, 183 Cal. 348, 191 P. 685, was concerned with a question of jurisdiction over an accounting by a testamentary trustee under the provisions of the latter section. The question there was one of jurisdiction between the courts of two different counties of this state. It was held that the superior court which by virtue of the decree of distribution has jurisdiction of a trust created by will is the court of primary jurisdiction, and if a bill in equity is filed in any other superior court for the purpose of settling the account of such a trustee, that court, upon being informed of the jurisdiction of the court in probate and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case and allow the account to be settled by the court having primary jurisdiction, provided the proceeding in the probate court is made in good faith and prosecuted with diligence. The purport of this decision is at once manifest. It is to be noted that it was not held that the superior court in which the action for accounting was filed did not have jurisdiction, but that the court which had decreed distribution of the estate had primary jurisdiction which should be recognized by the former court. Dowdall v. Superior Court, supra, plainly indicates that had no action been taken in the court of primary jurisdiction it would have been entirely proper for any other superior court in the state to entertain an action for an accounting by the testamentary trustee, assuming such a court to have jurisdiction over the parties. Notwithstanding the fact that the jurisdiction of the courts of this state is a matter of legislative control and that the Dowdall case was concerned with the question of jurisdiction as between courts of different counties within the state, it will be seen from the authorities hereinafter cited that the logical basis for the decision in the Dowdall case is equally applicable to situations involving like questions of jurisdiction as between sister states.

Schuster v. Superior Court, 98 Cal.App. 619, 620, 277 P. 509, was concerned with an application for a writ of prohibition to restrain the Superior Court of Los Angeles County from further proceedings in contempt instituted against the trustee of a testamentary trust, for failure to answer questions on a deposition. The principal contention of the petitioner in that case was that the respondent court had no jurisdiction over the subject matter of the action, or assuming that it had jurisdiction, it ought not to seek to exercise the same as a matter of comity. Petitioner was one of the trustees of a trust created by a will probated in the State of Arizona. An action for an accounting by the trustees had been instituted in that state and was pending on appeal at the time of the institution of a similar action for the same purpose in Los Angeles County. The deposition there in question was sought in the action for accounting brought in the county of Los Angeles. The appellate court in the Schuster case decided that the California courts should not exercise jurisdiction in the situation there presented and accordingly granted a peremptory writ restraining the lower court from further proceedings in contempt. The court in the Schuster case said (at page 628 of 98 Cal. App., at page 513 of 277 P.): "We are not here dealing with the different courts of our own state, whose jurisdiction is, subject to the Constitution, a matter of legislative control, but the judicial branch of government of a sister state, to whose acts and jurisdiction we owe the highest degree of courtesy and recognition. *We are not disposed to say that there may not be instances where the exercise of jurisdiction by our own courts might not be invoked,* but we are forced to conclude that the situation here presented does not warrant the court in taking jurisdiction, and that, when it assumes to act, it is acting improperly and in excess of its rightful authority. Weintraub v. Superior Court [91 Cal.App. 763], 267 P. 733 quotes with approval from Broom v. Douglass, 175 Ala. 268, 57 So. 860, 44 L.R.A.,N.S., 164, Ann.Cas.1914C, 1155, as follows: '"By 'excess of jurisdiction,' as distinguished from the entire absence of jurisdiction, we understand and mean that the act, though within the general power of the judge, is not authorized, and therefore void, with respect to the particular case because the conditions which alone authorize the exercise of his general power in that particular case are wanting; and hence the judicial power is not in fact lawfully invoked."' We cannot imagine language more apt to express the situation presented in the instant cause." (Italics added.) It should be noted that the Schuster case presented a situation where an action for an accounting was already pending in the court of "primary" jurisdiction, the court of the state where the will creating the trust was probated. It should also be noted that the language used by the appellate court leaves the way open for the exercise of jurisdiction by another court, or court of "secondary" jurisdiction, in some instances. The basis for the decision in the Schuster case is clearly that of comity.

Appellant refers to Schwartz v. Gerhardt, 44 Or. 425, 75 P. 698, as being quoted with approval in the Schuster case, supra. A reading of the Schuster case, however, clearly indicates that what is there said must be considered in the light of the situation there presented, namely, one in which the parties had already submitted the matter of the trustee's accounts to the court of primary jurisdiction. As already here pointed out, the decision in the Schuster case does not preclude, nor purport to preclude invocation of a secondary jurisdiction under circumstances such as are presented by the instant case.

It is true that the court in the Schuster case (at page 625, et seq. of 98 Cal.App., 277 P. 509) considers the possibility of a distinction between a testamentary trustee and a trustee appointed by the court, or an executor or administrator; and, though conceding that a testamentary trustee is vested with some rights and charged with responsibilities prior to the time of distribution the court there appears to have concluded that the manner of appointment makes little difference. The remarks upon the subject there made, however, do not form the basis of the decision there reached. Moreover, it does not appear that such remarks materially conflict with the views hereinabove expressed. It should also be pointed out that the illustration, employed in the Schuster case, of the appointment by a court of a successor to a testamentary trustee is not particularly apt, since such a successor must of necessity draw his powers from the will and occupies the same position as the trustee originally named in the will. What has been already said here regarding the powers of a testamentary trustee applies with equal force to successors thereof, and still leaves room for a distinction between the successors of testamentary trustees and executors or administrators, notwithstanding the dictum in the Schuster case on the subject. Moreover, Schwartz v. Gerhardt, supra, is distinguishable from the instant case upon the facts. That case was concerned not with a testamentary trust but with one created by judicial decree. In the matter of the exercise of his powers, the trustee of such a trust is more closely akin to an executor or administrator.

[6] In the matter of compelling a testamentary trustee to account for his trust, the doctrine of forum conveniens, namely, the place where the trustee may be reached by process, is frequently applied. Such a doctrine appears to have been applied in Ewing v. Ewing, L.R. 10 App.Cases 453 (House of Lords), a leading English case involving trust funds partly in England and partly in Scotland. It was there held that the Scotch and English courts had concurrent jurisdiction over the accounting of trust funds. "The courts of the state in which the trustee may be reached by process will, in the absence of factors necessitating the application of the doctrine of forum nonconveniens, assume jurisdiction of an action by the beneficiary of a trust under the will of a resident of another state, to recover the trust property or to compel the execution of the trust or for an accounting." (Note, 115 A.L.R. 802, 815, and cases cited.) In the instant case appellant petitioned the superior court for an accounting of the entire trust and the trustee appeared by counsel and submitted his accounts. The jurisdiction of the Illinois courts was not sought. There was no action for an accounting there pending. The trustee having submitted his accounts and appellant being a resident of this state, there appears no ground for the application of the doctrine of forum nonconveniens; nor does there appear to be any reason for invoking the principle of comity. Both parties having submitted the matter in controversy to the courts of this state, without having first applied to the Illinois

courts, upon any subsequent application for an accounting in the Illinois courts the parties might well find themselves there estopped to deny the jurisdiction of the superior court. There is eminent authority and sound reason for holding the superior court to have jurisdiction over the matter in question.

[7, 8] Aside from the conflicting jurisdiction of two sister states, the instant situation suggests another question, though not one specifically raised by the parties. If an action for accounting is, under the circumstances, properly brought in this state, should it not be addressed to the superior court in the exercise of its general equity jurisdiction rather than as a court sitting in probate? Both parties have denominated the instant action as one for an accounting under section 1120 of the Probate Code. When the superior court acts under the powers granted it by section 1120 it is engaged in the exercise of its special and limited probate jurisdiction as distinguished from its general law and equity jurisdiction. See In re Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120; In re Estate of Rey, 31 Cal. App.2d 648, 88 P.2d 718. But such a question need not here be answered. Though the parties state that the instant action is one brought under section 1120 there is nothing in the record to indicate that the court did not entertain the proceeding for an accounting in the exercise of its general powers rather than under its special limited powers in probate. It must therefore be presumed that the matter was taken over by the court in the exercise of its broader equity powers.

The contentions as to error in allowing the account without requiring testimony of the trustee amount to no more than that the evidence was insufficient to sustain the decree in the absence of such testimony, and should be considered under that point.

The items of rent which appellant contends were erroneously allowed were charged by the trustee as rent of premises in Altadena, California, occupied by appellant and which were a part of the trust estate. Appellant took possession of these premises under a written lease with the trustees for the period from January 8, 1926, to December 7, 1926, providing for a rental of $60 per month. Appellant thereafter remained in possession of the premises. On or about November 1, 1928, and pursuant to the terms of the will, the trustees conveyed an undivided one-third of the premises in question to Arthur Knox and another undivided one-third thereof to Charles Knox as an individual. The remaining undivided one-third of the said premises continued to be held in trust for appellant in accordance with the terms above set forth. Appellant concedes that until November 1, 1928, there is no question as to items of rent, which only appear up until that date in the general trust account, because until November 1, 1928, the trustees had title to the property occupied by appellant and she paid to the trustees rent under the written lease above mentioned. Appellant further concedes that the said lease was undoubtedly renewed by implication until the trustees had conveyed title in the undivided shares to Charles and Arthur. But appellant contends that, thereafter, appellant, Charles and Arthur became tenants in common of the premises in question and hence there could be no further renewal of the lease by implication, notwithstanding the fact that appellant continued to occupy the premises. This contention is based principally upon the rule that a tenant in common in possession is not liable for rent to his cotenants for use and occupation of the premises in the absence of an express agreement therefor.

[9] It must be borne in mind that at the time appellant entered into possession of the premises and agreed to pay rent therefor the entire legal estate to the property was vested in the testamentary trustees. After the legal estate in two-thirds of the property was conveyed, an undivided one-third each to Charles as an individual and to Arthur, the remaining undivided one-third interest in the premises continued to be held in trust for appellant. Upon conveyance of the respective undivided interests to Charles and Arthur the testamentary trustees and their survivor became tenants in common of the property with Charles, individually, and Arthur. In view of the fact that the testamentary trust was one to provide only for the payment of income to appellant as the beneficiary during her life, and it does not appear that it was ever contemplated that the real property in question should be conveyed to appellant unless she should cease to be married, appellant, as beneficiary of the trust, could not properly be classed as a cotenant of the premises in the absence of the contingent event mentioned. The terms of the trust present a situation within the provisions of section 863 of the Civil Code, which reads as follows: "Except as hereinafter otherwise provided, every ex-

press trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." See Bank of America, etc., Ass'n v. Sparr Realty Corp., 20 Cal.App.2d 10, 66 P.2d 476. There is no valid ground upon which to contend that appellant's agreement with the testamentary trustees to pay rent for occupation of the premises in question terminated with the conveyance of the undivided interests to Charles and Arthur. The creation of the common estate did not affect the validity of any such lease of the premises. Swartzbaugh v. Sampson, 11 Cal.App.2d 451, 54 P.2d 73.

[10-12] As a tenant in common of the real property here involved the trustee was liable to account to his cotenants for all rents collected from third parties for the premises (Howard v. Throckmorton, 59 Cal. 79; note, 27 A.L.R. 182, 188); and in the circumstances here presented appellant's occupation of the premises was no more than that of a third party. Appellant, however, contends that her trust estate should not be charged with the rent. It is difficult to perceive the equity in a situation which would permit appellant to occupy the whole of premises to which she had no title, part of which only was being held in trust to provide her income, refuse to pay rent therefor and at the same time received income from the trust without any deduction for the rent due for occupancy of the property. The estate was properly charged with the rent of the premises. As to the amount charged for rent, it should be pointed out that the lease was one between the trustees and appellant; and any reduction or change in amount could be made through adjustments agreed upon by the surviving trustee and appellant without the necessity of negotiating or dealing with the other cotenants. See Swartzbaugh v. Sampson, supra. The original lease called for the payment of $60 per month as rent, but it appears from the account that the special trust for appellant was charged at the rate of but $40 per month for the period from November 1, 1928, to January 1, 1937, and but $30 per month from January 1, 1937, to April 1, 1939. Appellant attempts to point out that the trustee's cotenants did not enter into any agreement or lease of the premises, and that, moreover, Arthur, having had nothing to do with such an agreement is not bound by the amount collected by Charles as trustee. What has already been said above answers this argument.

[13-17] Appellant also contends that this action for an accounting is not a proper one in which to try claims for rent. Such a position is untenable. Appellant's attempt to draw an analogy between the present case and one involving the title of a stranger to an estate fails, because, as already indicated, the instant case is not one in which Charles, individually, and Arthur are seeking to collect rents through the testamentary trustee. The trustee himself is seeking to charge appellant with rent for premises leased to her by the trustee. With that lease the cotenants of the trustee have no concern. Their only recourse would be to compel the trustee as their cotenant to account to them for rents received. Upon a partition of the premises the lease to appellant would only apply thereafter to the third of the property held by the trustee. Swartzbaugh v. Sampson, supra. It is thus clear that the cotenants of the trustee are not parties to the lease, nor have they any control over the terms thereof, nor are they concerned with the controversy here presented. Appellant's arguments as to the items charged as rent are all contrary to the rule that one tenant in common may let the entire premises to a third party, and that all a cotenant out of possession is entitled to is to be let into possession with the lessee of his cotenant to enjoy his moiety, or to compel his cotenant to account for the rents received. Swartzbaugh v. Sampson, supra. Moreover, even if appellant's contention that she was a cotenant of the premises were assumed to be correct, the conclusion above reached would be the same and the trust estate would be properly charged with Charles' and Arthur's share in the rent. Vucinich v. Gordon, 51 Cal.App.2d 434, 124 P.2d 868.

[18] Under her general contention as to the insufficiency of the evidence to support the judgment settling the trustee's account, appellant attacks the propriety of an investment in the form of a note secured by a purchase money mortgage given to the executor of the estate on the sale of certain real property in Illinois. The will, as amended by the codicil, provided that the trustees should so manage the property in trust, either by selling sufficient of the same or otherwise, that there should accumulate in their hands in cash or negotiable securities the sum of $15,000 as soon after the decedent's death as in their judgment should

seem expedient. The trustees set aside for this purpose the sum of $5,000 in cash and the note and mortgage, which was in the sum of $10,000. Appellant contends that such action constituted a breach of the trust because under the law of Illinois a mortgage is not a negotiable security and the trustees in thus setting the same aside to provide the total sum of $15,000 in the special trust fund for appellant had violated the terms of the will. Appellant's attempted distinction is overly refined. It does not appear that the negotiability of the note in question was by Illinois law affected by the security of the mortgage; and respondent points out that the investment has proved sound. Reading the terms of the trust as a whole, it is apparent that the term "negotiable" was employed to assure the trust fund being kept in a comparatively liquid state. It does not appear that the setting aside of a promissory note secured by a mortgage, in order to provide a fund of $15,000, would violate the terms of the will as reasonably construed. It should also be pointed out that appellant's citations of authority on this issue do not support her contention.

[19] Nor is there any merit to similar contentions as to an item representing a dividend on certain bank stock, and as to failure to pay taxes on certain real property. The mere fact that the trustees held an investment in the stock of a bank which thereafter failed does not impugn either their good faith or judgment, and appellant fails to point out how this item indicates mismanagement of the trust. The failure to pay taxes on certain real property is satisfactorily explained in the first report of the general trust, and appellant has shown nothing to the contrary. As to charges that certain discrepancies appear in the trustee's accounts, regarding items for rent and other miscellaneous items, respondent points out that no such discrepancies exist and appellant fails to make any reply to respondent's explanations in this respect. It appears that respondent's explanation of the items in question is correct.

[20] Appellant contends that the evidence is insufficient to support the settlement of the trustee's accounts because the evidence shows that the trustee failed to administer the trust for the benefit of the beneficiary in accordance with the terms of the will and the trustee mingled individual properties with the trust properties and used trust money to pay individual charges. The will, in creating the trust in question, provided: "As soon after the accumulation and setting aside of said fund of five thousand dollars (amended to $15,000 by the codicil) as to my trustees may seem wise, having in mind the proper conservation and protection of my estate, my said trustees, and the survivor of them shall divide all the rest, residue and remainder of my estate into three shares (in making such division my said trustees and the survivor of them shall have the power to turn over securities at their face value and to make division of my real estate in undivided interests) and one of said shares shall be set aside by them and added to said * * * ($15,000) fund, and same shall be administered by them upon the same trust herein provided for said * * * ($15,000) fund and one of said shares shall be paid over and conveyed to my son, Charles Edmund Knox and the remaining share shall be paid over and conveyed to my son, Arthur H. Knox. * * *" The trustees by the will were given full power and authority to direct, manage and control all the property held in trust, as they should see fit and deem expedient. Pursuant to the terms of the will, above set forth, the real property held in the general trust was distributed in undivided shares, one such share remaining in trust for the benefit of appellant. In her brief appellant states: "A superficial examination of the general trust account shows that after November 1, 1928, when only one-third of the real property was held in any trust, the trust which is here accounted for was administered as though all of the real property was a part of the trust and as though the trust was for the benefit, even after the division of the real property, not only of Edith, but also of Charles and Arthur." An examination of the trust account does not reveal this to be true. In accounting for the property held in undivided shares the trustee reported the total of principal, income, expenses and disbursements, as applied to the entire property, and charged and credited the trustee with one-third of such items. As respondent points out, the result of this manner of accounting for the funds is that each of the parties interested in the common properties has been credited with one-third of the income and each has borne one-third of any deficit or expense. This method of accounting for the property held in common shares does not amount to commingling of trust funds or to administering the property as though all of it were held in trust. Ap-

pellant objects to the fact that it appears that Arthur collected all the proceeds from certain of the common realty in Chicago, and thus received all the income therefrom without paying any of the expense. This contention is unfounded. It appears from the account that the trustee has entered a claim thereon against Arthur for the trustee's share of the rents so collected and has charged the trustee accordingly. As already pointed out, the account reveals that each party to the common property has been charged with his respective share of the expenses. Moreover, in connection with the rent collections made by Arthur, it appears from the account that the amount in question is the net amount of rents so collected, over and above certain deductions for repairs and expenses. It does not appear that Arthur has escaped his share of the burden of expense. It should also be pointed out that, as one of the cotenants, Arthur was entitled to collect the rents for the common property, being liable to account to his cotenants therefor. No impropriety is shown by the fact that Arthur was permitted to collect the proceeds from certain of the common property.

[21] Appellant's contentions as to the failure to divide a certain cash balance immediately upon its accumulation is not well founded. It should be remembered that the trustees were given full power of discretion in the management of the trust; and the failure to so divide such a cash balance does not appear to have been an abuse of the discretion reposed in the trustees.

[22] As already mentioned, appellant's contention as to error in the refusal of the court to permit the taking of the trustee's deposition is based upon a claim of insufficiency of the evidence to support the decree otherwise. The trustee appears to have made a full and complete accounting accompanied with a thorough report, and the record supports the findings of the court and the decree settling the trustee's accounts. At the time of the hearing of this matter the trustee was seriously ill at his home in New York. The motion to take the deposition of the trustee was made after all the evidence had been presented. Appellant has given no specific reason why, in view of the evidence presented, the deposition of the trustee was necessary to a decision by the trial court. It does not appear that the decision of the court would have been any different had such a deposition been allowed. The allowance of such a deposition rested with the discretion of the trial court, and no abuse appears.

[23] Appellant objects to an allowance of attorneys fees in the sum of $1,500 and to the allowance of fees to the trustee. As to the services of the attorneys, appellant argues that two-thirds of the items appearing in the general trust account involved individually owned property of Arthur and Charles, and that therefore the attorneys fees allowed against the estate should be reduced by two-thirds. Appellant, however, concedes that there is no question as to reasonableness of the allowance if all of the services could properly be charged against this trust. From what has already been said as to the method of accounting for the common property it is clear that all of the services of the attorneys are properly chargeable against the trust. Appellant's claim that the services of the attorneys were caused by dereliction of the trustee, in failing to keep his accounts, is unwarranted in the light of the findings of the court, supported by the evidence. For the same reason, appellant's contentions as to the allowance of fees to the trustee are without merit. While the instant proceeding appears to be the first formal accounting by the surviving trustee before a court, the record indicates that on previous occasions the trustee had rendered informal accountings to appellant and had conferred with her or her representatives regarding the trust and its administration.

For the foregoing reasons the order allowing and approving the accounts of the testamentary trustee is affirmed.

YORK, P. J., and WHITE, J., concurred.

52 Cal.App.2d 217

ZEIGLER v. BONNELL.

Civ. 12028.

District Court of Appeal, First District, Division 1, California.

May 25, 1942.

1. Appeal and error 🔑770(1)

Where respondent filed no brief on appeal and suggested no theory upon which judgment might be sustained, District Court of Appeal was entitled to accept facts as stated in appellant's brief and was under no duty to seek out points of law in support of the judgment. Rules of the Supreme Court and District Courts of Appeal, rule 5, § 1.

2. Appeal and error 🔑770(1)

Where respondent filed no brief on appeal, District Court of Appeal was entitled to assume that respondent had abandoned any attempt to support the judgment. Rules of the Supreme Court and District Courts of Appeal, rule 5, § 1.

3. Appeal and error 🔑755

The failure of respondent to file a brief on appeal in support of judgment imposes an unfair and improper burden on appellate court, and such practice should be condemned. Rules of the Supreme Court and District Courts of Appeal, rule 5, § 1.

4. Execution 🔑56
Joint tenancy 🔑4
Tenancy in common 🔑3

Execution may be had upon interest of one of joint tenants while all joint tenants are alive, and upon purchase of the interest of one of joint tenants at execution sale the joint tenancy is severed, and purchaser and other joint tenant or tenants become "tenants in common".

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant in Common".

5. Judgment 🔑798

Where real property was held by joint tenants, one of whom was a judgment debtor, and judgment debtor died prior to levy of execution but after an abstract of judgment had been recorded, and a levy of execution was made after death of judgment debtor against debtor's interest, surviving joint tenant took entire property free of lien of the judgment by right of survivorship, and purchaser at execution sale secured no right to the property. Code Civ. Proc. §§ 674, 688.

6. Joint tenancy 🔑6

The right of survivorship is the chief characteristic that distinguishes a "joint tenancy" from other interests in property.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

7. Joint tenancy 🔑6

A surviving joint tenant does not secure right of survivorship from deceased joint tenant but from devise or conveyance by which joint tenancy was first created.

8. Joint tenancy 🔑1

Joint tenants, while all are alive, each have a specialized form of a life estate, with what amounts to a contingent remainder in fee, the contingency being dependent upon which joint tenant survives.

9. Execution 🔑56
Joint tenancy 🔑4
Judgment 🔑782, 798

When a creditor has a judgment lien against interest of one joint tenant he can immediately execute and sell interest of judgment debtor and thus sever the joint tenancy, or he can keep his lien alive and wait until joint tenancy is terminated by death of one of joint tenants, and, if judgment debtor survives, judgment lien immediately attaches to entire property, but, if judgment debtor is first to die, the lien is lost.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Emily N. Zeigler against Harry E. Bonnell to quiet title to a certain parcel of realty. From a judgment determining that the plaintiff and defendant owned, as tenants in common, undivided half interests in the realty, the plaintiff appeals.

Reversed.

Alfred Barstow, of Alhambra, and Dryer, Richards & Page and William A. Page, all of Los Angeles, for appellant.

Karl W. Marks, of Los Angeles, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment in a quiet title action determining that she and defendant own, as tenants in common, undivided half interests in a designated parcel of real property. On this appeal plaintiff urges that she owns the parcel free and clear of any claim of defendant.

[1-3] Although given ample opportunity to do so, respondent has filed no brief on this appeal, nor has he or his counsel suggested any theory upon which the judgment may be sustained. Under such circumstances, we are entitled to accept the facts as stated in appellant's brief (Rule V, § 1, of the Rules of the Supreme Court and District Courts of Appeal; Pendergrass v. Axx, 111 Cal.App. 478, 295 P. 896; Frank Graves S., etc., Co. v. Orange County Bond & Mtg. Corp., 111 Cal.App. 475, 295 P. 859), and are under no duty to seek out points of law in support of the judgment. We are entitled to assume that respondent has abandoned any attempt to support the judgment. Duisenberg-Wichman & Co. v. Johnson, 123 Cal.App. 125, 10 P.2d 1010; Doud v. Jackson, 102 Cal. App. 213, 283 P. 107. This shirking of responsibility on the part of respondent and his counsel should be strongly condemned, imposing as it does an unfair and improper burden on the court. Mosher v. Johnson, 51 Cal.App. 114, 196 P. 84; Lapique v. Walsh, 51 Cal.App. 191, 196 P. 512.

The facts of this case are as follows: In January, 1935, William B. Nash, and his daughter, appellant herein, took title to the parcel of real property here involved as joint tenants. In July of 1935 respondent sued William B. Nash to recover a balance due on a promissory note executed by Nash, and attached the real property. In December, 1935, respondent secured judgment against Nash for $1,413.86. An abstract of the judgment was recorded, and the judgment thereby became a lien on Nash's interest in the property. § 674, Code of Civ.Proc. A writ of execution was issued but no levy was made under the writ. Until a levy, property is, of course, not affected by an execution. § 688, Code of Civ.Proc. Nash died February 11, 1939. After his death, and on December 22, 1939, respondent caused a new writ of execution to be issued against the interest of Nash, and in January of 1940 respondent purported to purchase the interest of Nash at the execution sale in full satisfaction of the judgment. On these facts the trial court determined that appellant and respondent each own an undivided one-half interest in the property as tenants in common. It is the theory of appellant that, upon the death of her father in February of 1939, the property became hers by right of survivorship, free of the judgment lien against the interest of the deceased joint tenant.

The legal proposition thus presented can be stated as follows: Where real property is held by joint tenants, one of whom is a judgment debtor, and the judgment debtor dies prior to a levy of execution but after an abstract of the judgment has been recorded, and a levy of execution is made after the death of the judgment debtor against the interest of the debtor, does the purchaser at the execution sale secure any rights in the property, or does the surviving joint tenant take the entire property free and clear of the lien of the judgment?

[4, 5] It is well settled in this and other states that, while all joint tenants are alive, execution may be had upon the interest of one of the joint tenants, and that upon the purchase of the interest of that joint tenant at execution sale the joint tenancy is severed and the purchaser and the other joint tenant or tenants become tenants in common. See cases collected and commented on in 111 A.L.R. 171; Pepin v. Stricklin, 114 Cal.App. 32, 299 P. 557; Hilborn v. Soale, 44 Cal.App. 115, 185 P. 982. The question, in the present case, is whether a judgment lien on the interest of one joint tenant prior to execution severs the joint tenancy. We are of the opinion that it does not.

[6-8] The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property. The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. Green v. Skinner, 185 Cal. 435, 197 P. 60. While both joint tenants are alive each has a specialized form of a life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives. The judgment lien of respondent could attach only to the in-

terest of his debtor, William B. Nash. That interest terminated upon Nash's death. After his death there was no interest to levy upon. Although the title of the execution purchaser dates back to the date of his lien, that doctrine only applies when the rights of innocent third parties have not intervened. Here the rights of the surviving joint tenant intervened between the date of the lien and the date of the sale. On the latter date the deceased joint tenant had no interest in the property, and his judgment creditor has no greater rights.

The exact problem here involved is the subject of an annotation in 111 A.L.R. 171. It is there pointed out that what little authority exists on the question is to the effect that upon the death of a joint tenant who is also a judgment debtor, the surviving joint tenant takes free of the judgment lien. In Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657, 111 A.L.R. 168, to which case the annotation is appended, the problem is fully discussed. The facts of that case are identical with those of the instant case. After holding that the lien of the judgment could only attach to whatever interest the judgment debtor had in the property, the court stated (224 Wis. 432, 272 N.W. 658, 111 A.L.R. at page 170):

"* * * Upon the death of a joint tenant, there remains no interest or property right in the deceased in the premises held by him in joint tenancy up to the time of his death, in respect to which there can be operative an execution issued after his decease on a judgment against him, unless it can be said that by reason of the mere lien, arising from the docketing thereof, there was an effective severance of the deceased debtor's interest as a joint tenant from the interest of his cotenant, even though no execution was issued or levy made on his joint tenancy interest during the deceased's lifetime. Notwithstanding the diligence of counsel and our efforts, no precedent has been found to the effect that an effective severance of a joint tenancy occurs by reason of merely the lien which exists as the result of the docketing of a judgment. * * *

"On the other hand, in People's Trust & Sav. Bank v. Haas, 328 Ill. 468, 160 N.E. 85, 86, the court, in holding that the lien of the judgment against the interest of a deceased joint tenant was extinguished by his death, and that a surviving joint tenant, Emma L. Horney, became the sole owner, said: 'Appellant argues that Field & Co. followed the procedure required by law to perfect a lien on lands not registered, and that what it did operated to sever the joint tenancy of Samuel E. and Emma L. Horney; that the filing of the transcript of the judgment is analogous to filing a contract of purchase for record prior to a transfer of the property. We cannot agree to that proposition. Nothing was done by the Horneys or any one else prior to Samuel's death, to sever the joint tenancy. By law the fee vested in Emma, as survivor of the joint tenants, upon Samuel's death, and we are of opinion the court did not err in rendering the decree.' That case is cited in Thompson on Real Property (1929) § 1717, in support of the statement, 'The mere filing by a creditor of a joint tenant of a memorial of his judgment in the registrar's office prior to the death of the joint tenant, judgment debtor, does not operate as a severance and the survivor takes the whole free from the lien of the judgment, in the absence of any other steps taken by the creditor to sever the title.'

"That proposition seems sound. Therefore the trial court rightly concluded that there was no effective severance of the joint tenancy interests in question during Adam Musa's lifetime; that, consequently, all of his right, title, and interest in the premises became extinguished and ceased upon his death; and that thereupon the entire right, title, and interest therein vested in the plaintiff by virtue of the deed conveying the premises to her and Adam Musa in joint tenancy."

In addition to these authorities see 14 Am.Jur., p. 169, § 107; 2 Tiffany on Real Property, 3rd Ed., § 425, at p. 211.

[9] This rule is sound in theory and fair in its operation. When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the

creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien.

The judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.

52 Cal.App.2d 265

ARNERICH v. ALMADEN VINEYARDS CORPORATION.

Civ. 12013.

District Court of Appeal, First District, Division 1, California.

May 26. 1942.

Hearing Denied July 23, 1942.

1. Eminent domain ⟜200

In action to condemn an easement for underground water pipelines, defendant had burden of proof on issue of amount of severance damages. Code Civ.Proc. § 1248, subd. 2.

2. Eminent domain ⟜195

In action to condemn an easement for underground water pipelines across strip of defendant's land separated from defendant's mainlands by a highway, expert testimony as to amount of damage to main lands, which was based on predicate that there was not enough water in area to supply plaintiff and defendant, and that as result of competition defendant would lose some of its profits from sale of water was properly excluded, where action involved only a right of way and not the water rights. Code Civ.Proc. § 1248, subd. 2.

3. Eminent domain ⟜262(4)

The jury's finding that condemnation for an easement for underground water pipelines across a strip of defendant's land did not constitute a material damage could not be disturbed. Code Civ.Proc. § 1248, subd. 2.

4. Eminent domain ⟜138

Under statute providing for condemning of a part of a larger parcel of land, to recover severance damages, loss in market value claimed must proximately flow from the taking, and damage which is speculative, remote, imaginary, contingent or merely possible, or damage caused by competition, or recovery in advance for torts or other injuries that may be committed cannot serve as basis for recovery. Code Civ.Proc. § 1248, subd. 2.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Action by Eva M. Arnerich against Almaden Vineyards Corporation to condemn an easement for underground pipelines across defendant's lands, wherein defendant sought to recover severance damages. From an adverse judgment, defendant appeals.

Affirmed.

David M. Burnett and John M. Burnett, both of San Jose, for appellant.

George W. Patterson and R. G. Wilkins, both of San Jose, for respondent.

PETERS, Presiding Justice.

Defendant appeals from a judgment based on a jury verdict that it take nothing for severance damages alleged to have been caused to defendant's main lands by plaintiff condemning an easement for underground pipe lines across the extreme northwest corner of defendant's lands. The judgment appealed from was rendered on a second trial of a portion of this proceeding. The first trial resulted in a determination that plaintiff had the legal right to condemn the easement, and in a verdict for defendant of $10 for the actual land taken for the easement, and $2,500 severance damages. A new trial was granted solely on the issue of severance damages. On the new trial the jury determined that defendant had suffered no severance damages at all, and it is from the judgment entered on that verdict that this appeal is taken.

The plaintiff operates a water company as a public utility on lands adjoining those of the defendant to the west. She brought this action in 1938 to acquire an underground easement 10 feet wide and 211 feet in length across the extreme northwest corner of the lands owned by the defendant corporation. This northwest corner is separated from the main portion of defendant's lands by Kooser road, the legal title to which, it was stipulated, is in defendant, but over which the public has an easement to pass. This corner, thus separated from the balance of defendant's land, contains one-third of an acre, and the easement, where it crosses this corner piece, occupies one-twentieth of an acre. The main lands of defendant are south of Kooser road, and consist of 226.509 acres devoted to the growing of grapes and alfalfa. For irrigation of its lands, and for the purpose of securing water to sell, defendant diverts water from Capitancillos creek which flows along the southerly boundary of its lands. It maintains two pipe lines and a ditch. The pipe lines, through which water is diverted for sale to other landowners to the north, cross the main portion of its lands and also the one-third acre in the northwest corner. From the sale of water to other landowners defendant derives an annual income averaging in excess of $2,000. Plaintiff does not divert directly from the creek. She secures her water from two wells located on her property, from which water is pumped, stored in a small reservoir and piped to customers, mainly to the north of her properties.

The small corner piece was not always owned by defendant. Prior to 1938 the Southern Pacific Company had title to a railroad right-of-way along the westerly boundary of defendant's property and owned the one-third acre here in question. The defendant had a revocable license from that company to run its water pipes across that right-of-way. In 1935 the plaintiff secured a similar revocable permit from the Southern Pacific Company, and installed pipes across the corner of land now under discussion. Such pipes have been continuously maintained by plaintiff across this corner since that date. In 1938 the Southern Pacific Company abandoned its railroad and defendant secured the title to the one-third acre. Defendant then served on plaintiff notice that the permit had been revoked and that her pipe lines must be removed. Plaintiff thereupon instituted this action to condemn the right-of-way.

At the present trial it was the theory of defendant that the one-third acre was contiguous to its other lands; that because its water rights were connected with its main lands, and because its water pipes crossed both its main lands and the one-third acre, there was not only unity of title but also unity of use; that its main lands and the one-third acre parcel constitute but a single parcel for the purpose of awarding severance damages. The trial judge, on the present trial, over defendant's objections, struck from the record all testimony of defendant's three expert witnesses relating to the amount of damages caused by the easement to defendant's main lands on the grounds that such testimony was speculative and uncertain, and was founded on elements not proper in such cases. The court instructed the jury that, as a matter of law, the one-third acre was not contiguous to the main lands of defendant for the reason that the two parcels were not physically contiguous, being separated from each other by a road, and because there was no proper evidence of unity of use. As a result, the jury was forbidden to award severance damages to the main portion of defendant's lands, but were instructed that they were limited to determining the damage, if any, caused to the one-third acre by the condemnation of the pipe line right-of-way. Pursuant to these instructions the jury returned a verdict that the one-third acre had not been injured by the easement (which was in accordance with the testimony of defendant's own witnesses) and therefore defendant had suffered no severance damages at all.

On this appeal defendant urges that the trial court on this second trial had no power to pass on the question of whether the two parcels were contiguous, for the reason that on the first trial the court found that the two parcels were contiguous, and a new trial was granted solely on the issue of the *amount* of severance damages and not on the question as to whether the two parcels were contiguous. It is also urged that, if the new trial included the issue as to whether the two parcels were contiguous, it was error to instruct the jury they were not contiguous. Neither of these questions need be passed upon on this appeal. This is so because we are of the opinion that the trial court properly struck from the record all evidence of damage to the main parcel, and without that evidence there is no evidence that defendant has suffered any compensable damage.

It was the theory of defendant that there was not enough water in Capitancillos creek for both defendant and plaintiff; that by plaintiff pumping from her wells on her own property, the water in the creek would be diminished to the damage of defendant; that the competition from the water plant of plaintiff would diminish the profits of the water business of defendant; that the one-third acre was so strategically located that a pipe line through it constituted the only feasible means by which water could be conveyed to customers to the north. In support of this position defendant produced three expert witnesses, all thoroughly familiar with the properties involved and fully qualified to testify as to values. On direct examination two of these witnesses gave it as their opinion that the easement had depreciated the market value of the main parcel $25,000, while the third fixed such depreciation at $15,000. All three admitted that the condemned easement in no way physically affected the main parcel. On cross-examination the expert Frazier Reed testified that the controversy over the water and pipe lines has lessened the value of the main parcel; that his figure of $25,000, at which he placed the depreciation, was the value of the water rights of defendant, and that he believed that such water rights were rendered valueless by the easement; that there was not enough water in the creek for both users; that in arriving at his conclusion that the main properties were depreciated in value he was taking into consideration the possibility that plaintiff was taking water that belonged to defendant, and that pumping on plaintiff's lands would reduce the amount of water in the creek; that a purchaser would not buy the property unless the water controversy was settled; that the pipe line going across the northwest corner of defendant's lands depreciates the value of the balance of the lands because "it serves notice of the right of the other people to take water out of the Capitancillos Creek"; that there is not enough water in that area to support two pipe lines; that that is the main reason for his estimate of depreciation; that litigation over the water rights necessarily depreciated the value; that he knew there was litigation over water rights between these parties prior to May 18, 1938, when this condemnation suit was instituted, and that the prior litigation also depreciated the value; that plaintiff "may use" the water to the detriment of defendant; that the plaintiff is diverting above defendant's diversion ditch and that is why they are condemning the right-of-way; that he had lost a sale of defendant's ranch because he could not assure the purchaser that the water rights were secure; that the pipe line, aside from the danger to the water rights, caused no damage at all to the balance of the ranch; that even if there were enough water for two users it would result in competitive bidding between the two distributors and a consequent loss of profits to defendant; that if water rights connected with property are not secure and are threatened by litigation the value of the property is affected; that the reduction in value "comes because the water right is threatened"; that "the taking of water by the Arneriches from above the diversion dam of the Almaden Vineyards Corporation affects the value of the Almaden Vineyards property to the extent, as I said, of $25,000."

W. L. Atkinson fixed the depreciation caused by the pipe line at $15,000, and testified that "the construction of the pipe line and the development of a public utility to take water and sell it is in my opinion the reason for the depreciation in value"; that the damage "is caused by the reduction in the probable amount of income that this ranch will obtain" from the sale of water; that the value of the water right attached to defendant's lands has been reduced; that before the pipe line was put in the water right was secure while now it is not; that the two factors upon which he predicated his opinion were the loss of sales to water customers and the possible injury to the water right; that if there were no loss of water there would be no depreciation; that the threat to the water right of defendant was the principal cause of depreciation; that the "question of the water and the hazard of the loss of water to this ranch being situated as it is, is in my opinion, the principal measure of damage"; that the "hazard" to which he referred was "the threat to remove from this property the value of the sale of water, and also the value of the water for the irrigation of the land."

James Bradley Clayton fixed the depreciation caused by the easement to the main lands of defendant at $25,000, and testified that this depreciation was caused by the "lack of being able to properly service their own land and the land of their customers with irrigation facilities"; that the damage to defendant is the "severing the water from the property"; that if the easement did not affect the water rights there would be no damage except the cloud created by the easement to the title of the one-third acre; that the litigation over water rights has affected the value; that litigation started in 1935.

[1-3] This is a fair summary of the testimony of these three witnesses. It was this testimony that was stricken from

the record by the trial judge on the ground that "the testimony as to the value after the severance is speculative and founded on elements that are not proper as elements in this case." This was the only testimony offered by defendant, upon whom rested the burden of proof on the issue of the amount of its damage. These witnesses predicated their estimate as to depreciation on their opinion that there was not enough water in that area to supply both plaintiff and defendant; that the pumping of water on plaintiff's land would lessen the water in the creek; that as a result of competition between plaintiff and defendant the latter would lose some of its profits from the sale of water; and that the litigation over water rights has lessened the value of defendant's lands. Those elements have no relevancy at all to this proceeding. The plaintiff was not seeking to condemn any water rights of defendant. If plaintiff has water rights superior to those of defendant she has the legal right to use those rights and to sell the water and to transport it to her customers. If the defendant's water right is prior and superior to that of plaintiff it may restrain plaintiff from improperly using the water, or compel her to condemn the water right. This action involves only a right-of-way for the purpose of laying pipes across 211 feet of defendant's property. That is only a small portion of plaintiff's pipe line. The fact that that 211 feet of pipe is an integral part of plaintiff's water system, and that through the water pipes may flow water which may or may not belong to defendant, is a false issue in this proceeding. Defendant may not convert this action to condemn a 10-foot strip 211 feet long across the corner of its property for the purpose of placing water pipes therein, into an action wherein it may secure damages for injury to its water rights caused, not by the pipe line where it crosses defendant's property, but by pumping on the plaintiff's property. Obviously as defendant's witnesses all admitted, the mere presence of the pipe line across that corner in no way injured defendant's main lands. It is only if plaintiff pumps water from her land and conveys it to her customers, and if the water so pumped does not belong to her, that defendant can suffer legal damage. If defendant had recovered $25,000 in this action based on the theory that the easement constituted a threat to its water right, and then instituted an action against plaintiff for an injunction or for damages on the theory that defendant's water rights were superior to those of plaintiff, this judgment would not be a bar to that action. The fundamental fallacy in defendant's position is the assumption that this is an action affecting its water rights. There is not one word in the complaint indicating directly or indirectly that plaintiff desires or intends to condemn the water rights. The rights of the parties to water in that watershed are not involved. That issue may be determined in a proper proceeding, but not in this proceeding. In this proceeding plaintiff cannot be compelled to pay for something she not only does not desire to condemn, but would not receive by the judgment. The damage, if any, to defendant's lands is caused by the pumping operations of plaintiff. That damage would be exactly the same in amount if, instead of condemning this strip, plaintiff had elected to condemn a strip on the adjoining Mirassou property. To repeat, according to defendant's witnesses, the only damage is the damage or threat of damage to defendant's water rights, caused not by the pipe line, but by the pumping operations, actual or threatened on plaintiff's property.

It is no answer to say that the one-third acre is so strategically located that it constitutes the only practical area through which pipes may be placed to pump water to the north. If that is so, it would be a factor in fixing the value of the easement, or the damage to the one-third acre. So far as the value of the easement is concerned, that was fixed at $10 by the judgment on the first trial. Defendant had the opportunity to appeal from that judgment, but did not do so, and it now has become final. On this appeal that is a closed issue. So far as the damage to the balance of the one-third acre is concerned, all of defendant's witnesses admitted and testified that there was no damage, except the cloud on the title. The jury found, on proper instructions, that this did not constitute a material damage. Its finding is supported and cannot be disturbed.

[4] To recover severance damages under section 1248, subdivision 2, of the Code of Civil Procedure, the loss in market value claimed must directly and proximately flow from the taking. Damage which is speculative, remote, imaginary, contingent, or merely possible, or damage caused by competition, or recovery in advance for torts or other injuries that may or may not

be committed cannot serve as a legal basis for recovery. 2 Nichols on Eminent Domain, 2d Ed., p. 736, § 239; 29 C.J.S., Eminent Domain, § 154, p. 1013; Coast Counties Gas & Electric Co. v. Miller & Lux, Inc., 118 Cal.App. 140, 5 P.2d 34; East Bay Mun. Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178.

Inasmuch as defendant offered no proper evidence at all that it had suffered any legal damage, the judgment appealed from is the only judgment that could have been entered in this case. This makes it unnecessary to pass on the other questions raised.

The judgment appealed from is affirmed.

KNIGHT, J., and BRAY, J., pro tem., concurred.

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52 Cal.App.2d 231

RANKINS v. RANKINS.

Civ. 13582.

District Court of Appeal, Second District, Division 2, California.

May 25, 1942.

Rehearing Denied June 15, 1942.

Hearing Denied July 23, 1942.

1. Exemptions ⚿76

The statutory exemption of money representing earnings for personal services of the debtor necessary for the use of himself and his family is not available as against an execution issued upon a judgment for the support of the debtor's minor child by a former marriage. Code Civ.Proc. § 690.11.

2. Divorce ⚿311

Where defendant's former wife caused execution to issue against money due defendant upon judgment for support of defendant's minor child, defendant and his present wife, constituting a second family, were entitled to an equitable portion of the impounded funds for their support.

3. Divorce ⚿312

Where trial court divided defendant's money held under execution by former wife on judgment for support of defendant's minor child between the execution plaintiff and defendant for support of defendant's second family, unless there had been an abuse of discretion, trial court's action could not be disturbed on appeal.

4. Divorce ⚿312

Where trial court gave $250 of $475.72 net of defendant's money held under execution on judgment for support of defendant's minor child to former wife as execution plaintiff, leaving the balance for support of defendant's family, and record did not show basis of court's determination or whether the second wife was considered a member of defendant's family, an abuse of discretion by trial court was not shown.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Execution proceedings under a judgment awarding custody and support of the parties' minor child by Leola Rankins against Oscar Rankins. From an order releasing money held under execution, plaintiff appeals.

Affirmed.

William H. Haupt, of Los Angeles, for appellant.

Randolph Karr, of Los Angeles, for respondent.

JESS E. STEPHENS, Justice pro tem.

This is an appeal from an order made after judgment. The facts, as they appear from the clerk's transcript and particularly from the affidavits therein, may be briefly stated as follows:

Plaintiff, Leola Rankins, brought an action seeking custody and support of the minor child of herself and defendant Oscar Rankins, and was awarded judgment ordering said defendant to pay the sum of $20 per month for the support of the minor. Defendant became delinquent in his payments and execution issued for $978. Rankins is (or was at that time) a professional prizefighter, and the sheriff levied upon his share of the receipts of a fight amounting to $709.72. Defendant filed affidavits claiming exemption under section 690.11 of the Code of Civil Procedure and setting forth facts to support his claim that the money represented earnings for his personal services rendered within the preceding thirty days, "and necessary for the use of affiant, and his family residing in this state and consisting of his wife, Ethel Rankins, and affiant, Oscar Rankins, and wholly supported by affiant." Defendant's affidavit also asserts that out of his receipts for each fight he has incidental costs to pay for trainers, sparring partners and seconds amounting to $234, and that he was about to engage in another fight in connection with which he would have to expend $209 before he receives any further income. Plaintiff asserts in her reply affidavit that defendant's alleged divorce from her is void because he did not have the necessary legal residence in Illinois, where it was obtained, and that therefore Ethel Rankins is not his legal wife and not a member of his family entitled to his support. She also presents affidavits indicating that the statement of defendant Rankins, sworn to on November 5, 1941, to the effect that he needs $209 to prepare for a coming fight, is false, because on November 3rd he voluntarily tendered to the athletic commission of this state his notice of retirement from prizefighting and had his boxing license canceled.

Upon the hearing in the matter of the exemption claim the court made the following minute order: "It is ordered that all money now held by the sheriff under execution in excess of $250 be released to the defendant, and that said $250 be paid to the plaintiff."

The first question to be determined is whether or not the exemption provided for in Code of Civil Procedure section 690.11 is available to defendant as against execution issued upon a judgment for the support of his minor child. In the case of Bruton v. Tearle, 7 Cal.2d 48, 57, 59 P.2d 953, 957, 106 A.L.R. 580, the Supreme Court said: "We have shown that the judgment against defendant is a judgment for alimony. One of the characteristics of such a judgment is that as against said judgment the judgment debtor's earnings are not exempt from execution" (citing cases). In Gaskins v. Security-First National Bank, 30 Cal.App.2d 409, 417, 86 P.2d 681, 685, the district court of appeal, in construing the exemption provision of the World War Veterans' Act of 1924 [38 U.S.C.A. § 421 et seq.], said: "The obligation of a father to support his minor children is not a debt contemplated by this act of Congress, but is an obligation growing out of the parental status and public policy, the performance of which can ordinarily be compelled by imprisonment as well as judgment and writ of execution; and we cannot assume that the Federal government ever intended to throw around these federal funds legal strictures that would permit or enable the beneficiaries thereof to refuse to discharge their duty to support their children."

The recent case of In re Smallbone, 16 Cal.2d 532, 106 P.2d 873, 874, 131 A.L.R. 222, has been cited as holding to the contrary. It is true that a rather sweeping statement is made therein to the effect that it is not the province of the courts to read an exception into the exemption laws. That this was not necessary to the decision is shown by the sentence immediately following it, where the court says: "But, this need not prove determinative of this proceeding." That case came before the Supreme Court by habeas corpus proceeding. Petitioner was a retired municipal employee, and he resisted the efforts of his former wife to compel him to pay support money as ordered by the court. He refused to collect his pension checks and allowed them to accumulate, subject to his order. He was adjudged guilty of contempt and sought release by writ, contending that pension money was exempt. The Supreme Court held that "when exempt property is converted into cash in the hands of the alimony debtor, or such money is being held for him by a third person, subject to relinquishment upon his demand or stipulation, he is no longer in a position to assert that he is not financially able to respond to the order or decree of the court directing him to pay alimony, attorney's fees or costs in an action for divorce." He was therefore remanded to custody. In view of this situation, and particularly in view of the fact that both Bruton v. Tearle, supra, and Yager v. Yager, 7 Cal.2d 213, 60 P.2d 422, 426, 106 A.L.R. 664, are cited approvingly in the decision itself, it cannot be assumed that the Supreme Court intended to reverse the policy specifically enunciated in those cases.

[1-3] It sems clear, therefore, that under the established decisions of this state defendant is not entitled to the exemption of this statute as against execution in the present proceeding. However, it must be remembered that this policy is established by judicial interpretation and not by specific statutory provision. In the case of Yager v. Yager, supra, we find this expression by the Supreme Court, referring to Code of Civil Procedure section 690.11: "Within the meaning of this provision it may be said that the divorced wife and minor child of the first marriage, for whose support the husband has been ordered to pay a fixed sum, are in a sense

members of his family entitled to participate with his second family in his earnings, and that the husband should not be permitted to urge the execution exemption against them. Our decision in Bruton v. Tearle, supra, expressly recognized that in providing for the collection of the husband's future earnings by a receiver and their application to the delinquent alimony, the court would have power to direct the receiver to pay to the husband an amount necessary for his personal support. In such supplementary proceedings in the divorce action the court should have power to make an equitable division of the husband's earnings between his first wife and the children of that marriage, if any, on the one hand, and himself and his second wife and family on the other." This would seem to be a necessary limitation upon the policy established by the hereinabove quoted decisions, when the policy of the state as indicated by the exemption statute is considered in conjunction with the equally established policy of requiring support of minors. Obviously the husband cannot be deprived of the means of livelihood, even for the most solemn obligation to others. He cannot earn without eating. Equally, the second family, which is authorized by our laws is entitled to support. The proper solution of this problem is that given by the Supreme Court in Yager v. Yager, supra. Unless there has been an abuse of discretion by the trial court in making such equitable division such action may not be disturbed on appeal.

[4] In the instant case the amount of money in the custody of the court was $709.72. Assuming that the court disallowed the claim of $209 on the basis of plaintiff's affidavits, and allowed the claimed expense of $234 on the basis of defendant's affidavits, the net amount remaining was $475.72. Of this the court allotted $250 to plaintiff upon her judgment, leaving $225.72 for defendant for the support of himself "and family." In the absence of findings or other record than the brief order itself we have no way of knowing the basis of the court's determination, nor whether or not Ethel Rankins, the alleged second wife, was considered to be a member of defendant's family. In this connection it may be noted that in the case of Garner v. Judd, 136 Cal. 394, 396, 68 P. 1026, the Supreme Court in considering another statute said: "we have no doubt that when a man has a home, where he lives with a woman whom he holds out to the world as his wife, he has a family, within the meaning of section 230 of the Civil Code." See, also In re Gird's Estate, 157 Cal. 534, 544, 108 P. 499, 137 Am.St.Rep. 131. In any event, we cannot say from the record before us that there was an abuse of discretion by the court.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

52 Cal.App.2d 250

THOMPSON et al. v. STEVESON.

Civ. 2818.

District Court of Appeal, Fourth District, California.

May 25, 1942.

Rehearing Denied June 23, 1942.

1. Appeal and error ⇨1011(1)

Conflicts in evidence are settled in trial court.

2. Appeal and error ⇨989

On appeal from judgment evidence not in support thereof will be disregarded.

3. Automobiles ⇨173(4)

A motorist's violation of statute by stopping automobile outside of business or residence district on paved portion of three-lane highway when motorist could have stopped automobile off the pavement on eight-foot shoulder of highway constituted negligence as regards liability for injuries sustained in collision with rear of such stopped automobile. Vehicle Code § 582, St. 1935, p. 190.

4. Negligence ⇨136(25)

Whether proven negligence is proximate cause of injury is usually a "question of fact" for trier of facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Automobiles ⇨244(36)

In action for injuries sustained when automobile preceding the automobile in which plaintiffs were riding suddenly swerved to the left of defendant's automobile which stopped on paved portion of three-lane highway outside of business or residence district, when automobile could have been stopped off the pavement on eight foot shoulder of highway, evidence sustained finding that defendant's violation of statute was "proximate cause" of collision by plaintiffs' automobile with rear of defendant's automobile. Vehicle Code § 582, St.1935, p. 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

6. Automobiles ⚿245(83)

In action for injuries sustained when plaintiff's automobile collided with rear of automobile which was stopped on paved portion of three-lane highway outside of business or residence district, plaintiffs' contributory negligence was a question of fact for trial judge. Vehicle Code § 582, St.1935, p. 190.

7. Appeal and error ⚿1008(1)

The trial judge's finding that there was no contributory negligence on part of plaintiff whose automobile collided with stopped automobile was conclusive on appeal. Vehicle Code § 582, St.1935, p. 190.

8. Damages ⚿132(1)

$8,012.50 to 30-year old attractive and good looking wife whose face was badly scarred leaving a difference in contour of the two sides of her face was not excessive.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by Louis K. Thompson and others against Evelyn Rose Steveson for injuries sustained in an automobile collision. From a judgment for plaintiffs defendant appeals.

Affirmed.

John Coker and Monroe & McInnis, all of San Diego, for appellant.

Hervey & Holt, of San Diego, and Henry F. Walker, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment for damages suffered by plaintiffs in a motor vehicle collision at about 6:30 o'clock p. m., on May 26, 1939, on Highway 101, between Del Mar and Solano Beach in San Diego County.

It was stipulated at the trial that at and south of the point of collision there was a three-lane paved highway with an oiled shoulder about 8 feet wide on the east side and another about 20 or 30 feet wide on the west side of the pavement. At the opening of the trial the following stipulation was entered into as to the speed of plaintiffs' car, the speed of another car immediately preceding it which was following the car driven by defendant: "The Court: Any question of excessive speed? Mr. Coker: No, your Honor, I think both cars, that is plaintiffs' car and the car immediately ahead of it were proceeding at a normal speed, perhaps forty to forty-five miles an hour."

[1, 2] While a number of the facts are admitted the evidence is sharply conflicting on other material points. Following the time-honored rule that conflicts in the evidence are settled in the trial court we will summarize the evidence tending to support the judgment and will disregard other evidence conflicting with it.

The place of the collision was "outside of a business or resident district." § 582, Veh.Code, St.1935, p. 190. Defendant was driving north in the east traffic lane. She had her two children with her. Shortly before the collision the little boy sitting on the rear seat complained of being cold. Defendant told him to put on his sweater, but he could not find it. She brought her car to a gradual stop in order to assist the child. She did not drive off the pavement though perhaps the right wheels of her car were resting slightly off the pavement and on the oiled shoulder.

A car driven by Bernard Lemohn was following defendant's car and was traveling in the east traffic lane. Plaintiffs' car, driven by Louis K. Thompson, with Edythe I. Thompson sitting on the front seat to his right, was following the Lemohn automobile and was also traveling in the east traffic lane.

Mr. Thompson clearly described the accident as follows:

"Q. And just tell us then what occurred. A. We were driving there at a comparatively slow rate of speed, and this car ahead of me very suddenly pulled to the left and passed me—not passed me, pulled ahead and passed the car ahead of him; and, I couldn't see, of course, while this other car—I couldn't notice too much what was ahead of him, and there all of a sudden was this other car stopped on the road.

"Q. Was that other car moving at all when you saw it? A. It was not moving.

"Q. What lane of the highway was that standing or parked car in? A. Directly in front of me, on the same lane which I was driving.

"Q. Did you see that car at all before the car immediately ahead of you pulled out to pass it? A. No, I didn't see it; I was watching my road in front of me.

"Q. And when this car pulled out and passed—when the car immediately ahead of you pulled out to the left and passed the standing car, what did you do? A. As soon as it flashed through my mind that that car was stopped I applied my brakes and tried to stop before I could hit her.

"Q. Were you able to bring your car to a stop before you hit? A. I was not.

"Q. Did you make an effort to turn to the left or to pass it? * * * A. I could not pass either to the left or to the right. The whole situation happened so quickly I didn't have a chance to turn out at all.

"By the Court: Q. How far was the car ahead of you when you first observed it? A. That's when I applied my brakes. My judgment is I was about 40 or 45 feet.

"Q. The roadway is level there, isn't it? A. I think so."

Defendant urges the following ground for reversal of the judgment: (1) That the trial judge entertained an erroneous conception of the law applicable to the facts involved; (2) That any negligent act or omission on the part of defendant was not a proximate cause of the accident; (3) That Mr. Thompson was guilty of contributory negligence; (4) That his negligence was imputed to Edythe I. Thompson, his wife; (5) That the portion of the judgment of $8,012.50 in favor of Mrs. Thompson was excessive.

The first ground urged for reversal involves the other grounds and need not be separately considered.

In considering the question of proximate cause we should observe that the trial court found defendant guilty of two acts of negligence and that they were proximate causes of the collision. He found that Mrs. Steveson failed to give the proper arm signal signifying her intention to stop as required by section 544 of the Vehicle Code, and of violating the provisions of section 582 of the same code by stopping and leaving her car standing on the paved and main traveled portion of the highway when it was practicable to stop and leave it standing off from such portion of the highway by stopping it on the oiled shoulder to her right.

[3-5] We need devote little attention to the question of the failure to give the proper signal. The evidence of Mr. Thompson, already quoted, indicates that his view of defendant's car was screened by the Lemohn car until it pulled into the center traffic lane, too late for Thompson to have avoided the collision. Under such circumstances the question of the failure of Mrs. Steveson to give a proper arm signal being a proximate cause of the accident might be open to serious argument. We regard this question unimportant as we must assume as a proven fact that she violated section 582 of the Vehicle Code when she stopped her car on the pavement when she could have stopped it off from the pavement on the shoulder of the highway. This violation of the statute constituted negligence on her part. The question of whether or not proven negligence is the proximate cause of an injury is usually one of fact addressed to the trier of fact. Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26. As the trial judge found that defendant's violation of the provisions of section 582 of the Vehicle Code was a proximate cause of the collision we cannot disturb that finding here. Mason v. Crawford, 17 Cal.App.2d 529, 62 P.2d 420. We cannot see how the trial judge could have reached a contrary conclusion under the testimony which we have quoted and which he accepted as true.

[6, 7] We need give little attention to the argument that the evidence shows that Mr. Thompson was guilty of contributory negligence as a matter of law. Under the facts disclosed here the question of contributory negligence was one of fact addressed to the trial judge. His finding that there was no contributory negligence is conclusive here.

Counsel presented an interesting argument on the question of the negligence of

Mr. Thompson being imputed to his wife under the rule announced in McFadden v. Santa Ana, etc., Ry. Co., 87 Cal. 464, 25 P. 681, 11 L.R.A. 252. The argument arises from the fact that plaintiffs were tourists in California and were residents of a common-law state in which property may not be held in community. The arguments and authorities, while interesting, are strictly academic. As the trial judge found Mr. Thompson free from contributory negligence there was no negligence to be imputed to his wife.

[8] The question of the judgment being excessive requires slight consideration. Mrs. Thompson was seriously cut and bruised in the accident. She was about 30 years old. Photographs taken of her before the accident show her to have been an attractive and good-looking young woman. Without particularizing other injuries and elements of damage, photographs taken after the accident show her face to have been badly scarred. Among about six facial scars the most disfiguring are, one on the right cheek running from near the nose to near the right ear, an indentation of the left side of the nose, one running from the left eye upward into the forehead.

Her appearance was subsequently improved by several plastic operations, but the evidence shows that she will carry scars as long as she lives. Mrs. Thompson was a witness in court and was observed by the trial judge. This is a form of evidence that cannot be reproduced in the record on appeal. He summed up what he observed and referred to six obvious facial scars. He said there was a difference in the contour of the two sides of her face; that "now, after a lapse of two years, that puffiness in the cheek, that deep scar and displacement, is noticeable at practically any distance. It is noticeable now, as she sits some 20 feet from the bench. It is very distinctly noticeable. Not only the discoloration, but the puffiness, the overlapping which plastic surgery has not yet eliminated or corrected."

Under the facts before us we cannot hold as a matter of law that the judgment is excessive.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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52 Cal.App.2d 359

GRANT v. GRANT.

Civ. 13574.

District Court of Appeal, Second District, Division 2, California.

May 28, 1942.

1. Divorce ⚷255

If a complaint in a divorce action contains no allegations with reference to property rights, and prayer of the complaint fails to ask for the disposition of property rights, a decree made after defendant's default has been entered, purporting to dispose of property rights, is void and subject to "collateral attack".

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

2. Divorce ⚷255

If a complaint in a divorce action presents by appropriate allegations issues relative to property rights, but the prayer seeks no relief relative thereto, a decree, purporting to dispose of such property rights after defendant's default has been entered, is not void, and is not subject to "collateral attack", but is voidable and subject to correction on a motion for new trial, or reversal or modification on appeal.

3. Divorce ⚷255

If the terms of a property settlement agreement are appropriately pleaded, approved by the trial court, and referred to and adopted in a divorce decree, as to the matters covered by the agreement, the decree is not subsequently subject to modification by act of the court.

4. Divorce ⚷245(1)

In the absence of a property settlement agreement, an award for alimony in an interlocutory decree of divorce may be modified by the trial court when conditions have changed since the entry of the initial order. Civ.Code, § 139.

5. Divorce ⚷245(2), 255

Where neither complaint in wife's divorce action nor the prayer thereof contained any reference to alleged property settlement between wife and husband, divorce decree, approving the settlement subsequent to husband's default, was a nullity, and subject to "collateral attack", and provision of decree for alimony was subject to modifica-

tion on change of conditions. Civ.Code, § 139.

6. Divorce ⟹286

On appeal from order denying defendant's motion to modify interlocutory decree of divorce by striking therefrom provision requiring defendant to pay plaintiff alimony, the District Court of Appeal was required to assume the verity of the allegations of defendant's affidavit filed in support of the motion.

7. Divorce ⟹245(2)

The alleged fact that divorced wife and a third person were living together as man and wife and that she was employed, was such a "change of condition" as to entitle former husband to modification of provision of divorce decree for payment of alimony. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Change of Condition".

◆

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action for divorce by Alexandria Grant against John Grant. Defendant's default was entered to the complaint and an interlocutory decree of divorce was entered in favor of the plaintiff, awarding plaintiff alimony. From an order denying defendant's motion for modification of the provision for alimony, the defendant appeals.

Order reversed.

Dee Holder and Samuel Marks, both of Los Angeles, for appellant.

Fetterly & Fetterly, of Los Angeles, for respondent.

McCOMB, Justice.

From an order denying defendant's motion for the modification of a provision for alimony in an interlocutory decree of divorce, defendant appeals.

These are the undisputed facts:

Plaintiff and defendant were married October 30, 1932. January 27, 1939, plaintiff filed a complaint for divorce from defendant, the prayer of which read as follows:

"Wherefore, plaintiff prays judgment of this Court as follows:

"1. That plaintiff be awarded a judgment of divorce, and that the bonds of matrimony now existing between the plaintiff and defendant be dissolved; and,

"2. That defendant be ordered to pay to plaintiff reasonable sums of money as and for her support and maintenance, both during the pendency of this action and permanently thereafter;

"3. That defendant be ordered to pay to plaintiff as and for attorneys fees and court costs herein, a reasonable sum; and,

"4. For such other and further relief as to this Court may seem meet and just in the premises."

The complaint is devoid of any allegations concerning the property rights of the parties and there is no allegation with reference to the property settlement between them. Defendant's default was entered to the complaint and on February 27, 1939, an interlocutory decree of divorce was entered in favor of plaintiff, which contained among others the following provisions:

"That defendant, John Grant, be, and he is hereby, ordered to pay to the plaintiff herein, as and for her support and maintenance, the sum of $17.50 each and every week commencing forthwith and continuing until such time as the plaintiff herein remarries;

"* * * That that certain property settlement agreement of the parties hereto dated February 14th, 1939, be, and the same is hereby, approved."

Defendant moved to modify the interlocutory decree of divorce by striking therefrom all provisions which required him to pay plaintiff alimony, and in support of his motion filed an affidavit reading in part as follows: "That since said order was made the conditions and circumstances surrounding the parties, and upon which said order was based, have materially changed, in this: That said Alexandria Grant, plaintiff in the above entitled action, is not entitled to any further support from this affiant for the reason that ever since the separation of the said parties, to-wit: on the 21st day of April, 1937, the said Alexandria Grant has been living with and been supported by Sylvester E. Helbert, also known as Gene Helbert, as man and wife, under the name of Mrs. Gene Helbert; that the said Alexandria Grant resided at 1316 Grant Street, Santa Monica, California, for over a year under the name of Mrs. Gene Helbert, and is at the present time living with the said Gene Helbert at 3102 17th Street, Santa Monica, as his wife, under the name of Mrs. Gene Helbert; That the said Alexandria Grant was employed by the Hahn Drug

Company, Santa Monica, California, under the name of Mrs. Gene Helbert, and is at the present time employed by Guen's Fountain Lunch, Santa Monica, under that name. That the said Alexandria Grant held herself out to her neighbors, when she resided at 1316 Grant Street, Santa Monica, as the wife of Gene Helbert, and holds herself out where she resides at 3102 17th Street as the wife of Gene Helbert, and is known to the neighbors by that name. That she resides at the present time at 3102 17th Street, Santa Monica, with her two daughters by a former marriage, with the said Gene Helbert, as his wife; that Alexandria Grant drives a 1939 Studebaker sedan bearing 1940 license No. 8P767 which automobile is registered in the name of Gene Helbert, 3102 17th Street, Santa Monica, California."

The trial court denied defendant's motion and entered findings of fact and conclusions of law to the effect that it did not have jurisdiction to modify the interlocutory decree of divorce unless plaintiff had remarried. Apparently the trial court believed that the provision in the interlocutory decree for alimony was based upon the terms of the property settlement agreement and therefore was not subject to modification.

This is the sole question necessary for us to determine:

Was the provision in the interlocutory decree approving the property settlement agreement between plaintiff and defendant void or merely voidable?

Under the circumstances above set forth, the provision in the interlocutory decree approving the property settlement between the parties was void. From the apparently conflicting statements in opinions of our Supreme Court the following rules may be adduced:

[1] (1) If a complaint in a divorce action contains no allegations with reference to property rights and the prayer of the complaint fails to ask for the disposition of property rights, a decree made after defendant's default has been entered purporting to dispose of property rights is void and subject to collateral attack. (Lang v. Lang, 182 Cal. 765, 769, 190 P. 181; Benton v. Benton, 122 Cal. 395, 398, 55 P. 152; Metropolitan Life Ins. Co. v. Welch, 202 Cal. 312, 314, 260 P. 545; see, also, Horton v. Horton, 18 Cal.2d 579, 582, 116 P.2d 605.)

[2] (2) If a complaint in a divorce action presents by appropriate allegations issues relative to property rights but the prayer seeks no relief relative thereto a decree purporting to dispose of such property rights after defendant's default has been entered is not void and is not subject to collateral attack but is voidable and subject to correction on a motion for a new trial or reversal or modification upon appeal. (Parker v. Parker, 203 Cal. 787, 792, 266 P. 283; Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64; see, also, Horton v. Horton, supra, 18 Cal.2d 582, 116 P.2d 605.)

[3] (3) If the terms of a property settlement agreement are appropriately pleaded, approved by the trial court, and referred to and adopted in its decree, as to the matters covered by the agreement, the decree is not subsequently subject to modification by act of the court. (Ettlinger v. Ettlinger, 3 Cal.2d 172, 178, 44 P.2d 540; Miller v. Superior Court, 9 Cal.2d 733, 737, 72 P.2d 868.)

[4] (4) In the absence of a property settlement agreement, an award for alimony in an interlocutory decree of divorce may be modified by the trial court when conditions have changed since the entry of the initial order. (Civ. Code, sec. 139; see Snyder v. Snyder, 219 Cal. 80, 81, 25 P.2d 403.)

[5-7] Applying the foregoing rules to the facts in the instant case, it appears that neither the complaint nor the prayer thereof contained any reference to the property settlement agreement between the parties. Therefore, since the decree approving the same was entered subsequent to the entry of defendant's default, this provision of the decree was a nullity and subject to collateral attack. This being true, the provision in the decree for alimony was not based upon a property settlement agreement between the parties, and under the fourth rule above stated it was subject to modification when conditions existed which were different from those that obtained at the time the original order was made. In the present case it is apparent that if the allegations of defendant's affidavit are true, and we must assume their verity for the purpose of this appeal, new conditions had arisen which would have entitled defendant to a modification of the provision in the decree for payment of alimony.

For the foregoing reasons the order is reversed.

MOORE, P. J., and STEPHENS, Justice pro tem., concurred.

In re LAIR'S ESTATE.

LAIR v. SHNELL et al.

Civ. 13438.

District Court of Appeal, Second District,
Division 2, California.
May 25, 1942.

Rehearing Denied June 16, 1942.
Hearing Denied July 23, 1942.

1. Trusts 🔑329

Where first account of testamentary trustee was approved except as to a charge of $850, superior court on receipt of the remittitur was without authority to change its finding that sum of $55.11 was proceeds of rents received from corpus of estate, and to order that such sums be carried as a part of the corpus of the estate which could not be used by trustee.

2. Trusts 🔑274(3)

Generally, current expenses of trust, including compensation for trustee and attorney, should be paid out of income, and extraordinary and unusual charges, such as expenses of litigation, should be paid from the corpus.

3. Trusts 🔑274(3)

Services rendered in closing trust and distributing property are performed for benefit of remainderman, and compensation for such services is properly chargeable against corpus of estate.

4. Trusts 🔑327

In proceeding for accounting by testamentary trustee, decree that trust property should be kept free of all liens, charges, or encumbrances was too broad, as preventing charging of corpus of estate with any extraordinary charges.

5. Trusts 🔑274(3)

The corpus of testamentary trust was not chargeable with counsel fees rendered on behalf of trustee in appeals in accounting proceeding, where such appeals involved disputes between trustee and remaindermen as to proper items to be considered as income.

6. Trusts 🔑274(3)

A trustee could charge corpus of testamentary trust for extraordinary expenses which he incurred in connection with unfounded action to remove him from office.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the matter of the estate of Nancy Ray Lair, deceased, wherein John W. Lair, as trustee, etc., filed an account which was opposed by John W. Shnell and others. After the death of John W. Lair, as trustee, etc., A. W. Brunton, as administrator with the will annexed, etc., was substituted as the petitioner. From an order of the Probate Court settling the account, A. W. Brunton, as administrator with the will annexed, etc., appeals.

Order reversed with directions.

See, also, 38 Cal.App.2d 737, 102 P.2d 436.

A. W. Brunton, in pro. per. for appellant.

Charles W. Cradick and William H. Haupt, both of Los Angeles, for respondents.

W. J. WOOD, Justice.

This is an appeal by the administrator-with-the-will-annexed of the estate of John W. Lair, deceased, from an order of the probate court dated November 29, 1940, settling the account of John W. Lair as trustee of the estate left by his wife, Nancy Ray Lair. By her will Nancy Ray Lair left the bulk of her estate to John W. Lair in trust, he to have the income therefrom for life, the corpus to go to certain beneficiaries named in the will. The estate was probated and distribution was made to John W. Lair as trustee on September 10, 1936. John W. Lair presented his first account as trustee which was settled by the court on August 15, 1939. In settling this account the court found: "It is true that on September 10, 1936, the said John W. Lair, as trustee under the will of Nancy Ray Lair, deceased received the following personal property in trust, which said property the court finds to have been proceeds of rents received from the corpus of said trust estate. Cash in the sum of ......55.11." Respondents had made objections to the account as filed but they did not object to the charge of the item of $55.11 as proceeds of rents from the corpus of the estate. The principal objection made by respondents was to a charge of $850 which had been made a lien upon the corpus of the estate during the progress of administration and before distribution to the trustee. The trial court sustained the objection of respondents to this charge of $850 and the trustee appealed from the ruling. This court on May 6, 1940, decided the appeal in favor of the trustee, held that the charge of $850 should be made against the corpus of the estate and directed the superior court to settle the account in accordance with the views expressed in the opinion. Estate of Lair, 38 Cal.App.2d 737, 102 P.2d 436. Upon the receipt of the remittitur the superior court filed new findings in which the said sum of $55.11 was found to be a part of the corpus of the trust estate.

The trustee has appealed from the following portion of the decree of November 29, 1930: "It is further ordered adjudged and decreed that save and except the deed of trust hereinafter referred to, which is an encumbrance against lot 14, in block 18, of the Central Subdivision of block 17 and 18 of the Barrett Villa Tract, the property hereinafter mentioned shall at all times be kept free and clear of all liens, charges or encumbrances, and that the said John W. Lair, as such trustee, shall not, at any time, make any disbursement to himself, as surviving spouse of said decedent, of any of the income from the said trust estate until after the payment of all expenses for the maintenance of said properties and the expenses of the administration of said estate."

John W. Lair died on February 6, 1941, and his legal representative has been substituted as appellant.

[1] On the former appeal no question was raised as to the finding of the court in which it was found that the sum of $55.11 was "proceeds of rents received," and this item was not considered or mentioned in the opinion. The first account having been approved except as to the charge of $850, the superior court upon the receipt of the remittitur was without authority to change its findings and order that the item of $55.11 be carried as a part of the corpus of the estate. English v. Olympic Auditorium, Inc., 10 Cal.App.2d 196, 199, et seq., 52 P.2d 267.

The decree from which the present appeal is prosecuted not only lists the sum of $55.11 as a part of the corpus but it provides that the property therein mentioned, including this sum, "shall at all times be kept free and clear of all liens, charges or encumbrances, and that the said John W. Lair, as such trustee, shall not, at any time, make any disbursement to himself, as surviving spouse. * * *" It is apparent that the court erred in ordering that John W. Lair could not use this part of the income from the estate.

[2-6] Appellant contends that the language of the decree is too broad in that it prevents the allowance of counsel fees out of the corpus of the estate. It is a general rule that the current expenses of a trust, including compensation for the trustee and his attorney, should be paid out of the income and that extraordinary and unusual charges should be paid from the corpus of the estate. The expenses of litigation generally fall in the latter class. Estate of Gartenlaub, 185 Cal. 648, 198 P. 209, 16 A.L.R. 520; Estate of Duffill, 188 Cal. 536, 206 P. 42. Services rendered in closing the trust and distributing the property are performed for the benefit of the remaindermen and compensation for such services is properly chargeable against the corpus of the estate. Estate of Kruce, 10 Cal.App.2d 426, 51 P.2d 1174. Appellant contends that he should be allowed to charge against the corpus counsel fees on the former appeal and on this appeal and also counsel fees in an action in which respondents herein sought to remove the trustee from office, an action now pending in this court on appeal in which an opinion is this day filed, and that the language of the decree is too broad to permit these charges. The language used in the decree is unfortunate and we agree that it is too broad in its scope, for it prevents the charging of the corpus of the estate with any extraordinary charges whatever. However, we do not mean to hold that appellant is entitled to charge the corpus with counsel fees rendered on behalf of the trustee in the former appeal herein or in the present appeal, for these appeals involve disputes between the trustee and the remaindermen as to proper items to be considered as income. However, a different situation was presented in the action in which it was sought to remove the trustee from office and the trustee should be permitted to charge the corpus for the extraordinary expenses which he was compelled to incur. An unfounded action was commenced against the trustee, the main purpose of which was to effect the cancellation of a trust deed given to secure the payment of the sum of $850 hereinabove referred to, and to remove the trustee for having permitted the execution of the trust deed. In the decision on the former appeal (38 Cal.App.2d 737, 102 P.2d 436) it was held that this charge of $850 was

properly made against the corpus of the estate. Clearly there was no occasion for the filing of the suit. In Conley v. Waite, 134 Cal.App. 505, 25 P.2d 496, it is held that "when an unfounded suit is brought against him by the cestui que trust, attorney's fees may be allowed him in defending the action and may be made a charge against the interest in the estate of the party causing the litigation." In defending that action the trustee was defending the trust and was complying with the expressed desires of the testatrix. The corpus of the estate should also be charged with the expenses incidental to transferring the estate to the remaindermen.

The order from which the appeal is taken is reversed with directions to the superior court to enter a new decree in accordance with the views herein expressed. Costs of appeal to be recovered by appellant from respondents.

MOORE, P. J., and McCOMB, J., concurred.

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52 Cal.App.2d 226

SHNELL et al. v. BRUNTON.

Civ. 13581.

District Court of Appeal, Second District, Division 2, California.

May 25, 1942.

Rehearing Denied June 16, 1942.

Hearing Denied July 23, 1942.

1. Trusts 🔑298

Under statute, probate court has jurisdiction to settle accounts of testamentary trustees. Probate Code, § 1120.

2. Trusts 🔑331

A judgment, in suit in equity, that plaintiffs recover from testamentary trustee a certain sum for benefit of corpus of testamentary trust estate, was improper where such sum was included in account of trustee presented to probate court and, on appeal from order settling the account, the reviewing court had disposed of the contentions of the parties concerning such item. Probate Code, § 1120.

Appeal from Superior Court, Los Angeles County; Willis I. Morrison, Judge pro tem.

Action for removal of testamentary trustee, cancellation of deed of trust, and personal judgment against trustee, by John W. Shnell and others against John W. Lair, trustee under the will of Nancy Ray Lair, deceased. After the death of John W. Lair, A. W. Brunton, as administrator with the will annexed of the estate of John W. Lair, deceased, was made the party defendant. From the judgment and from an order denying the defendant's motion to vacate the judgment, the defendant appeals.

Judgment and order reversed.

A. W. Brunton, in pro. per for appellant.

Charles W. Cradick and William H. Haupt, both of Los Angeles, for respondents.

W. J. WOOD, Justice.

A complaint, which plaintiffs term a bill in equity, was filed on September 12, 1939, against John W. Lair, trustee under the will of Nancy Ray Lair, deceased, seeking the removal of the testamentary trustee, the cancellation of a deed of trust for $850, and a personal judgment against the trustee. The appeal comes before us together with the appeal in the matter of the Estate of Nancy Ray Lair, 52 Cal. App.2d —, 126 P.2d 133, this day decided. A former appeal in the matter of the Estate of Nancy Ray Lair, was decided by this court and is reported in 38 Cal. App.2d 737, 102 P.2d 436. The pertinent facts are set forth in the opinions in those two appeals.

It will be noted that the present action was filed less than one month after the first account of John W. Lair, trustee, was settled by the probate court. An appeal was taken by the trustee from the order settling that account and on appeal the order of the trial court respecting the trust deed for $850 was reversed, the reviewing court holding that the sum of $850 should be charged against the corpus of the estate. The present action came on for hearing on January 20, 1941, and evidence was received. Before decision was rendered John W. Lair, the trustee, died and A. W. Brunton, as administrator-with-the-will-annexed of the estate of John W.

Lair, was made party defendant. The case was reopened for the taking of further testimony and findings were filed and judgment rendered on June 5, 1941, wherein it was ordered that plaintiffs recover from defendant the sum of $55.11 for the benefit of the corpus of the trust estate created under the will of Nancy Ray Lair, deceased. The appeal is taken from this judgment. There is also an appeal from an order denying appellant's motion to vacate the judgment.

[1, 2] The probate court has jurisdiction to settle the accounts of testamentary trustees. Prob.Code, § 1120. The item of $55.11, the basis of the judgment from which the present appeal was taken, was included in the account of the trustee presented to the probate court, which account was settled by the court. In an appeal from the order settling the account this court has on this day filed a decision disposing of the contentions of the respondent parties concerning this item of $55.11. At the time this appeal and the appeal in the matter of the estate of Nancy Ray Lair were submitted to us for decision the estate of John W. Lair stood charged with $55.11 in each action. Since the charge arose from the same transaction it is apparent that this condition must be remedied. The matter properly belongs in the probate proceeding. We have there disposed of it.

The judgment and the order are reversed.

MOORE, P. J., and McCOMB, J., concurred.

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52 Cal.App.2d 279

LE GRAND et al. v. RUSSELL et al.
(SMITH, Third Party Claimant).
Civ. 13191.

District Court of Appeal, Second District, Division 2, California.
May 26, 1942.

Rehearing Denied June 22, 1942.
Hearing Denied July 23, 1942.

1. Automobiles 🔑19

Where seller had received full purchase price for automobile prior to levy of execution issued upon judgment against seller and had delivered pink slip to buyer to enable the latter to secure a certificate of registration in his name, under statute regulating passage of title of an automobile, seller was "estopped" from denying the transfer and his judgment creditor who could take no better title than judgment debtor, was likewise estopped. Vehicle Code, § 186, St.1935, p. 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Execution 🔑264

Judgment creditor takes no better title to property than his judgment debtor had.

3. Fraudulent conveyances 🔑281

That automobile was kept in various garages on seller's premises as a matter of convenience in carrying on buyer's work of building houses on seller's premises did not justify a finding of lack of a bona fide and sufficient "change of possession" to raise statutory presumption that transfer was fraudulent as to seller's creditors. Civ.Code, § 3440.

See Words and Phrases, Permanent Edition, for all other definitions of "Change of Possession".

◆

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by William D. LeGrand, and others, against Lambert P. Russell, and others, wherein plaintiff recovered judgment. Nathan Smith, as third party claimant, asserted ownership of an automobile levied upon pursuant to a writ of execution issued upon the judgment. From an adverse judgment, third party claimant appeals.

Judgment reversed.

John J. Craig, of Los Angeles, for appellant.

Faries & Williamson, Fulton W. Hoge, J. M. McCroskey, and Kenneth O. Rhodes, all of Los Angeles, for respondents.

STEPHENS, Justice pro tem.

This is an appeal by third party claimant from a judgment of the trial court based upon findings that a certain automobile was the property of defendant C. T. Kennedy and not of appellant.

It appears from the record that appellant was employed by Kennedy, a building contractor engaged in constructing a number of dwelling houses, and that on October 12, 1940, appellant purchased the automobile in question (a small, used Ford truck) from Kennedy for the sum of $150, paying $30 cash and the balance in installments which were completed December 2, 1940. On the latter date appellant received the "pink slip," endorsed by Kennedy, and mailed it to the department of motor vehicles with the accompanying fees and requested that a new one be issued in his name. This new pink slip was issued by the department on December 13, 1940. On December 12, 1940, the sheriff levied upon and took possession of the automobile pursuant to a writ of execution issued upon a long-standing judgment against defendant Kennedy.

Respondents rely upon section 186 of the Vehicle Code, St.1935, p. 118, and the case of Coca Cola Bottling Company v. Feliciano, 32 Cal.App.2d 351, 89 P.2d 686. Section 186 of the Vehicle Code at the time in question read as follows: "No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose until transfer of registration is made and the department has issued a new certificate of ownership and registration card with respect thereto as provided herein, except as a transferor may be estopped by law to deny a transfer and except as provided in sections 178 and 180 hereof and in Chapter 3 of this division."

[1, 2] It is clear that inasmuch as Kennedy, the transferor, had received the full amount of the purchase price and had delivered the pink slip to the buyer prior to the levy, he was estopped, as against the buyer, to deny the transfer. He therefore comes within the exception provided in the above section of the code. The judgment creditor takes no better title than his judgment debtor, and is likewise estopped. Carpenter v. Devitt, 49 Cal.App.2d 473, 122 P.2d 79, and cases cited therein. As stated in the latter case, the matter of this exception was not discussed or passed upon in the case of Coca Cola Bottling Company v. Feliciano, supra.

[3] Some contention is made that there was not a continuous change of possession as required by section 3440 of the Civil Code. However, the evidence as shown by the bill of exceptions is insufficient to sustain this claim. The undisputed testimony of the third party claimant (the buyer) is that he took immediate possession when he purchased, and that no one thereafter drove the car excepting himself and his son. He kept it stored at his home. He was in the carpenter contracting business, doing work for Kennedy (the seller) in the building of houses on a tract of land owned by the latter. In doing this work he occasionally left the automobile in different garages appurtenant to these houses. Apparently this was a matter of convenience in carrying on his work. It was in one of these when the sheriff seized it. This would not justify a finding that there was not a bona fide and sufficient change of possession as required by Civil Code section 3440. The injustice of declaring the transfer void on the basis of this section becomes apparent when it is remembered that the primary purpose of such a statute is to protect creditors who may have relied upon the continued ownership of the personal property in question; whereas in the instant case the judgment (totaling $9,866.56) was obtained seven years and nine months prior to the transfer of this used light truck, which sold for $150.

The judgment appealed from is reversed.

MOORE, P. J., and McCOMB, J., concurred.

PEOPLE v. SANCHEZ et al. *

Cr. 3560.

District Court of Appeal, Second District, Division 1, California.

May 26, 1942.

Hearing Granted June 22, 1942.

1. Courts 🔑**45**

The superior court, sitting in exercise of its general jurisdiction, was without authority to recess in such capacity, reconvene as a juvenile court, and thereupon dispose of criminal prosecution against 17-year-old defendant in its latter capacity. St.1937, pp.

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* Subsequent opinion 132 P.2d 810.

1021, 1031, 1043, 1044, 1046, 1047, §§ 571, 572, 700(m), 825, 826, 831, 832, 834, 835.

2. Courts ⟹45

The authority granted by statute authorizing superior court to recess as a criminal court and reconvene as a juvenile court is restricted to those cases in which defendant is over age of 18 years and under age of 21 years. St.1937, p. 1046, § 834.

◆

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Proceeding by the People against John Sanchez, Angelo John Porrello, and others under an indictment charging defendants in two counts of robbery and in one count of attempted robbery. From an order denying motion of defendant Porrello to vacate and set aside a judgment by which he was sentenced to the state prison at San Quentin, the defendant Porrello alone appeals.

Reversed and remanded with directions.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles County, defendant Angelo John Porrello and two others were accused in counts one and two of the crime of robbery, while count three alleged the commission by them of the offense of attempted robbery. This appeal concerns only the defendant Porrello, and is taken from an order denying his motion to vacate and set aside a judgment by which he was sentenced to the state prison at San Quentin. In reviewing the record, we shall, therefore, take cognizance only of those proceedings which affected this appellant. In that regard, it appears that on March 7, 1941, defendant Porrello entered pleas of not guilty to all counts contained in the information, and trial of the same was thereupon set for April 16, 1941. On the last named date, in Department 44 of the Superior Court of Los Angeles County, the record reveals that the following proceedings were had: "Cause as to Defendant Angelo John Porrello is transferred to Department 39 for further proceedings." It should here be noted that Department 39 is the department of the Superior Court of Los Angeles County designated to hold sessions as a juvenile court.

Nowhere in the record do we find anything to enlighten us as to what action was taken in the juvenile court after reference thereto by the judge presiding in Department 44. The next entry appearing in the clerk's transcript indicates that on April 17, 1941, in Department 44, which is not the juvenile court, appellant herein was permitted to withdraw his plea of not guilty theretofore entered as to count one and to enter a plea of guilty thereto. At the same time he admitted being armed with a deadly weapon at the time of the commission of the offense to which he pleaded guilty, and upon a statement of facts and stipulation of counsel, the court found the crime to be robbery of the first degree. Appellant thereupon waived time for passing sentence and was granted permission to file an application for probation, the hearing thereon and the pronouncement of judgment being continued to May 7, 1941. On the date last mentioned according to the clerk's transcript, appellant herein appeared in Department 44, at which time the record shows that:

"* * * The Court recesses as a Criminal Court and reconvenes as a Juvenile Court. It is ordered that proceedings herein be suspended as to Count 1 of the information. * * * Pursuant to the provisions of the Welfare and Institutions Code, Sections 834 and 835, St.1937, pp. 1046, 1047, defendants are now declared wards of the Juvenile Court under Subdivision (m), Section 700 of said code.

"It is further ordered that the defendants be committed to the Preston School of Industry at Ione, California, during their minority, to-wit: until * * * June 18, 1944, as to Defendant Angelo John Porrello * * *.

"Cause is continued to May 22, 1941, at 9:30 A. M. and transferred to Department 39" (Juvenile Court) "for further hearing relative to financial responsibility and reimbursement. * * *"

In the order by which appellant Porrello was committed to the Preston School of Industry we find the following: "Whereas the said Angelo John Porrello, a boy of the age of 17 years, having duly pleaded guilty in this Court of the crime of robbery, a felony. * * *"

Pursuant to the foregoing commitment, appellant herein was delivered to the authorities at the Preston School of Industry.

Subsequent to the placement of appellant in the Preston School of Industry and on or about June 25, 1941, a communication was received from the superintendent of said school, advising of the inmate's physical condition and of his confinement to bed because of heart trouble, and requesting that he be returned to the jurisdiction of the court for the reason that "he could in no way profit by the training program offered at the school." This information was given to the judge presiding in Department 44, who declined to make any order returning the appellant to the jurisdiction of the court, but indicated that he would make other disposition of the case should the boy be returned. On or about August 12, 1941, in Department 41 of the superior court, the probation officer advised the court of the receipt of a further communication from the superintendent of the Preston School of Industry, reading as follows: "In re Angelo John Porrello. I am enclosing affidavits signed by the Superintendent of the Preston School of Industry and Director of Institutions in the case of Angelo John Porrello. I am also enclosing copy of communication which I sent to Dr. Rosanoff concerning Porrello's case." Attached to the probation officer's report was an affidavit sworn to by the Director of Institutions of the State of California, which recites in substance that the defendant is unfit due to physical disability to profit by the training program of the Preston School of Industry, and directing his return to the Superior Court of Los Angeles County for further consideration and order.

Upon the recommendation of the probation officer, the judge presiding in Department 41, known as the Master Calendar Criminal Department of the Superior Court of Los Angeles County, directed that the order of May 7, 1941, committing appellant to the Preston School of Industry, be vacated and set aside, and that he be returned to Los Angeles County for further consideration and order in connection with his case. The sheriff was directed to make such return and to place appellant in the General Hospital; and the cause was placed on the calendar in Department 44 of the Superior Court for August 20, 1941. The matter was continued from time to time until, on September 11, 1941, in Department 41, the court, sitting as a criminal department of the superior court, made an order reciting that the previous order committing the defendant to the Preston School had been vacated and set aside; that no legal cause why judgment should not be pronounced existed; and thereupon the court sentenced the defendant to the state prison for the term prescribed by law for the offense of robbery as charged in count 1 of the information and to which the defendant had pleaded guilty. Thereafter appellant made a motion in the last named department for an order vacating and setting aside the judgment and sentence to San Quentin penitentiary, and on December 17, after hearing upon such motion, the superior court made its order denying the same. As heretofore indicated, this appeal is from the last mentioned order.

Appellant contends (1) that the trial court was without jurisdiction to vacate its order committing him to the Preston School of Industry; (2) that his commitment to such school constituted jeopardy, by reason of which his subsequent sentence to the state prison violated the due process of law clauses of the federal and state Constitutions, in that such state prison sentence placed him twice in jeopardy for the same offense; and (3) that in vacating and revoking its original order committing appellant to the Preston School of Industry the trial court abused its discretion.

[1] We do not deem it necessary to discuss any of the foregoing grounds of appeal, because of our conviction that none of them is determinative of the sole, only and real issue here presented but not referred to in the briefs of either appellant or respondent, viz., the jurisdiction of the superior court to make its original order committing appellant to the state school. We are persuaded that the superior court sitting in the exercise of its general jurisdiction was without authority to recess in such capacity, reconvene as a juvenile court, and thereupon dispose of this case in the latter capacity. We arrive at this conclusion because the court found and determined that at the time appellant was before it charged with a felony he was of the age of seventeen years. Section 571 of the Welfare and Institutions Code designates the superior court, when sitting in the exercise of the jurisdiction conferred by chapter 2 of the code, as the "juvenile court." Section 572 of the last named code directs that in counties such as Los Angeles, having more than one judge of the superior court, the judges of said court shall annually in the month of January designate one or more of their number to hear all cases provided for in the chapter last referred to.

Section 825 of the Welfare and Institutions Code specifically provides that no court shall have jurisdiction to try the case of any person under the age of eighteen years at the time of the alleged commission of a public offense unless the matter has first been submitted to the juvenile court, by petition as provided in article 7 of chapter 2, or by certificate of any other court as provided in article 9 of the Welfare and Institutions Code, and said juvenile court has made an order therein directing that such person be prosecuted under the general law. Section 826 provides that whenever an indictment or information is filed in any court charging a person with a crime, and it is suggested or appears to the judge before whom such person is brought that at the date the offense is alleged to have been committed such person was under the age of eighteen years, the judge shall immediately suspend all proceedings against such person; he shall examine into his age, and if from such examination it appears to the satisfaction of such judge that the person in question was at the date the offense is alleged to have been committed under the age of eighteen years, he must forthwith certify the case to the juvenile court, setting forth in such certification the facts mentioned in section 826. This section also requires that thereupon all proceedings against such person shall be suspended until the juvenile court issues its mandate as provided in sections 831 and 832. The last mentioned sections empower the judge of the juvenile court, should he conclude that such person is not a fit subject for further consideration in the juvenile court, either to proceed as a committing magistrate and hold a preliminary examination if the person is charged with a felony, or to remand the person to the court in which the charge is pending for further proceedings thereon. Upon the receipt of such mandate, the court before whom the charge is pending is then vested with full authority to proceed with the examination or trial of the charge.

Section 833 definitely provides that whenever a person is accused of crime in the superior court by indictment or information, and it is suggested to the court that the person is under the age of eighteen years at the date the offense is alleged to have been committed, the superior court shall recess as a criminal court and reconvene as a juvenile court; but the section further provides: "If there are two or more judges of the same superior court, and the action is brought before a judge other than a juvenile court judge, the case shall be transferred from the department in which it is to the department of a juvenile court judge. The juvenile court shall hear and dispose of any such case in the same manner and with the same powers as if the case had been transferred thereto from a court other than the superior court."

[2] While it is true that section 834 of the Welfare and Institutions Code, as contended by the attorney general, authorizes the superior court to recess as a criminal court and reconvene as a juvenile court, such authority is restricted to those cases in which the defendant is over the age of eighteen years and under the age of twenty-one years. Appellant herein, being under the age of eighteen years, does not come within the purview of section 834, but his case is governed by the provisions of section 833.

In the case at bar, it appears from the clerk's transcript that an order was made transferring the cause to the juvenile court, but nowhere does it appear that the juvenile court judge at any time found that appellant was not a fit subject for further consideration under the juvenile court law and remanded the cause to the criminal department of the superior court for further proceedings therein. In fact, at the time the superior court had under consideration appellant's motion to set aside and vacate its judgment sentencing appellant to the state prison, the reporter's transcript reveals the following:

"The Court: Just a moment. Was he not declared unfit for the juvenile court and returned to Department 44?

"Mr. Lavine (Defendant's Counsel): No, that does not appear in the minutes.

"The Court: Look on the jacket and see if he was not declared unfit and returned to Department 44.

"Mr. Lavine: No, that does not appear as far as the defendant Porrello is concerned. Perhaps—

"The Court: Perhaps the juvenile file would show that. * * *"

Further inquiry along this line was thereupon apparently abandoned.

Until this appellant, because of his age, was certified to the juvenile court and by the latter tribunal remanded back to the criminal department of the superior court as a subject unfit for consideration by the juvenile court, the superior court was without jurisdiction to consider or dispose of the case sitting in the exercise of its general jurisdiction as a criminal department of the court.

For the foregoing reasons, the order appealed from and the judgment by which appellant was sentenced to state prison are reversed and the cause remanded with directions to the superior court to proceed in accordance with the provisions of sections 825 and 826 of the Welfare and Institutions Code and the views herein expressed.

YORK, P. J., and DORAN, J., concurred.

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52 Cal.App.2d 213

LANDEGREN v. QUILICI.

Civ. 11939.

District Court of Appeal, First District, Division 1, California.

May 25, 1942.

1. Appeal and error ⚷931(1)

In reviewing evidence on appeal from judgment in accordance with trial court's fact findings, all conflicts must be resolved in respondent's favor and all legitimate and reasonable inferences indulged in to uphold findings, if possible.

2. Appeal and error ⚷989

When trial court's fact findings are attacked on appeal as unsupported by evidence, appellate court can only determine whether there is any substantial evidence supporting trial court's conclusion.

3. Appeal and error ⚷996

When two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

4. Appeal and error ⚷1011(1)

In action for assault and battery, conflict in evidence as to which party was aggressor and whether defendant acted in self-defense, using no more force than reasonably necessary, was for trial court.

5. Assault and battery ⚷35

In action for assault and battery, evidence *held* sufficient to support trial court's findings that plaintiff was aggressor and provoked fight with defendant and that defendant acted in self-defense, using no greater force than occasion warranted.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Edward Landegren against Alberto Quilici for assault and battery. Judgment for defendant, and plaintiff appeals.

Affirmed.

Joseph A. Brown, of San Francisco, for appellant.

James A. Toner and Francis B. Perry, both of San Francisco, for respondent.

PETERS, Presiding Justice.

This appeal approaches the frivolous. It is an appeal by plaintiff from a judgment in favor of defendant entered in an action brought for damages for an alleged assault and battery. The trial court found that it was not true that defendant assaulted plaintiff without cause; that it was true that plaintiff wilfully and maliciously approached defendant in a menacing and assaulting manner; that it is true that defendant, believing himself to be in danger of great bodily harm, defended himself against the assault of plaintiff and used only such force as was reasonably necessary for his protection and defense. Appellant's sole contention is that these findings are unsupported by the evidence. A reading of the transcript demonstrates that these findings find ample support in the record.

[1-3] The proper rule to be applied to such an appeal was stated as follows in Crawford v. Southern Pacific Co., 3 Cal. 2d 427, 429, 45 P.2d 183, 184: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence,

contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483."

If counsel would keep this fundamental rule in mind, and not take fruitless appeals in purely fact cases where the evidence is conflicting, they would not only save money for their clients, but save their time and the time of the appellate courts.

[4, 5] The facts most favorable to respondent as disclosed by the record are as follows: Appellant is a painting contractor. On November 6, 1939, he was painting a two-story building located at Buchanan and Greenwich Streets, San Francisco. On the lower floor of that building is a tavern operated by respondent, and projecting out from the building is a large electric sign advertising the tavern. While painting the exterior of the building on the day in question appellant covered the electric sign with a large cloth. When he quit work for the day he forgot to remove the cloth. Respondent discovered that his sign was covered when he turned on his lights, and attempted to remove the cloth with a long pole. In the meantime, appellant, who had started towards his home, returned and discovered respondent poking at the cloth. An argument took place, followed by a fight in which both participants were cut and bruised, and in which appellant suffered several broken ribs.

Obviously, the first questions presented to the trial court was, who started the fight —who was the aggressor? Secondly, it was required to determine whether respondent acted in self-defense, and, if so, whether he used any more force than was reasonably required under the circumstances. On these issues respondent testified that while he was trying to remove the cloth the appellant approached him from the rear and began reviling him and accusing him of destroying the cloth; that he apologized to appellant and requested that the cloth be removed; that he told appellant he did not want any trouble, but did want the cloth removed; that he then entered his tavern and went out in back. Mrs. Quilici, wife of respondent, testified that appellant then entered the tavern, pounded on the bar, and called her vile names, then left the tavern and went upstairs to the apartment of the landlady. The landlady testified that appellant came up the stairs and demanded the key to the garage where his ladders and painting equipment were stored; that appellant "was like a madman, he was furious and vicious at the time"; that when he asked for the key "he called me all kinds of insulting names and went downstairs mumbling to himself"; that he "dashed down the stairs furious as anything, and mad." When appellant got to the bottom of the stairs respondent had returned to the tavern, and seeing his wife in front of the door, went outside to talk to her. Mrs. Quilici testified that her husband asked her to come inside; that the appellant "came downstairs while he was saying that, so quick my husband says to me to go in the house, that was my place where I belonged. This painter came running down the stairs, called my husband all kinds of names and started with his fist, tried to fight my husband." Respondent testified that when appellant saw him in front of the tavern he came down the stairs and started towards him "like a wildcat"; that "the only thing I can do is push my wife inside and see what happened. I prepare myself, to the best of my knowledge what happened after that, we struggled for awhile in the middle of the street, we got in the middle of the street, Mr. Landegren went down with one hand, he wasn't down altogether, anyhow, maybe I am excited I don't know, but I try when he is down to help him up thinking everything is all over. When he is up, the worst names any man can call in front of a wife and mother, that is Mr. Landegren. Then we started again, maybe I follow him, maybe I don't, I don't remember exactly what happened, I was excited. Just about the time I got across the street, Mr. Landegren laid one on my forehead right here, pretty hard, knocked me down. While I am down, breathing, he just stand on top of me, hit me all he can all over my body, wherever he could hit me. All I can do is hold him up with my left hand, all I can, I am down. Then I am relieved, somebody got him by the shirt in the back and pulled him up. For a second I don't even know who it was. It happened to be my wife, she saw me getting a terrible beating and she got in and got him by the shirt in back of his neck and pulled him off me. I didn't even wait to see whether he was going to beat her up or not, I was in terrible shape, bleeding hard, I can hardly breathe, I have sort of asthma, when I get excited I can't breathe so well, so I ran in my house, got fresh water, trying to stop the bleeding, see if I can inhale some breath, I don't know if I can explain." He also testified that he had two black eyes and a bloody nose, and was bruised all over; that the fight started on the sidewalk and continued out into the street; that when appellant got knocked down "I helped him up, in any real American way we don't hit on the ground, but he knocked me down, kept on pounding me, until somebody came or I would be dead." Several witnesses testified that when appellant knocked respondent down he continued to beat him while he was lying on the ground.

This is a fair summary of the evidence produced by respondent. It is true that appellant's testimony was contrary thereto, and that he testified to a brutal and unprovoked assault by respondent. This conflict was for the trial court. From the above evidence the trial court was entitled to find, as it did, that appellant was the aggressor throughout; that he provoked the fight, and that respondent acted in self-defense, using no greater force than the occasion warranted. The findings being supported by competent, material and substantial evidence, this court has no power to disturb the judgment based thereon.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.

WEST KEY NUMBER SYSTEM

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52 Cal.App.2d 282

FINNEY v. WIERMAN et al.

WIERMAN et al. v. FINNEY.

Civ. 13430.

District Court of Appeal, Second District,
Division 3, California.

May 26, 1942.

1. Automobiles 🔑246(58)
New trial 🔑39

In action and cross-action for damages sustained in head-on collision between automobiles traveling on three-lane highway, where plaintiff motorist contended that she left her right-hand lane only because she was placed in imminent peril by rapid approach directly toward her of other automobile, instruction that if motorist "violated" statute regarding traffic lanes, motorist was guilty of negligence was improper and therefore granting of new trial was not an abuse of discretion. Vehicle Code, § 526, St.1935, p. 181.

See Words and Phrases, Permanent Edition, for all other definitions of "Violate".

2. Trial 🔑296(4)

In action and cross-action for damages sustained in head-on collision between automobiles traveling on three-lane highway, where plaintiff motorist contended that she left her right-hand lane only because she was placed in imminent peril by rapid approach directly toward her of other automobile, error in giving instruction regarding traffic lanes was not cured by giving of general instruction on quality of judgment required by one suddenly confronted with unexpected and imminent danger. Vehicle Code, § 526, St.1935, p. 181.

3. Automobiles 🔑246(58)

In action and cross-action for damages sustained in head-on collision between automobile traveling on three-lane highway, where plaintiff motorist contended that she left her right-hand lane only because she was placed in imminent peril by rapid approach directly toward her of other automobile, giving of instruction requiring jury to find motorist guilty of negligence if they believed she operated automobile across center line of highway was improper. Vehicle Code, § 525, St.1937, p. 619.

4. Automobiles 🔑246(58)

In action and cross-action for damages sustained in head-on collision between automobiles traveling on three-lane highway, where plaintiff motorist contended that she left her right-hand lane only because she was placed in imminent peril by rapid approach directly toward her of other automobile, the jury should have been instructed that if they believed facts to exist as testified by motorist, jury should conclude that she was not guilty of negligence in entering center or her left-hand traffic lane. Vehicle Code, § 526, St.1935, p. 181; Vehicle Code, § 525, St.1937, p. 619.

5. Automobiles ⚷245(79)

The operator of an automobile is not guilty of negligence as a matter of law merely because he drives the automobile into another lane or onto the left side of the highway. Vehicle Code, § 526, St.1935, p. 181; Vehicle Code, § 525, St.1937, p. 619.

6. Trial ⚷261

In action and cross-action for damages sustained in head-on collision on three-lane highway, the fact that only instruction offered by plaintiff qualificative of defendants' instructions regarding driving of automobile in center or left-hand lane was properly refused did not excuse error in giving defendants' unqualified instructions. Vehicle Code, § 526, St.1935, p. 181; Vehicle Code, § 525, St.1937, p. 619.

7. Appeal and error ⚷933(1)

On appeal from order granting motion for new trial, every intendment is in favor of supporting the order of trial court.

8. Appeal and error ⚷977(3)

An order granting motion for new trial should not be reversed except for manifest and unmistakable abuse of discretion.

◆

Appeals from Superior Court, Los Angeles County; Walter Desmond, Judge.

Consolidated actions by Ora Finney against Frances L. Wierman and another and by Frank Wierman and others against Ora J. Finney for damages sustained in automobile collision. From an order in each case granting the motion of the party Finney for a new trial, Frances L. Wierman and others appeal.

Affirmed.

Joseph A. Ball, of Long Beach, for appellants.

Fred N. Howser and Richard E. Ryan, both of Long Beach, for respondent.

SCHAUER, Presiding Justice.

On February 16, 1939, between 6 and 6:30 p. m. (after sundown), Ora Finney was the operator and sole occupant of an automobile traveling south on San Antonio Boulevard near the town of Norwalk. At approximately the same time and place, in the opposite direction, Frances L. Wierman was driving a car owned by herself and her husband Clyde G. Wierman, in which car their infant daughter and the parents of Clyde were passengers. These two consolidated actions are the outgrowth of a head-on collision between the two automobiles.

The jury returned verdicts denying Ora Finney any recovery on her complaint and awarding damages against her in favor of each of the passengers in the Wierman car but denying recovery to the driver, Frances Wierman, and to her husband Clyde. As between Ora Finney on one side and Frances and Clyde Wierman on the other, the verdict which was returned and filed reads in material part as follows: "We the jury in the above entitled action, find for the defendants, Frances L. Wierman and Clyde G. Wierman, against the plaintiff, Ora J. Finney, and in favor of the cross-defendant, Ora J. Finney, against the cross-complainants, Frances L. Wierman and Clyde G. Wierman, Contributory Negligence. No recovery."

From the order in each case granting the motion of the party Finney for a new trial, these appeals are taken. On behalf of the appellants (Wiermans) it is asserted that upon the record before us the only ground which can be considered as a basis for the orders is that of errors in law occurring at the trial to the prejudice of the respondent Finney. This assertion is not disputed by respondent and consequently we make no further inquiry concerning it. From that basis appellants contend that no substantial or prejudicial error in law occurred at the trial and that consequently the court erred in each case in granting a new trial. The orders appealed from must be affirmed.

San Antonio Boulevard, in the locale concerned, was a white-lined three-lane highway, traffic over which was governed by section 526 of the Vehicle Code, St.1935, p. 181, which requires that:

> "(a) A vehicle shall be driven as nearly as practical [practicable] entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.
>
> "(b) * * * a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway ahead is clearly visible and such center lane is clear of traffic within a safe distance * * *."

The trial court at the request of defendants instructed the jury (defendants' No. 10-A) in the exact language of the statute, including that above quoted, and added thereto the express admonition that "If you believe from a preponderance of the evidence that Ora Finney violated the provisions of this section, she was guilty of negligence as a matter of law." If we assume that the word *"violated"* as used in such instruction informed the jury that they must find not only that respondent Finney did an act prohibited by the statute but did it without legal justification, then we may say that such instruction correctly stated an abstract proposition of law. But aside from the uncertainty of the sufficiency of implications in the word "violated," the giving of an instruction containing an entirely correct statement of substantive law may under some circumstances be prejudicially erroneous. Respondent contends that it was here; or at least that the implied finding of the trial court that under all the circumstances of the case the giving of such instruction was error and prejudicial to the litigant Finney, was reasonably supported and hence that its action in granting a new trial was not an abuse of discretion. Such position is well taken.

According to the testimony of respondent Finney she was operating her car lawfully in a southerly direction within her right-hand (the westerly) lane of the highway and continued so to do until she was placed in imminent peril of immediate disaster by the near and rapid approach of the unlighted Wierman car, coming from the south in a general northerly direction but heading diagonally across the highway toward the *westerly* (Finney's) lane and directly toward respondent Finney's car. At this point respondent Finney, in a last effort to avoid the collision, altered her course to her left (easterly) and entered the center lane; at the same time, she says, appellant Frances Wierman veered to the east (appellant's right) and the collision occurred with the cars partly in the center lane and partly in the easterly lane.

[1] If the jury believed the testimony of the respondent Finney to the effect above epitomized, and if they had been properly instructed, they could have concluded that respondent Finney was not negligent in departing from the westerly and entering the center or even the easterly lane of the highway. But, as has been noted, they had been instructed in language importing without qualification that if respondent Finney entered the center lane "except when overtaking and passing another vehicle where the roadway ahead is clearly visible and such center lane is clear of traffic within a safe distance * * *. she was guilty of negligence as a matter of law." The fact that such instruction was appropriate to appellants' theory of the case does not justify its being given in unqualified and all-inclusive form.

[2] Appellants also contend that any vice which otherwise might be found in the quoted instruction was obviated by the giving of a general instruction on the quality of judgment required to be exercised by one who, without negligence on his part, is suddenly confronted with unexpected and imminent danger. Appellants assert that the jury should have understood that the sudden peril doctrine was to be applied to respondent Finney's conduct if they found that in her own lane, without fault on her part, she was suddenly confronted by the peril of the approaching Wierman car, and that the unqualified instruction as to its being negligence as a matter of law to enter the center lane except as stated in the statute, was to be applied only if they found that respondent left the westerly (her right hand) lane otherwise than in the exercise of ordinary care. From the standpoint of the jury no such construction of the instructions, viewed together or singly, is reasonable; i. e., while counsel, learned in the law, might be able to so interpret and explain such instructions, it is not reasonable to expect that jurors, for whose enlightenment the instructions are given, should be able to so interpret them.

[3-5] Another instruction which either should not have been given at all or should have been qualified appropriately as to its applicability was defendants' No. 9-A. It quoted the provisions of section 525 of the Vehicle Code, St.1937, p. 619, declaring the duty of a driver to operate his vehicle "upon the right half of, and as close as practicable to the right-hand curb or edge" of the roadway, and ended with the positive injunction, "If you believe from a preponderance of the evidence that either driver violated the provisions of this section, she was guilty of negligence as a matter of law." This instruction, like defendants' No. 10-A as shown above, absolutely required the jury to find respondent Finney guilty of negligence if they believed her testimony that she operated her car across the center of the highway to her left, no

matter what were the circumstances impelling her to such action. To the contrary the jurors should have been instructed in legal effect, in accord with the principle enunciated in Straten v. Spencer, (1921), 52 Cal.App. 98, 108, 197 P. 540, that if they believed the facts to exist as testified to by respondent Finney and epitomized above, they must conclude that she was *not* guilty of negligence in entering the center or the easterly traffic lanes. The operator of a car obviously is not guilty of negligence as a matter of law merely because he drives the car into another lane or onto the left side of the highway. (Hagenah v. Bidwell, (1920), 46 Cal.App. 556, 560, 189 P. 799; Anderson v. Dahl, (1932), 121 Cal.App. 198, 202, 8 P.2d 883; Lowe v. City of San Diego, (1935), 8 Cal.App.2d 440, 442, 47 P.2d 1083.)

[6] The fact that plaintiff's (Finney's) proposed instruction No. 3 was the only one offered by her which was directly pertinent to and qualificative of defendants' Nos. 9-A and 10-A (the two above discussed) and that it was properly refused because it erroneously included a statement on the sudden peril doctrine without the limitation that the peril must be encountered without negligence on the part of the plaintiff (Finney), does not excuse the error in the giving of defendants' unqualified instructions as above depicted.

[7, 8] It is to be remembered that in all of the preceding discussion we have advanced upon the theory that every intendment is in favor of supporting the order of the trial court. We find in the record before us no error in granting the motion for a new trial as made in each case and obviously therefore appellants have failed to show that manifest and unmistakable abuse of discretion which would be essential to justify reversal of the orders. (Fennessey v. Pacific Gas & Elec. Co., (1938), 10 Cal.2d 538, 544, 76 P.2d 104; Simmons v. Lamb, (1939), 35 Cal.App.2d 109, 113, 94 P.2d 814.) The trial court is to be commended for recognizing and promptly rectifying, as it did, the error into which it had been led by the instructions proposed to it.

The order appealed from in each case is affirmed.

SHINN and PARKER WOOD, JJ., concurred.

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52 Cal.App.2d 241

PEOPLE v. POOR et al.

Cr. 3565.

District Court of Appeal, Second District, Division 3, California.

May 25, 1942.

1. Criminal law ⚷511(2)

To corroborate accomplice's testimony, only slight evidence tending to connect defendant with commission of offense charged is required.

2. Criminal law ⚷511(1)

In prosecution for robberies while armed with pistol, positive direct testimony of one of victims that he was robbed by defendant was sufficient to "corroborate" accomplice's testimony identifying defendant as participant in robberies.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroborate".

3. Criminal law ⚷942(1)

A new trial is not required to be granted to convicted defendant on ground of "newly discovered evidence" of witness shown by affidavit to have committed perjury at trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

4. Criminal law ⚷911, 1156(3)

A motion by convicted defendant for new trial on ground of newly discovered evidence is addressed to sound discretion of trial court, whose ruling thereon should not be disturbed on appeal unless such discretion was abused.

5. Criminal law ⚷945(1)

"Newly discovered evidence", to entitle convicted defendant to new trial, must be such as to render different verdict reasonably probable on retrial.

6. Criminal law ⚷942(1)

In prosecution for robberies while armed with pistol, trial court did not abuse his discretion in denying convicted defendant's motion for new trial on ground of "newly discovered evidence" that codefendant's testimony that he was not present at and did not participate in robberies was false.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Lewis Poor, Jess Gonzales, and one Segura were charged with, and defendants Gonzales and Segura convicted of, robberies while armed with a pistol, and defendant Gonzales appeals.

Affirmed.

George R. Stene, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

The defendants, Poor, Gonzales, and Segura, were charged in an information in two counts with robbery while armed with a pistol. The defendants pleaded not guilty. Gonzales admitted that he had been convicted previously of a felony. The trial proceeded as to Gonzales and Segura. Poor testified for the prosecution. The jury found Gonzales and Segura guilty on both counts as charged.

Gonzales made a motion for a new trial upon various grounds, including the ground of alleged newly discovered evidence.

In support of such motion an affidavit by Gonzales was filed which stated in substance that after the trial Segura first informed Gonzales that Gonzales had no connection with this robbery and that Segura would so testify; that Gonzales could not discover this earlier because Segura refused to divulge the information at any prior time for the reason Segura hoped to be acquitted of the charge.

In further support of the motion an affidavit by Segura was filed which stated that the robbery was committed by Poor, Segura, and a person called "Freddy," and that Gonzales was not present or in any way connected with the robbery.

The motion for a new trial was denied, and sentence was pronounced.

Gonzales appeals from the judgment of conviction and from the order denying his motion for a new trial. His contention is that the court erred in denying said motion, made upon the ground of newly discovered evidence.

The argument in support of appellant's contention on appeal is: that the only testimony connecting him with the robbery was (1) the testimony of Poor, a purported accomplice, and (2) the testimony of Joe Jiminez, a victim of the robbery, whose testimony was weak, confusing, and impeached; that four witnesses testified that appellant was at a cafe, about six miles from the scene of the robbery, at the time the robbery was committed; that if such newly discovered evidence were presented upon a new trial, it is probable that appellant would be acquitted.

At the trial Poor testified that he, Segura, and appellant robbed Jiminez and Salas, the other victim; that they went to a hotel and divided the loot. Jiminez testified that appellant robbed him. Segura testified that he (Segura) was not present at, and did not participate in, either of the robberies; that he did not remember whether he had seen appellant the day of the robbery or the day before; that he spent the evening of the robbery at or near a theater (which was several blocks from the scene of the robbery). A police officer testified that Segura said at the time he was arrested that he had participated in the robberies.

[1, 2] The testimony of the accomplice, Poor, identifying appellant as a participant in the robberies, was corroborated by the positive testimony of Jiminez, one of the victims. To corroborate the testimony of an accomplice only slight evidence which tends to connect the appellant with the commission of the offense is required. People v. Yeager, 1924, 194 Cal. 452, 473, 229 P. 40. In this instance, however, the corroboration was not slight but was the direct testimony of an eye witness. It clearly comes within the rule stated in People v. Hoyt, 1942, 20 Cal.2d 306, 125 P.2d 29.

[3] The newly discovered evidence offered by Segura was to the effect that his testimony that he was not present and did not participate in the robberies was not true. It is not a legal requirement that a new trial be granted upon the ground of newly discovered evidence when it is shown by affidavit of a witness that he committed perjury at the trial. People v. Lee, 1935, 9 Cal. App.2d 99, 106, 48 P.2d 1003; People v. Tallmadge, 1896, 114 Cal. 427, 430, 46 P. 282.

[4-6] The motion for a new trial was addressed to the sound discretion of the trial court and its ruling thereon should not be disturbed unless its discretion has been abused. People v. Lerner, 1936, 11 Cal.App. 2d 208, 210, 53 P.2d 194. Newly discovered evidence must be such as to render a different verdict reasonably probable upon a retrial. People v. Morton, 1939, 32 Cal.App.

2d 662, 664, 90 P.2d 845. The trial court did not abuse its discretion.

The judgment and the order denying the motion for a new trial are, and each is, affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

52 Cal.App.2d 356

LOS ANGELES MORRIS PLAN CO. v. O'DAY et al.

Civ. 13491.

District Court of Appeal, Second District, Division 2, California.

May 28, 1942.

1. Execution 🔑73

Where motion for issuance of execution more than five years after entry of judgment was supported by affidavit showing that after rendition of judgment execution was issued and returned unsatisfied, and that several demands were made upon the defendant for payment but no payment was made, and that defendant was financially able to pay judgment, court did not abuse its discretion in granting motion for issuance of execution. Code Civ.Proc. §§ 681, 685.

2. Execution 🔑73

Where motion for issuance of execution more than five years after entry of judgment was supported by affidavit alleging that after entry of judgment execution was returned unsatisfied and that several unsuccessful demands had been made for payment and that defendant was financially able to pay judgment, abuse of discretion could not be predicated upon court's failure to require showing that plaintiff had proceeded further in compliance with statute authorizing execution within five years or that plaintiff had made efforts to collect judgment in addition to efforts shown in affidavit. Code Civ.Proc. §§ 681, 685.

3. Election of remedies 🔑3(1)

The fact that plaintiff had elected to sue on judgment did not prevent plaintiff, under doctrine of "election of remedies", from obtaining order for issuance of execution, more than five years after entry of judgment where action on judgment had been dismissed. Code Civ.Proc. §§ 681, 685.

See Words and Phrases, Permanent Edition, for all other definitions of "Election of Remedies".

4. Election of remedies 🔑3(1)

A proceeding under statute granting court discretion to issue execution more than five years after entry of judgment results in creation of lien upon specific property levied on whereas filing of separate action on judgment would, if reduced to a judgment, create a more general lien, as against contention that the remedies were inconsistent so that election to sue on judgment resulted in an "election of remedies". Code Civ.Proc. § 685.

5. Execution 🔑16

In proceeding on plaintiff's motion for issuance of execution more than five years after entry of judgment, defendant could not complain that plaintiff was "estopped" from seeking writ of execution because plaintiff had previously instituted action on judgment where defendant was not damaged by the filing of the action on the judgment. Code Civ.Proc. § 681.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by the Los Angeles Morris Plan Company against James O'Day, L. D. Dicker and others. From an order granting plaintiff's motion for issuance of an execution against L. D. Dicker, he appeals.

Affirmed.

Nathan M. Dicker, of Los Angeles, for appellant.

Walter H. Sprague, of Los Angeles, for respondent.

W. J. WOOD, Justice.

This is an appeal from an order granting plaintiff's motion made under section 685 of the Code of Civil Procedure for the issuance of an execution against defendant L. D. Dicker more than five years after the entry of judgment. Defendant contends that the superior court abused its discretion in ordering the execution to issue.

It is provided in section 681 of the Code of Civil Procedure that execution may issue at any time within five years after the entry of judgment. And in section 685 it is provided: "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion." Plaintiff contends that it was not necessary to set forth any excuse for not taking out execution within five years from the entry of the judgment and cites very respectable authority in support of its position. Peers v. Stoll, 32 Cal.App.2d 511, 90 P.2d 119. However, plaintiff need not depend upon this contention for we are satisfied that, in view of the allegations in the affidavit filed, the superior court did not abuse its discretion in granting the motion for the issuance of the execution.

[1, 2] As a basis for its motion plaintiff filed an affidavit from which it appears that the judgment upon which execution issued was entered on July 11, 1930, against defendant Dicker in the sum of $320, attorney's fees and costs, making a total of $445.25. In the original complaint, which was filed on October 3, 1925, several defendants in addition to Dicker were named. The complaint was based upon a loan in the sum of $500, payable in installments of $10 per week. A number of payments were made on the loan and the suit was for the balance of the loan. Several requests for payment were made prior to the filing of the action. After the action was filed several writs of attachment were issued against Dicker but nothing was obtained thereon. On numerous occasions notices and letters requesting payment on the obligation were made but without result. After the judgment was entered an execution was issued but it was returned unsatisfied. A second execution was issued and on May 12, 1931, defendant Dicker was examined but no assets could be located. Between the years 1931 and 1938 several demands were made upon Dicker for payment but no payment was made. The affidavit further sets forth that defendant Dicker "is now operating the Industrial Credit Association, in Los Angeles, California, and is financially able to pay this judgment." It is apparent from the affidavit that the court was justified in concluding that plaintiff had made reasonable effort to collect the judgment. Plaintiff did in fact "proceed in compliance with the provisions of section 681 of this code." Under section 685 a certain discretion is reposed in the court. A charge of abuse of discretion cannot be successfully predicated upon the failure of the court to require a showing by plaintiff that it had proceeded further in compliance with section 681 or that it had made efforts to collect the judgment in addition to the efforts shown in the affidavit.

[3-5] Defendant filed a counter-affidavit in which it is alleged that on April 2, 1934, plaintiff filed an action in the Municipal Court of Los Angeles, which action was based on the judgment rendered in the present litigation; and that the municipal court action was dismissed by stipulation on April 24, 1934. He now contends that since plaintiff elected to sue on the judgment in 1934 he is prevented under the doctrine of election of remedies from obtaining the order for the issuance of the execution from which the present appeal is taken. We cannot sustain this contention, for the remedies are not inconsistent. Shively v. Harris, 5 Cal.App. 513, 90 P. 971. The only substantial difference between the two remedies is that the proceeding under section 685 would create a lien upon the specific property levied upon, whereas the filing of a separate action would, if reduced to a judgment, create a more general lien. Moreover, defendant was not damaged by the filing of the action in the municipal court and he is therefore not now in position to claim that plaintiff is estopped from seeking a writ of execution in the present action. Campanella v. Campanella, 204 Cal. 515, 521, 269 P. 433.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

52 Cal.App.2d 287

In re DODDS' ESTATE.

WAIDLEY v. DOBBS.

Civ. 13687.

District Court of Appeal, Second District, Division 3, California.

May 26, 1942.

Hearing Denied July 23, 1942.

1. Judgment 🔑200
Trial 🔑388(1)

Whenever findings are required, no judgment can be rendered until they are made and filed with the clerk, and a judgment entered before that is done is void. Code Civ.Proc. § 632.

2. Appeal and error 🔑337(2)

Even if minute entry granting petition for letters of administration could be regarded as a judgment, it was not valid and could not constitute the basis for an appeal where it was entered before the filing of the decision. Probate Code, §§ 1221, 1230; Code Civ.Proc. § 632.

3. Appeal and error 🔑337(2)

An attempted appeal taken before rendition of judgment was premature and could not be saved by statute providing that no appeal should be dismissed on ground that it was taken after rendition of judgment or order and before formal entry. Code Civ. Proc. § 939.

Appeal from Superior Court, Los Angeles County; Jesse E. Stephens, Judge.

Proceeding in the matter of the estate of Virginia Dodds, deceased, wherein Orba L. Dobbs filed a petition for letters of administration, opposed by Raymond J. Waidley. From an order appointing an administrator, Raymond J. Waidley appeals, and Orba L. Dobbs moves to dismiss the appeal.

Motion granted and appeal dismissed.

Busick & Busick, of Sacramento, for appellant.

N. E. Youngblood, of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

This is an attempted appeal by the contestant from an order appointing an administrator. Trial was had before the court without a jury on the issues raised by the petition for letters of administration and the contestant's answer. The filing of written findings of fact and conclusions of law was not waived; they were filed on January 19, 1942, and the judgment based thereon was filed January 22, 1942. The notice of appeal was filed January 10, 1942. At the conclusion of the trial on January 6, 1942, the court orally announced what its decision would be and a minute entry was made as follows: "Petn granted. Bond 13500 Surety 27000 personal." Appellant relies on this minute entry as being the judgment from which the appeal is taken. He calls our attention to section 1221 of the Probate Code, which reads "All orders and decrees of the court or judge must be entered at length in the minute-book of the court, or else signed by the judge and filed; but decrees of distribution must always be so entered at length." We conclude that respondent's motion to dismiss the appeal on the ground that it was taken prematurely must be granted.

Section 1230 of the Probate Code provides that: "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions. The party affirming is plaintiff, and the one denying or avoiding is defendant. * * * If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in civil actions. * * *" Section 632 of the Code of Civil Procedure, which governs the procedure in civil actions, requires that (except when waived as therein provided): "In superior courts and municipal courts, upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk * * *."

[1, 2] It is well settled that whenever findings are required there can be no rendition of the judgment until they are made and filed with the clerk. (Crim v. Kessing, (1891) 89 Cal. 478, 487–488, 26 P. 1074, 23 Am.St.Rep. 491; Brownell v. Superior Court, (1910) 157 Cal. 703, 707, 109 P. 91); a judgment entered prior thereto is void (Easterly v. Cook, (1934) 140 Cal.App. 115, 123, 35 P.2d 164.) Therefore, even if we could regard the minute entry of January 6, 1942, as being otherwise a judgment it would have no validity because it was entered prior to filing the decision. On the record before us it cannot constitute the basis for an appeal.

[3] Section 939 of the Code of Civil Procedure provides that an appeal may be taken "within sixty days from the entry"

of the judgment or order to be appealed from or within thirty days "after" determination of a motion for a new trial. It also ordains that no appeal "shall be dismissed on the ground that it was taken after the rendition of such judgment or order and before formal entry." This latter provision, however, cannot save the attempted appeal in the instant case. It was taken before the rendition of the judgment and hence is irrefragably premature. (Aspegren & Co., Inc., v. Sherwood, Swan & Co., (1926) 199 Cal. 532, 537, 250 P. 400; Young v. Briggs, (1936) 17 Cal.App.2d 338, 344, 61 P.2d 1223.)

The appeal is dismissed.

SHINN and PARKER WOOD, JJ., concurred.

52 Cal.App.2d 228

FAITH v. ERHART.

Civ. 13465.

District Court of Appeal, Second District, Division 2, California.

May 25, 1942.

As Amended June 22, 1942.

1. Limitation of actions ⚷195(3)

A patient to be entitled to maintain action for dentist's malpractice in extracting teeth was required to establish that patient did not know cause of ill health at any time prior to one year from date of filing of complaint, and that failure to gain such knowledge was not due to a failure to exercise reasonable care. Code Civ.Proc. § 340, subd. 3.

2. Evidence ⚷20(1)

It is common knowledge that physicians frequently find great difficulty in determining cause of "generally run-down health" especially in case of a person whose teeth have been extracted in such manner as to leave many roots.

3. Limitation of actions ⚷179(2)

An action against dentist for malpractice in extracting teeth leaving some roots embedded in jaw was not barred by limitation because it was commenced more than ten years after extractions took place where plaintiff alleged that during four-year period before filing of complaint she consulted many physicians concerning her "generally run-down health" and that plaintiff was not apprised that her condition was caused by the extractions until an X-ray picture was taken within four months of filing of complaint. Code Civ.Proc. § 340, subd. 3.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Merrill Ann Faith against C. H. Erhart to recover for malpractice in extracting teeth, wherein defendant filed a demurrer. From a judgment sustaining the demurrer without leave to amend, plaintiff appeals.

Reversed with directions.

Philander B. Beadle and Samuel Vartan, both of San Francisco, for appellant.

Wm. M. Rains, of Los Angeles, for respondent.

W. J. WOOD, Justice.

This is an action against a dentist in which malpractice is charged. Plaintiff has appealed from a judgment entered against her after the trial court sustained without leave to amend defendant's demurrer to the first amended complaint.

It is alleged in the amended complaint that on August 15, 1930, at plaintiff's request defendant undertook to render dental care and treatment for her and in the course of the treatment extracted approximately twenty-six teeth. It is further alleged "that defendant so negligently performed said extractions and thereafter treated plaintiff therefor as to cause the roots or portions thereof of six of said extracted teeth to break and remain imbedded in plaintiff's jaw and gums. * * * That defendant so treated plaintiff for a period of four months and immediately prior to discharging plaintiff, defendant, with full knowledge that said roots had broken and remained imbedded in the jaw, which condition in the exercise of due care required further dental care and treatment, and with the intent to conceal from plaintiff all the facts and circumstances concerning said negligent treatment and results thereof, did falsely state and represent to plaintiff that the extractions were complete and that no further dental care and treatment was necessary because of the extractions. That plaintiff believed said representations to be true and relying upon the same, did not seek further medical or dental care or treatment therefor until the times hereinafter set forth. That plaintiff first learned the falsity of said statements on the 15th day of February, 1941, at which time x-ray films taken on said day revealed the presence of said broken roots and portions thereof, all in a highly infected state; that for approximately four years prior to said discovery, plaintiff suffered serious ill and generally run-down health; that plaintiff consulted and was examined by many physicians for her condition of poor health; that it was not discovered and plaintiff was not apprised that said condition of health was caused by and was due to the negligent extractions and discharge from further treatment as aforesaid until the taking of said x-rays on the 15th day of February, 1941. That by reason of said negligence of defendants, plaintiff suffered ill health, pain and suffering and was subjected to an operation to remove said broken roots."

The complaint was filed on May 22, 1941. It is contended by defendant that the action is barred by subdivision 3 of section 340 of the Code of Civil Procedure, which provides that actions founded in negligence must be commenced within one year. In Huysman v. Kirsch, 6 Cal.2d 302, 303, 57 P.2d 908, a general rule was announced which makes necessary a reversal of the judgment in the case now before us. In the Huysman case the court referred to its ruling in Marsh v. Industrial Acc. Comm., 217 Cal. 338, 18 P. 2d 933, 86 A.L.R. 563, in which it was held "that the statute of limitations did not run against these employees until they knew the causes of their injury, or by reasonable care and diligence should have known the cause of their injury" (page 312 of 6 Cal.2d, page 913 of 57 P.2d), and in applying the rule to a malpractice case the court said: "We can see no good reason why, if the statute of limitations did not begin to run in one case, that it should run in the other."

[1-3] From the allegations of the complaint in the present case it appears that plaintiff had no knowledge of the negligent acts of defendant until within four months of the filing of the complaint. It was incumbent upon her to establish that she did not know the cause of her ill health at any time prior to one year from the date of the filing of the complaint and that her failure to gain such knowledge was not due to a failure to exercise reasonable care and diligence. She alleges that during the four-year period before the filing of the complaint she consulted and was examined by many physicians concerning her "generally run-down health" and that she was not apprised that her condition was caused by the "negligent extractions" until an X-ray picture was taken. This is tantamount to an allegation that the physicians consulted did not ascertain or advise plaintiff as to the true cause of her ill health. Doubtless improvement could be made upon these allegations by giving the names and standing of the physicians consulted, the nature of their examinations and the advice given but the court erred in sustaining the demurrer without leave to amend, thus preventing the making of more specific allegations. The practice of medicine is not an exact science and it is a matter of common knowledge that physicians frequently find great difficulty in determining the cause of "generally run-down health." Especially is this true in the case of a person whose teeth had been extracted in such manner as to leave many of the roots remaining with the patient. It could not be held as a matter of law that the patient had failed in the exercise of due diligence if she and her consulting physicians felt it unnecessary to have X-ray pictures taken of the jaws from which the teeth had been extracted at least seven years earlier, at which time the extracting dentist had given assurance that no further dental care or treatment was necessary.

The judgment is reversed with directions to the superior court to permit plaintiff to file a second amended complaint if she cares to do so.

MOORE, P. J., concurred.

McCOMB, J., dissented.

ANDERSON v. PACIFIC TANK LINES, Inc., et al.

Civ. 2772.

District Court of Appeal, Fourth District, California.

May 25, 1942.

Rehearing Denied June 23, 1942.

Hearing Denied July 23, 1942.

1. Automobiles 🔑244(14), 245(17)

In action for injuries to truck driver, crashing into rear of trailer attached to defendants' disabled truck stopped on highway at night, evidence of defendants' failure to keep electric flares, placed to rear of trailer, illuminated during hours of darkness, as required by statute, was sufficient to take question of defendants' negligence to jury and support its implied finding of such negligence, though there was evidence that flares were extinguished by motorist driving over them before collision. Vehicle Code, § 590, St.1937, p. 620.

2. Automobiles 🔑173(5)

A breach of positive statutory duty of operator of disabled vehicle, stopped on highway at night, to see that flares, placed to rear of vehicle, remain illuminated during hours of darkness, is "negligence per se", which may support judgment for one injured in collision with such vehicle, if such negligence was proximate cause of collision and injured party was free from contributory negligence. Vehicle Code, § 590, St.1937, p. 620.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

3. Automobiles 🔑201(9)

Extinguishment of electric flares by motorist running over them after placing thereof on highway to rear of trailer, attached to disabled truck stopped thereon, was not "independent intervening act of negligence by a third party", proximately causing subsequent collision of another truck with such trailer, and hence did not relieve owner and driver of disabled truck from liability for injury to driver of other truck because of their negligence in failing to perform statutory duty to keep flares burning during hours of darkness. Vehicle Code, § 590, St. 1937, p. 620.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Intervening Act of Negligence by a Third Party".

4. Trial 🔑253(4)

In action for injuries to truck driver, crashing into rear of trailer attached to disabled truck stopped on highway at night, instruction to find for plaintiff, if driver of disabled truck failed to display continuously illuminated flares required by statute to rear of trailer and such violation proximately caused accident, was erroneous as omitting question of plaintiff's contributory negligence. Vehicle Code, §§ 590, 618(a), St. 1937, p. 620, St.1935, p. 201.

5. New trial 🔑56

Where juror's misconduct is urged as ground for new trial, prejudice from such misconduct must be shown.

6. Appeal and error 🔑1069(1)

In action for injuries to truck driver, crashing into rear of trailer attached to defendant's disabled truck stopped on highway, Supreme Court, on appeal from judgment on verdict of eleven of twelve jurors for plaintiff, cannot regard one juror's misconduct in inspecting plaintiff's truck during trial to inform himself as to truth of conflicting evidence concerning condition of its brakes as prejudicial to defendant, in absence of showing of what information juror obtained by such inspection or what effect it had on his verdict.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Harvey Anderson against the Pacific Tank Lines, Incorporated, and another for personal injuries. From a judgment for plaintiff and an order denying defendants' motion for judgment notwithstanding a jury's verdict for plaintiff, defendants appeal.

Affirmed.

Luce, Forward, Lee & Kunzel, Fred Kunzel, and Herbert Kunzel, all of San Diego, for appellants.

Harry P. Sweet and Joseph Brand Colton, both of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment for damages resulting from a collision of motor vehicles on the highway leading from San Diego to Imperial Valley, and from an order denying a motion for judgment notwithstanding the verdict. The accident occurred at about 9:30 o'clock on the night of December 18, 1939.

[1] Laurence Trevithick was the driver of a truck weighing, unloaded, more than 4,000 pounds to which was attached a trailer, both of which were loaded with oil at the time of the accident. When going up the La Posta Grade which, according to the evidence, was about 67 miles east of San Diego and about 17 miles west of Jacumba, a pinion shaft was stripped, stopping all forward movement of the vehicles which were then on their right half of the pavement. This happened at about 9 o'clock p. m. It being impossible to move the truck and trailer off the pavement, Trevithick, with the assistance of two other truck drivers who stopped to help him, blocked the wheels and placed two pot-type flares in front of the truck, and three electric flares to the rear of the trailer at distances respectively of about 3, 66 and 126 yards. In addition to these flares, two road lights on the front of the truck, which were covered with red cloth, were left burning, and also the amber and red clearance lights on both sides of both the truck and trailer and the two tail lights on both vehicles. There were also two reflectors on the rear of both the truck and the trailer. The road to the rear of the truck and trailer was straight and unobstructed for about 500 feet.

After the flares were placed Trevithick left as a passenger in one of the other trucks to go to Jacumba to telephone to his employer in Los Angeles for help. The stalled truck and trailer were left unattended.

At about 9:30 o'clock plaintiff was driving a truck easterly over the same highway. He crashed into the rear of the trailer and was injured. There were no illuminated flares to the rear of the trailer and there is evidence indicating that its tail lights were not illuminated. The clearance lights were illuminated. At least two of the electric flares which had been placed in the road to the rear of the trailer were found crushed. It is evident that some vehicle had been driven over them some time before the collision involved here.

Defendants argue that this evidence fails to show any negligence on their part and that their motions for nonsuit and for judgment notwithstanding the verdict should have been granted.

Section 590 of the Vehicle Code, St. 1935, p. 194, as amended by St.1937, p. 620, provides that when vehicles, such as we have here, are disabled on a highway and cannot be removed, flares, red lanterns or warning lights or reflectors shall be placed on the roadway both in front of and to the rear of the vehicle and that "the warning signals herein mentioned shall be displayed continuously during the times mentioned in section 618 while such vehicle remains disabled upon the highway."

The quoted portion of the section is clear and unambiguous and does not permit of judicial interpretation. It places on the operator of the stalled vehicle the duty of not only placing the warning signals out on the highway but of keeping them illuminated during the hours of darkness. As defendants did not perform the duty clearly imposed upon them by law the implied finding of the jury that they were guilty of negligence finds ample support in the record. There was no error in denying the motions for nonsuit and for judgment notwithstanding the verdict.

[2] Defendants rely upon the cases of Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Yates v. Brazelton, 108 Cal.App. 533, 291 P. 695; Lockie v. Pence, 5 Cal.App.2d 172, 42 P.2d 340; Nelson v. Signal Oil & Gas Co., 10 Cal.App. 2d 448, 51 P.2d 885, and Butcher v. Thornhill, 14 Cal.App.2d 149, 58 P.2d 179, as, by analogy, supporting the argument that as the flares had been placed to the rear of the trailer defendants had performed the duty required of them by law and could not be held to be negligent because the flares had been extinguished by some motorist having driven over them.

Each of the foregoing cases involved the question of negligence because a tail light on a vehicle which had once been lighted became extinguished without the knowledge of the driver. The rule announced in Berkovitz v. American River Gravel Co., supra, has been applied in subsequent cases. The Supreme Court there said [191 Cal.195, 215 P. 677]: "The tail light, however, is not in the immediate view of the driver, whose attention is ordinarily directed ahead, and it cannot be the intention of the law that a watchman must be maintained over the rear light to observe whether it is constantly burning. It is well known that with the best of care coaloil lights, as well as electric lights, sometimes go out. If one drives a motor vehicle in the nighttime when he knows, or in the exercise of ordinary care ought to know, that the tail light is not burning, he is guilty of negligence. While ignorance of the law is no excuse, ignorance of the fact, where ordinary care has been exercised, is a sufficient excuse. Violation of an ordinance 'is presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances.' Mora v. Favilla, 186 Cal. 199, 199 P. 17; [Harris v. Johnson, 174 Cal. 55, 58, 161 P. 1155, L.R.A. 1917C, 477, Ann.Cas.1918E, 560]; Gooding v. Chutes Co., 155 Cal. [620], 622, 102 P. 819, 23 L.R.A.,N.S., 1071, 18 Ann.Cas. 671; Cragg v. Los Angeles Trust Co., 154 Cal. [663], 667, 98 P. 1063, 16 Ann.Cas. 1061; Baddeley v. Shea, 114 Cal. [1], 6, 45 P. 990, 33 L.R.A. 747, 55 Am.St.Rep. 56."

The tail light cases are to be distinguished from the instant case by the difference in the statute regulating tail lights and that regulating the placing and maintaining of flares. See, §§ 615, 618 and 590, Vehicle Code. The latter section imposes the duty on the driver of the stalled truck to not only place the flares but to display them continuously during the required times. The law governing tail lights does not contain the second positive mandate. In the tail light cases negligence is predicated on the question of the use of due care to see that they are illuminated. They are based on common law negligence of failure to use due care rather than on negligence per se based on the failure to obey the positive mandate of a statute. In the instant case the statute places the positive duty on the operator to see that the flares remain illuminated after they are placed on the road. A breach of that duty is negligence per se which may support a judgment if it is a proximate cause of a collision and the injured party is free from contributory negligence.

[3] Defendants argue that the flares were extinguished by having been run over by some unknown motorist; that this was an independent intervening act of negligence by a third party which was the proximate cause of the accident instead of the negligence of defendants. Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 67 P.2d 678.

We cannot agree with this argument. This negligence of a third party, if any, might make him liable to plaintiff for resulting damages, but would not relieve defendants from the duty imposed upon them by law of keeping the flares burning during the hours of darkness while the truck and trailer remained on the highway. Stasulat v. Pacific Gas & Electric Co., supra, does not conflict with this conclusion.

[4] The trial judge instructed the jury on the provisions of section 590 and subdivision (a) of section 618 of the Vehicle Code. He concluded this instruction as follows: "I instruct you that the violation of Section 590 is a violation of a rule of positive law and is negligence in itself. So if you find by a fair preponderance of the evidence that defendant, Laurence Trevithick, the agent of defendant, Pacific Tank Lines, Inc., failed to display continuously the warnings required by section 590, and that such violation was proximately the cause of the accident and of the injuries and damages, if any, complained of by plaintiff, then your verdict should be for the plaintiff and against the defendants."

This instruction omitted the question of plaintiff's contributory negligence and to that extent was erroneous. However, the jury was elsewhere clearly instructed on contributory negligence and that plaintiff could not recover if he had been guilty of contributory negligence.

In the case of Ward v. Read, 219 Cal. 65, 25 P.2d 821, 822, the Supreme Court had before it for consideration an instruction which concluded as follows, "or if you find that the plaintiff was driving on his right side of the highway and in a careful manner and as a reasonable and prudent man would drive then and in that event you will find a verdict for the plaintiff."

When the Ward case was before this court we reached the conclusion that the instruction was prejudicially erroneous. Ward v. Read, 16 P.2d 799. The Supreme Court granted a hearing and affirmed the judgment. It held that all instructions must be considered together; that there were ample correct instructions on negligence, contributory negligence and proximate cause; that the jury could not have been misled by the admittedly erroneous instruction from which we have quoted. Upon the authority of Ward v. Read, supra, and for the reasons there given we cannot regard the erroneous quoted instruction given in the instant case as so prejudicial as to require a reversal of the judgment. Defendants cite the later case of Spear v. Leuenberger, 44 Cal.App. 2d 236, 112 P.2d 43, which holds that it is reversible error to give a formula instruction which omits one element necessary to a consideration of the case. However, we consider ourselves bound by the decision of the Supreme Court on this question.

[5, 6] Defendants urge that the trial court should have granted their motion for new trial because of misconduct on the part of a juror in inspecting plaintiff's truck during the progress of the trial to inform himself as to the truth of certain conflicting evidence as to the condition of its brakes. It was stipulated that the jurors "might view plaintiff's truck." The trial court did not act on the stipulation. The fact that a juror had inspected the truck came to the notice of counsel for defendants about twenty minutes after the case had been submitted to the jury. There is no showing of what information, if any, the juror obtained, or what effect, if any, the inspection of the truck had upon his verdict.

It is established that where misconduct of a juror is urged, prejudice from that misconduct must be shown. Wilson v. California Cab Co., 125 Cal.App. 383, 13 P.2d 758; MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 271 P. 509; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. The record is barren of any showing of prejudice to defendants resulting from the misconduct of the juror. The record shows that eleven jurors voted for the verdict which was returned in favor of plaintiff, and one voted against it. It may be that the juror who inspected the truck was the one who voted against the return of the verdict. We cannot assume prejudice and in the absence of a showing of prejudice we cannot regard the misconduct of the juror as prejudicial.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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52 Cal.App.2d 273

TURNER et al. v. LISCHNER et al.

Civ. 13464.

District Court of Appeal, Second District, Division 1, California.

May 26, 1942.

Rehearing Denied June 22, 1942.

1. Appeal and error 🔑712, 714(5)

Where a bill of exceptions has been duly certified and engrossed, reviewing court will not give consideration to matters outside the record, and will not review any question of fact presented in briefs of counsel, unless such factual matters may be quoted from transcript on appeal.

2. Appeal and error 🔑907(4)

Where bill of exceptions, in action against owners for injuries sustained by a tenant when porch railing collapsed, contained only a summary of testimony bearing on defendants' knowledge of defective condition of porch railing, District Court of Appeal would assume that porch railing was defective, and that such defective condition was sole proximate cause of injuries sustained by tenant.

3. Landlord and tenant 🔑164(2)

Where porch and clothes line were reserved by landlord for use in common by different tenants, there was imposed upon landlord a duty to use ordinary care to keep those particular portions of the premises in a safe condition.

4. Landlord and tenant 🔑164(6)

Recovery cannot be had for injury to a tenant when a portion of a guard railing collapses, where there is no evidence to charge owner with notice any more than there is to charge tenant with like notice.

5. Landlord and tenant 🔑170(1)

Where there are conditions which may tend to create a nuisance, accompanied by surrounding circumstances such as would reasonably put landlord on inquiry, and where a landlord is acquainted with specific facts which tend to subject occupants of the property to dangers, actual knowledge on landlord's part of such facts may warrant the conclusion that there was present "notice" of defects that was equivalent of knowledge thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

6. Landlord and tenant 🔑164(6)

A landlord is under duty not to expose his tenants to risks of which he has knowledge.

7. Landlord and tenant 🔑169(6)

Evidence supported finding that owners were possessed of knowledge, or equivalent of knowledge, of defective condition of porch railing, so as to render them liable for injuries sustained by tenant when railing collapsed, where owners reserved porch for use in common by the different tenants.

8. Appeal and error ⇨1002

The District Court of Appeal is not empowered to review questions of fact, where there is in the record substantial evidence and inferences deductible therefrom, although contradicted, which if believed by jury will support their verdict.

9. Appeal and error ⇨1003, 1012(1)

The alleged weakness and lack of convincing force of the evidence for a party to the litigation is a matter primarily for consideration by trial court or jury

10. Judgment ⇨199(3)
Trial ⇨139(1)

Motions for a nonsuit, directed verdict, and judgment notwithstanding the verdict must be denied when there is any evidence to sustain plaintiff's case.

11. Judgment ⇨199(3)
Trial ⇨165, 178

In passing upon motions for a nonsuit, directed verdict, and judgment notwithstanding the verdict, trial court must give to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference that may be drawn from such evidence.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by A. E. Turner and Amy Pearl Turner against Hyman Lischner and others for injuries suffered by plaintiff Amy Pearl Turner, when a wooden railing on an upper porch of premises owned by defendants, and occupied in part by plaintiffs, collapsed. From a judgment for plaintiffs, the defendants appeal.

Affirmed.

Derthick, Cusack & Ganahl and August Weymann, all of Los Angeles, for appellants.

Henry S. Cohen and Bernard B. Cohen, both of Los Angeles, for respondents.

WHITE, Justice.

Plaintiffs brought this action against defendants to recover damages for injuries suffered by plaintiff Amy Pearl Turner when a wooden railing on an upper porch of the premises owned by defendants and occupied in part by plaintiffs gave way and collapsed, thereby causing Mrs. Turner to fall to the ground a distance of approximately fourteen feet. The complaint alleges and it is undenied in the answer that the accident in question occurred on the 5th day of February, 1940. The case was tried with a jury, and at the conclusion of plaintiff's case motions for nonsuit were made on behalf of each defendant and denied. At the conclusion of the trial motions for a directed verdict in favor of the defendants were made, and likewise denied. The jury returned a verdict in favor of the plaintiffs and assessed damages against the defendants in the sum of $850. From the judgment entered upon such verdict defendants prosecute this appeal. The record is brought into this court upon a bill of exceptions.

We are unable to give an epitome of the evidence in its entirety for the reason that the bill of exceptions before us bears in part the following certificate of the trial court: "* * * and the same is therefore allowed, settled and certified by me that the testimony contained therein is a summary of all the testimony in the record bearing on the knowledge of the defendants as to any defect in the porch rail as described in the complaint, and on that point alone."

[1, 2] Notwithstanding the several claims urged by appellants as grounds for a reversal of the judgment, we are restricted to a consideration only of the claim that the evidence is insufficient as a matter of law to show that appellants had knowledge of the defective condition of the porch railing in question. This for the reason that it is the settled rule that when a bill of exceptions has been duly certified and engrossed, the reviewing court will not give consideration to matters outside the record and will not review any question of fact presented in the briefs of counsel, unless such factual matters may be quoted from the transcript on appeal. Shively v. Kochman, 20 Cal.App.2d 688, 691, 68 P.2d 255; Steele v. International Air Race Ass'n, 47 Cal.App.2d 61, 117 P.2d 407; Daly v. Otis, 92 Cal.App. 242, 243, 267 P. 921. In the light of the record before us, we must assume that the porch railing was defective and that such defective condition was the sole proximate cause of the accident which resulted in the injuries sustained by plaintiff Mrs. Turner.

Confining ourselves to the sole question presented by the record, viz., whether appellants had knowledge of such defective condition of the railing in question, we find in the transcript testimony that in March, 1938, defendant Dr. Lischner employed a carpenter to put the premises in condition for leasing; that he was the only workman on the premises to his knowledge. Another witness testified that in February and March, 1938, he lived in a room from which, on March 12, he looked out of a window across a yard toward the porch described in the pleadings herein, about thirty feet away, and saw a man carrying lumber and making repairs; that he saw this man nail a board, approximately one by six inches, across the top of the railing; that at that time he saw the defendant Dr. Lischner on the premises, and that the doctor had his sign on the building at the same time. While it is true that the carpenter aforesaid by his testimony denied nailing the one-by-six on top of the railing, his testimony served only to create a conflict with the inferences logically deducible from the testimony of the previous witness who testified that he saw the one-by-six nailed on the railing. Another witness testified that she was present on or about March 3, 1938, when defendant Dr. Lischner was informed that the building and porches were in bad shape and was asked to make some repairs, to which he replied that he would not spend any more money on the building; that he had spent all he was going to spend. This witness was present on another occasion shortly after May 3, 1938, when Dr. Lischner was again informed that the premises were in bad shape and that the building and porches required repair, to which the named defendant again replied that he would not spend any more money on the place. This same witness, who testified that she was engaged in the real estate business in February and March, 1938, and was familiar with the condition of the premises involved in this case as of that time, identified certain photographs as being fair representations of the condition of the rear end of the building and the stairs during the months of February and March, 1938. Another witness testified directly that she was the woman mentioned by the preceding witness who had informed defendant Dr. Lischner of the allegedly bad condition of the building and porches and had requested him to make some repairs. She also testified that on the two occasions in question when she talked with said defendant, the latter informed her of his unwillingness to spend any more money in repairing the premises.

The defendant Dr. Lischner testified that he had no knowledge of any latent or other defect in the porch rail; that prior to leasing the premises in March, 1938, he employed a carpenter to put the premises in condition; he denied that he had his office or office sign on the premises in March of 1938. The carpenter heretofore mentioned further testified that he examined the rear stairs and porch of the building in question and that they "appeared in safe and sound condition"; that he did not nail the board on the top of the railing. Another witness, testifying for the defendant, stated that from October, 1937, to March, 1938, he lived on the premises; that he used the rear porch frequently to hang out wash; that the porch and railing appeared to be in good condition. Similar testimony was given by another tenant.

[3-5] It is conceded by all parties to the instant litigation, and the exhibit introduced into evidence and now before us confirms the concession, that the defect in question was a latent one at the time of the accident. Where, as in the case at bar, a portion of the premises, that is, the porch and clothesline, as indicated by the testimony, are reserved by the landlord for use in common by the different tenants, there is imposed upon the former a duty to use ordinary care to keep those particular portions of the premises in a safe condition. If a personal injury results to a tenant from the landlord's negligence in this regard, the latter is liable therefor. Bock v. Hamilton Square Baptist Church, 219 Cal. 284, 287, 26 P.2d 7. If this case presented the familiar legal question as to the liability of the landlord for injury to a tenant to a defect unknown to either, our task would be a simple one, for it is uniformly held that in cases involving injury to a tenant when a portion of a guard railing collapses where there is no evidence to charge the owner with notice any more than there is to charge the tenant with like notice recovery cannot be had (Ayres v. Wright, 103 Cal.App. 610, 284 P. 1077; De Motte v. Arkell, 77 Cal.App. 610, 247 P. 254), for the reason that liability for personal injuries to a tenant attaches to a landlord because he knew, not because he ought to have known, of the defective condition of the premises. But the law is equally well settled that where there are conditions which may tend to create a nuisance, accompanied by surrounding circumstances such as would reasonably and justly put an owner on inquiry, and where a landlord is acquainted with specific facts which tend

to subject occupants of the property to dangers, actual knowledge on his part of such facts may warrant the conclusion, based on common experience, that there was present notice of defects that was the equivalent of knowledge thereof. Under the existence of such circumstances liability attaches to the landlord because the law assumes, under such conditions, not only that he ought to have known but that he did know.

[6, 7] Having in mind the ever-present duty resting upon a landlord not to expose his tenants to risks of which he has knowledge, we are confronted with the question whether the evidence in the case at bar provides proof of knowledge or its equivalent upon his part. We are persuaded that the evidence in this case, together with the reasonable inferences and deductions to be drawn therefrom, authorized the jury to conclude that the appellant owner was possessed of knowledge or the equivalent of knowledge of the defective condition of the porch railing. It is unnecessary to here reiterate the evidence hereinbefore narrated. Suffice it to say that such evidence supplies proof of the fact that complaint was made to appellant Dr. Lischner of the defective condition existing in the porch construction; that his reply to such complaints consisted of an expression of his refusal to spend further sums of money upon the premises; that an employee of appellant nailed a board across the top of the railing. In this connection it should be noted that the porch railing which collapsed, with the board nailed thereon, was exhibited to the jury and is now before us. This exhibit not only discloses the defective condition of the railing, but warrants the inference that appellant's employee carelessly nailed the one-by-six on top of the two-by-four, thereby not only concealing an existing defect but creating a dangerous hazard not thereafter observable or noticeable by respondents.

[8, 9] True, some of the evidence upon which the foregoing inferences might be predicated was contradicted by witnesses for the defendants, but such contradictions only presented to the jury the duty of formulating a verdict based on conflicting testimony. Even though we concede that there were present in the case direct testimony and evidence of circumstances that, had the verdict been in favor of defendants, such verdict would have been supported by ample proof, nevertheless this court is not empowered to review questions of fact where there is in the record substantial evidence and inferences deducible therefrom, although contradicted, which if believed by the jury will support their verdict. In such a situation, the jury's verdict as to such matters is final and conclusive. The alleged weakness and lack of convincing force of the evidence for a party to the litigation is a matter primarily for consideration by the trial court or jury.

[10, 11] Appellants' final contention, that the trial court erred in denying their motions for a nonsuit, directed verdict and judgment notwithstanding the verdict, cannot be sustained, under the general and uniformly recognized rule that such motions must be denied when there is any evidence to sustain the plaintiff's case. In passing upon such motions, the power of the court is strictly limited. It has no authority to weigh the evidence, but must view it in the light most favorable to plaintiff. In other words, the court must give to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference that may be drawn from such evidence.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

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52 Cal.App.2d 330

CAMINETTI v. GUARANTY UNION LIFE INS. CO.

Civ. 13381.

District Court of Appeal, Second District, Division 1, California.

May 28, 1942.

Rehearing Denied June 19, 1942.

Hearing Denied July 23, 1942.

1. Insurance 🔑64

Evidence supported trial court's conclusion that the withdrawal of $6,000 per month from funds of a mutual life insurance company for use in paying salaries of those who managed company made it "hazardous" for company to continue in business within the statute authorizing in such case the

Superior Court to vest the assets of the company in the insurance commissioner. St. 1935, pp. 496 et seq., 541, § 1012, St.1937, p. 2564, § 1011(d).

See Words and Phrases, Permanent Edition, for all other definitions of "Hazardous".

2. Insurance 🔑44, 64

The Insurance Code does not require that the insurance commissioner wait until an insurance company is insolvent before taking action to protect policyholders. St. 1935, p. 496 et seq.

3. Insurance 🔑64

The withdrawal of excessive sums from funds of a mutual life insurance company for use in paying salaries of those who managed company created a "hazardous" condition within statute authorizing superior court to vest title to an insurance company's assets in insurance commissioner, in his official capacity, upon the filing of an application by commissioner showing that company is in such condition that its further transaction of business will be hazardous to policyholders or the public, notwithstanding that company was solvent. St.1937, p. 2564, § 1011(d).

4. Insurance 🔑44, 64

Under statute authorizing superior court to vest title to an insurance company's assets in insurance commissioner, in his official capacity, upon the filing of an application by commissioner showing that company is in such condition that its further transaction of business will be "hazardous" to policyholders or the public, the quoted word means involving risk of loss. St.1937, p. 2564, § 1011 (d).

The noun "hazard" means exposure to the chance of loss or injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Hazard".

5. Insurance 🔑44, 64

If the management of an insurance company so conducts its business that there is loss, or risk of loss to policyholders, it becomes the duty of the insurance commissioner to take possession of company's assets and to conduct its business as conservator. St. 1935, p. 496 et seq.; St.1937, p. 2564, § 1011 (d).

6. Insurance 🔑64

Evidence that a mutual life insurance company rejected claims of $89,100.99 and settled them by refunding premiums amounting to $16,431.61, that during same year company compromised claims of $177,370.83, and paid in connection with such compromise settlements $84,081.85, and that during a six year period no dividends were paid to policyholders and premiums on one group of policies were twice increased warranted conclusion that there was a "hazard" to company and policyholders so as to justify insurance commissioner in taking over company's business. St.1937, p. 2564, § 1011(d).

7. Insurance 🔑64

Improper proprietary control, if any, exercised over a mutual life insurance company by members of family which managed company would be evidence of a "hazardous" condition within statute authorizing superior court to vest title to an insurance company's assets in insurance commissioner, in his official capacity, upon the filing of an application by commissioner showing that company is in such condition that its further transaction of business will be hazardous to policyholders or the public. St.1937, p. 2564, § 1011(d).

8. Insurance 🔑10

The office of insurance commissioner and the Insurance Code are designed to insure that an officer of the state will be vigilant to protect the rights of the true owners of every insurance business conducted in California, whether that business is mutual or proprietary in character. St.1935, p. 496 et seq.

9. Insurance 🔑64

Where a mutual life insurance company made an application for an order terminating a conservatorship under insurance commissioner after commissioner had taken over company's business on ground that payment out of company's funds of excessive sums as salaries to members of family which managed company was hazardous to policyholders, trial court could properly consider the circumstance that at time of take-over the company's board of directors made a cut in salaries and that some of the directors resigned, in determining that salaries theretofore paid were improper. St.1935, p. 496 et seq.; St.1937, p. 2564, § 1011(d).

10. Insurance 🔑64

Where insurance commissioner took over a mutual life insurance company's business on ground that payment out of company's funds of excessive sums as salaries to family which managed company was hazardous to policyholders, the ground for the take-over was not removed so as to justify returning the business to family managers by fact that at time of take-over the company's board of directors made a cut in salaries paid to members of family in control and that some of the directors resigned, especially where there was no change in power of family management to control company. St.1935, pp. 496 et seq., 541, § 1012; St.1937, p. 2564, § 1011(d).

11. Insurance 🔑64

Whether family managers of a mutual life insurance company, which had been taken over by insurance commissioner on ground that payment out of company's funds of excessive sums as salaries to managers was hazardous to policyholders, had such intention as would thereafter preclude further raids upon funds of policyholders so as to justify returning the business to managers was confided to trial court's discretion. St. 1935, pp. 496 et seq., 541, § 1012; St.1937, p. 2564, § 1011(d).

12. Appeal and error 🔑1010(1)

If the trial court, upon competent testimony and without abuse of discretion, determines that the past record of the management of a mutual insurance company is such that that management should not again be permitted to control destinies of policyholders, such determination is binding upon courts of review.

13. Trial 🔑59(2)

The order of proof on any trial is, to considerable extent, within the trial court's discretion.

14. Insurance 🔑64

A mutual life insurance company seeking an order terminating a conservatorship of its business under insurance commissioner was bound to undertake the presentation of testimony and to assume the burden of proof as to allegations in company's application for order. St.1935, pp. 496 et seq., 541, § 1012; St.1937, p. 2564, § 1011(d).

15. Insurance 🔑10

The Insurance Commissioner of the state of California is a "public officer", clothed with power of the state.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Officer".

16. Insurance 🔑3

The business of insurance is a "business charged with a public interest".

See Words and Phrases, Permanent Edition, for all other definitions of "Business Charged With a Public Interest".

17. Evidence 🔑83(1)

In determining whether the insurance commissioner was justified in taking over an insurance company, the commissioner was entitled to a presumption that his official duty has been regularly performed, and such presumption applied to a finding of the commissioner, after an examination, that company was in such condition that its further transaction of business would be hazardous to its policyholders or creditors or to the public. St.1935, pp. 496 et seq., 541, § 1012; St.1937, p. 2564, § 1011(d); Code Civ. Proc. § 1963, subd. 15.

18. Insurance 🔑64

Where mutual life insurance company made an application for an order terminating a conservatorship under insurance commissioner after company's business had been taken over by commissioner on ground that payment out of company's funds of excessive sums as salaries to members of family which managed company was hazardous to policyholders, evidence respecting expense of other California mutual insurance companies and the solicitation by commissioner of proxies for himself in the company was incompetent. St.1935, pp. 496 et seq., 541, § 1012; St.1937, p. 2564, § 1011(d).

19. Insurance 🔑64

Where a mutual life insurance company made an application for an order terminating a conservatorship after commissioner had taken over company's business on ground that payment out of company's funds of excessive sums as salaries to members of a family which managed company was hazardous to policyholders, evidence of a purported approval by a former commissioner of payment of attorney's fees incurred in defending officers against criminal charges was incompetent. St.1935, pp. 496 et seq., 541, § 1012; St.1937, p. 2564, § 1011(d).

◆

Appeal from Superior Court, Los Angeles County; Buben S. Schmidt, Judge.

Proceedings by A. Caminetti, Jr., as Insurance Commissioner, etc., against Guaranty Union Life Insurance Company, a corporation. From an order of the superior court refusing to set aside an order appointing a conservator, Guaranty Union Life Insurance Company, a corporation, appeals.

Order sustained.

Otto Christensen and John L. Flynn, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

In this case we have again to deal with an appeal from an order of the superior court approving the take-over of a mutual insurance company by the State Insurance Commissioner. Principles involved are the same as those discussed in A. Caminetti, Jr., Insurance Commissioner of the State of California v. State Mutual Life Insurance Co., Cal.App., 126 P.2d 165, this day decided. The facts are similar, with exceptions which will be pointed out. The arguments are likewise similar, with some additional to those discussed in the State Mutual case, supra.

Guaranty Union Life Insurance Company was organized as a mutual insurance company under the Insurance Code of this state. St.1935, p. 496 et seq. The primary movers in this organization and the managers of the company were two brothers, who had theretofore been managers of two mutual assessment insurance companies. Upon the organization of the new company the assets and insurance business of the two companies last mentioned were transferred to it.

As the new company grew, executives and employees were added. Among these were more brothers of the two already mentioned, a sister, and brothers-in-law, until at the time of the take-over, there were engaged in the business as executives, managers and employees eight related persons. These persons were being paid by the company $6,000 per month as salaries. In the meantime, one of the first mentioned brothers passed away, and the other brother who was with him in the beginning became president of the company in his place.

The payment of this large amount of salaries to the members of a family, which dominated and controlled a mutual insurance company, was the principal reason alleged by the insurance commissioner for the take-over.

[1] The company was solvent; it had grown under the family management; but the commissioner determined, and the court approved his determination, that the withdrawal from the funds of the mutual policyholders of these monthly salaries made it hazardous for it to continue in business. There is substantial evidence in the record to support this conclusion of the trial court, which requires the affirmance of the order. As compared with $72,000 per year paid to the family management of appellant corporation, an actuary called as a witness for the corporation testified that in his opinion a company of its size and character would require an executive staff of three or four persons, with a salary cost of about $24,000 a year.

Estoppel of the state to take over the company has already been discussed in the case of State Mutual Life Insurance Co., supra.

Further contentions presented by the appellant are disposed of as follows:

(a) That the order of the trial court is not supported by the evidence. With the exception of that mentioned hereunder, there is no need of repeating in any detail the evidence before the trial court. As already stated, our examination of the record discloses that there was sufficient evidence to support the order dismissing appellant's application to terminate the conservatorship of the commissioner and for the return of the business.

(b) That the evidence does not support the commissioner's holding that the payment of the salaries complained of involved a hazardous condition as defined in subdivision d of section 1011 of the Insurance Code, St.1937, p. 2564; said subdivision and section only means financial hazard.

[2, 3] Did the withdrawal of these funds constitute a hazardous condition as defined by the Insurance Code? To follow to its conclusion appellant's argument that there could be no hazard to policyholders so long as the business is solvent, would be to sanction the withdrawal of policyholders' money in the payment of excessive salaries without restriction. This is not the law. Excessive withdrawal of policyholders' funds continued long enough will eventually render any company insolvent, and thus destroy the very purpose of the payment of insurance premiums. The people of the

state and interested policyholders have a vital interest in this. There is no requirement of our Insurance Code that the insurance commissioner must wait until an insurance company is insolvent before he takes action to protect the policyholders. To so hold would be to apply the ancient aphorism about locking the barn door after the horse is stolen.

[4, 5] Along with other meanings, the standard dictionary defines the noun "hazard" as exposure to the chance of loss or injury, and the adjective "hazardous" as involving risk of loss. It is in this sense that subdivision (d) of section 1011 of the Insurance Code must be read. If the management of the insurance company so conducts its business that there is loss, or risk of loss to the policyholders, it becomes the duty of the insurance commissioner to take possession of the company's assets and to conduct its business as conservator. This is the meaning of the word "hazardous" as used in the statute.

The Insurance Code contains ample authority for the reorganization or rehabilitation of insurance companies taken over by the insurance commissioner, so that they may resume normal business, if that be possible. Liquidation does not necessarily need to follow conservatorship.

Withdrawal of money from a mutual insurance company as salary for services not performed, or for services overpaid, continued long enough must finally result in loss to the policyholder members and in the insolvency of the company. And, insolvent or not, such withdrawals must result in loss to the policyholders month by month as the money is taken out of the insurance company's funds.

[6] There are additional reasons why improper withdrawal of funds becomes hazardous to an insurance company, to its members, and to the public. The management may succumb to the temptation to improperly rewrite existing policies, thus transferring to the general funds of the company built-up policy reserves belonging to individual policyholders, for the purpose of using such reserves to pay excessive salaries. Or the management may be induced to adopt an unfair and hardboiled policy in dealing with claims of beneficiaries, to the end that money for excessive and unearned salaries may be diverted from them. During the year 1939 appellant corporation rejected claims of $89,100.99, and settled these by the refund of premiums amounting to $16,431.61, or $72,669.38 less than was payable under the terms of the policies. During the same year it compromised claims of $177,370.83, paying in connection with such compromise settlements $84,081.85, or $93,288.98 less than the amount covenanted to have been paid by the policies. By the rejection and compromise of these claims, the company "saved" a total of $165,958.36 in that year. During the six-year period in which the corporation was operated by this family management no dividends were paid to the policyholders, and premiums on one group of policies were twice increased. The insurance commissioner could well have determined that this record alone indicated a hazard to the company and its policyholders, either by improper assumption of risks, or by unfair treatment of policyholders and claimants.

[7] There has been some discussion in the briefs as to whether the family management of this company exercised a proprietary control over its affairs. If there was any improper proprietary control it would not only fall under another subsection of Insurance Code section 1011, but would be evidence of hazardous condition as the term has been defined. In this connection, there are in the record two rather significant things:

One was an agreement entered into between the brothers, sisters, and brothers-in-law, requiring them to pay to certain relatives of any of them who might die a proportion of the salary paid by the company to surviving members of the family. In this agreement were recitals by way of preamble, as follows:

"This Agreement, made and entered into by and between the following named individuals: A. L. Rose, Milton Rosenthal, D. S. Kent, B. Abrams, S. G. Rose, Donald L. Rose, Paul Weller.

"Whereas, the Guaranty Union Life Insurance Company is a mutual company with no evidence of ownership available; and

"Whereas, each of the above named individuals have been responsible for the organization, growth, and development of the company; and

"Whereas, it is thought advisable to provide in some manner for the future security of the families of each of the above named individuals in the event of disability or death of any one of the above named individuals, we do each of us agree as follows, to wit:"

Secondly, the brother who was president admitted that the company paid the legal expense, including attorney's fees, involved in a proceeding in the superior court which resulted in an order changing his name from Rosenthal to Rose.

[8] These matters, and others before the trial court, demonstrate the rather common and sometimes erroneous concept of human nature that that over which one exercises dominion and control becomes one's vested property. The office of insurance commissioner and the code of procedure enacted into law by our legislature, denominated the Insurance Code, are designed to insure that an officer of the state will be vigilant to protect the rights of the true owners of every insurance business conducted in California, whether that business be mutual or proprietary in character.

[9] (c) It then is argued that if any grounds for the take-over existed, they were removed by the voluntary action of the company. At or about the time of the take-over the board of directors made a drastic cut in salaries paid to the members of the family in control; some of the directors resigned; other citizens of the community took their places. In passing, it may be said that the trial court could well have considered this circumstance in determining that the salaries theretofore paid were improper. However, these facts are urged in support of appellant's contention that the trial court should have found under Insurance Code section 1012, St. 1935, p. 541, "that said person can properly resume title and possession of its property and the conduct of its business."

[10-12] To this argument there is a ready and complete answer. It is that there was no change in the power to control this company by the family management of it. Before the court or the commissioner would have been warranted in turning the business of the mutual members of the company back to the family managers there must have been evident a state of mind as to them which would thereafter preclude any further raids upon the funds of the policyholders. This is a matter which, of necessity, must be confined to the discretion of the trial court, which hears the testimony, and views the witnesses, and analyzes the financial statements of the company. If the trial court, upon competent testimony and without abuse of discretion, determines that the past record of the management of a mutual company is such that that management should not again be permitted to control the destinies of the policyholders, that determination is binding upon our courts of review.

(d) It is next argued that the trial court erred in compelling appellant to assume the burden of proof upon the hearing of its application in the superior court. This involves an interesting question of procedure in cases of this kind, apparently necessary to be determined for the first time by this court. What should be the order of proof after the insurance commissioner has taken over an insurance company, and the matter is before the superior court? And upon whom rests the burden of proof?

The trial court required appellant to assume the burden of proof and to proceed with the presentation of testimony. When the case for the applicant was closed, a motion was granted dismissing defendant's application to have the business restored to the company.

[13] Of course, the order of proof on any trial is a matter to some considerable extent within the discretion of the trial court. But the appellant complains that it was required not only to present its case first, but to undertake the burden of proof incumbent upon the plaintiff in any ordinary law suit.

[14] The trial court was correct in its ruling as to the burden of proof. It was the duty of appellant to undertake the presentation of testimony and to assume the burden of proof upon its application to the court for an order terminating the conservatorship.

[15-17] The insurance commissioner of the State of California is a public officer, clothed with the power of the State. The business of insurance is one charged with a public interest. Upon consideration of whether or not the commissioner was justified in taking over an insurance company, he is entitled to the presumption that his official duty has been regularly performed. (Subd. 15, § 1963, Code of Civ.Proc.) This presumption applies to the finding of the commissioner in this case that after an

examination appellant corporation was in such condition that its further transaction of business would be hazardous to its policyholders, or creditors, or to the public. (Subd. d, § 1011, Ins.Code.)

The Insurance Code provides that the order of the commissioner taking over the company shall continue in force and effect until on application either of the commissioner or of the company it shall appear to the court that the ground for the commissioner's order does not exist or has been removed and that said company can properly resume title and possession of its property and the conduct of the business. (§ 1012, Ins.Code.)

In this case the application for restoration of the company to its former managers alleged that there was no ground for the making of the commissioner's order, that the cause for the take-over, if any, was removed, and that the company could properly resume title and possession of its property and the conduct of the business. It was incumbent upon the appellant to prove the facts alleged. Therefore, the burden of proof was upon appellant.

[18, 19] (e) Finally we come to a consideration of asserted error in the trial court's rulings on the admissibility of evidence. These rulings come under three heads: (1) That the court erred in sustaining objection to admission of evidence as to the expense of other California mutual insurance companies; (2) that the court erred in sustaining objection to the admission of evidence as to the solicitation by the insurance commissioner of proxies for himself in this particular company; and (3) that objection was sustained to the introduction of evidence of a purported approval by a former insurance commissioner of the payment of attorney's fees incurred in defending officers against criminal charges. An examination of the record sustains the view which the trial court took in its rulings on each of these matters, i. e., that they, and each of them, were incompetent, irrelevant and immaterial.

The order of the superior court denying the application of appellant for an order terminating the conservatorship is sustained.

YORK, P. J., and DORAN, J., concurred.

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52 Cal.App.2d 321

CAMINETTI v. STATE MUT. LIFE INS. CO.

Civ. 13165.

District Court of Appeal, Second District, Division 1, California.

May 28, 1942.

1. Insurance ⟹56

The manager of a mutual insurance company, by his representation of policyholders as their proxy and by his assumption of conduct of their mutual business, occupies a "fiduciary relation" to policyholders and owes to them exact honesty in all of his dealings with their money, and, as to them, he is bound to act in good conscience and in good faith, having due regard for their interests at all times, and he may not cause to be paid to himself any of the policyholders' money that is not fairly and equitably due to him, considering size of company and nature of services which he renders. St. 1935, pp. 671–681, §§ 10810–10940.

See Words and Phrases, Permanent Edition, for all other definitions of "Fiduciary Relation".

2. Insurance ⟹64

Evidence supported conclusion that $1,000 a month paid from a mutual life insurance company's funds to its executive vice president as salary was "hazardous" to policyholders within the statute authorizing superior court to vest assets of company in such case in the insurance commissioner and a breach of the "fiduciary relation" which vice president sustained to mutual members whom he represented. St.1935, pp. 540, 541, 671–681, §§ 1011, 1012, 10810–10940.

See Words and Phrases, Permanent Edition, for all other definitions of "Hazardous".

3. Appeal and error ⟹1010(1)

Where there was substantial evidence in record to support trial court's conclusion, the District Court of Appeal was bound as a matter of law to affirm judgment.

4. Insurance ⟹3

The business of insurance is a "business affected with a public interest".

See Words and Phrases, Permanent Edition, for all other definitions of "Business Affected With a Public Interest".

5. Insurance ⚷64

The superior court had jurisdiction to make an ex parte order vesting title to the assets of a mutual life insurance company in the insurance commissioner, in his official capacity, where payment of monthly salary to company's executive vice president out of company's funds was hazardous to company and its policyholders. St.1935, pp. 540, 541, 671–681, §§ 1011, 1012, 10810–10940.

6. Insurance ⚷64

An application of the insurance commissioner for an ex parte order vesting title to a mutual life insurance company's assets in commissioner, in his official capacity, was not deficient where application alleged that a monthly salary paid to company's executive vice president out of company's funds was so disproportionate to value of services rendered by him and to company's income that further transaction of its business would be hazardous to policyholders and the public. St.1935, pp. 540, 541, 671–681, §§ 1011, 1012, 10810–10940.

7. Insurance ⚷4

The statute under which insurance commissioner proceeded in obtaining an ex parte order vesting title to a mutual life insurance company's assets in him, in his official capacity, is constitutional. St.1935, pp. 540, 541, 671–681, §§ 1011, 1012, 10810–10940.

8. Estoppel ⚷62(2)

That the insurance commissioner and his predecessors in office knew of practices by a mutual life insurance company which were hazardous to its policyholders and the public but failed to take over the company after knowing of such practices for several years did not "estop" the state from taking over company. St.1935, pp. 540, 541, 671–681, §§ 1011, 1012, 10810–10940.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

9. Estoppel ⚷62(2)

Failure of state officers to enforce a law never "estops" the people from enforcing that law either then or at any future time.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceedings by A. Caminetti, Jr., as Insurance Commissioner, etc., against the State Mutual Life Insurance Company, a corporation, wherein the commissioner secured an order vesting title in him, in his official capacity, to assets of the insurance company and the company filed a notice of motion to set aside the order. From an order denying the motion, the State Mutual Life Insurance Company, a corporation, appeals.

Affirmed.

See, also, Cal.App., 126 P.2d 169.

Sherman & Sherman, Robert W. Kenny, Morris E. Cohn, and W. B. Thomas, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

The Insurance Commissioner of the State of California, upon an ex parte application to the superior court secured an order vesting title in him, in his official capacity, to all of the assets of State Mutual Life Insurance Company, a California insurance corporation. Pursuant to said order, the commissioner took possession of the books, records, property and assets of the company, and proceeded to conduct its business as conservator. Insurance Code, § 1011, St.1935, p. 540. State Mutual Life Insurance Company is a mutual insurance company as defined by chapter 9 of the Insurance Code. Insurance Code, §§ 10810–10940.

The principal reason alleged by the commissioner for the take-over was that $1,000 a month salary paid to the executive vice-president of this insurance company was so disproportionate to the value of the services rendered by him, and to the income of the company, that further transaction of its business would be hazardous to its policyholders and the public. Insurance Code, § 1011.

The Insurance Code provides in cases of this kind that the ex parte order shall continue in force and effect until it shall appear to the court that the cause for granting said order does not exist or has been removed "and that said person can properly resume title and possession of its property and the conduct of its business." Insurance Code, § 1012.

The insurance company filed its notice of motion to set aside the order, and also filed an answer to the commissioner's application therefor; and the matter came on regularly for hearing. The superior court made its order denying the motion. From this order the company has appealed.

An example to illustrate the operations of any general type of business must of necessity be incomplete. To include within it all of the things in detail which go to make up the business, and then to attempt to distinguish between different variants which occur in the conduct of the business generally, makes the example too long and destroys its purpose—which is merely illustrative. With the understanding that it does not contain all of the elements which go to make up every company; stripped of technical distinctions and niceties; and in order to illustrate in part the functions of a mutual insurance company, an example would be as follows: Ten individuals each pay a premium of $1 a month for the purpose of insuring themselves against loss by accident, or ill health, or death, or other casualty. From this premium money, and based on averages used for insurance purposes, these persons build up a fund to pay losses caused by the hazards insured against. Ordinarily they are called "policyholders." From year to year part of the premium money is paid out for losses; part of it goes into reserves for future losses; part of it is spent for necessary expenses of conducting their mutual business.

[1] At this point there is to be considered what might be termed the eleventh man. He is the manager of the mutual business, which is generally carried on through the instrumentality of a non-profit corporation. The manager secures from the policyholders proxies authorizing him to represent them at stockholders' meetings; he votes these proxies for corporate directors subservient to him, thereby assuring to himself complete control of the business and its operations. He has no money of his own invested in the company, except possibly a mutual policyholder's interest, of negligible amount compared with the total investment of the other members. By his representation of the policyholders as their proxy, and by his assumption of the conduct of their mutual business, his relation as to them is a fiduciary one. He owes to the mutual policyholders exact honesty in all of his dealings with their money. As to them he is bound to act in good conscience and in good faith, having due regard for their interests at all times. He may not cause to be paid to himself any of the policyholders' money that is not fairly, justly and equitably due to him, considering the size of the company and the nature of the services which he renders.

In the case at bar there were, of course, many more than ten policyholders, with but one manager. But the principles involved in the example given are applicable no matter how many members make up the money.

The insurance commissioner concluded after an examination, and the court determined after a hearing, that $1,000 a month taken from the funds of State Mutual Life Insurance Company and paid to its executive vice-president was hazardous as far as the company was concerned, and was a breach of the fiduciary relation which the manager sustained to the mutual members whom he represented.

There is in the record support for the argument of counsel for appellant that when the executive vice-president took over this company it was in bad financial condition; that by his work and efforts and managerial ability the company's financial condition changed year by year for the better; that for a considerable period at the beginning of his management he took no salary whatever; that an average of his monthly salary for all the time of his management was much less than $1,000 per month; and that the company was at all times solvent.

[2, 3] There is also in the record substantial evidence to support the conclusion of the trial court, which then, as a matter of law, requires this court to affirm the judgment. Dreyer v. Cole, 210 Cal. 339, 292 P. 123; Ray v. Kennedy, 24 Cal.App.2d 583, 76 P.2d 147; Miller v. Pacific Freight Lines, 40 Cal.App.2d 451, 453, 104 P.2d 1069; Kern Valley Bank v. Koehn, 10 Cal.App. 679, 681, 103 P. 173.

The proxies by which the executive vice-president controlled this company were secured when insurance policies were delivered to the mutual members. At that time there was presented to each member a document bearing in boldface type "please sign and return this policy receipt immediately." Following a clause receipting for the policy, there was an additional provision by which the manager, or his nominee, was named proxy to vote at all meetings of the policyholders for a period of seven years.

Most of the business of the company was sickness and accident insurance. In 1939 the cost of operation of the accident and health department consumed 77 per cent of the total income of that department. In the first six months of 1940 more than 73 per cent of the total income of the accident and health department was spent for operating expenses, which operating expenses included $1,000 a month salary paid to the executive vice-president. Moreover, it appeared that this same individual received a salary of $30,000 a year from another mutual insurance company of which he was president, and over which he exercised control by reason of the trust and confidence reposed in him by the mutual members thereof.

[4] There is a duty committed to the insurance commissioner by the people of the State of California to protect the rights of all insurance policyholders. It is settled law of California that the business of insurance is one affected with a public interest. Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 329, 74 P.2d 761.

As was said in German Alliance Insurance Co. v. Lewis, 233 U.S. 389, 34 S. Ct. 612, 620, 58 L.Ed. 1011, 1023, L.R.A. 1915C, 1189: "To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby, and charged with great responsibility."

And dealing specifically with the subject of mutual insurance and its regulation by the state is to be found the following significant language by the Supreme Court of the State of Ohio in the case of State ex rel. National Mut. Ins. Co. v. Conn, 117 Ohio St. 190, 157 N.E. 563, 566; "Mutual insurance has acquired a status of usefulness and a reputation for service in the insurance world. It has the sanction of legislation and has resulted in the majority of instances in reducing the cost of insurance. It has resulted in a multitude of other instances in disaster to persons who believed their risks were conservatively covered. Between these extremes of experiences, it has become established that governmental safeguards are imperative. The superintendent of insurance is by statute made the guardian and the conservator of the rights of the multitude of insured, whose interests are large in the aggregate, but whose separate and individual rights are of too small value to warrant any expensive efforts toward investigation or redress."

In the present case a review of the testimony before the trial court discloses not only that there was substantial evidence upon which the order was made, but that it was the duty of the insurance commissioner to take over this insurance company.

[5-7] There is no merit in the further contentions presented on this appeal: that the application of the commissioner for the ex parte order is deficient; that the court was without jurisdiction to make the order; and that the proceeding as a whole is based upon an unconstitutional statute. They are all covered by and disposed of, either directly or by analogy, in the Pacific Mutual cases. Carpenter v. Pacific Mutual Life Insurance Co., 10 Cal.2d 307, 74 P.2d 761; Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182; Carpenter v. Pacific Mutual Life Insurance Co., 13 Cal.2d 306, 89 P. 2d 637.

[8] Appellant presents the further argument that the state is estopped from taking over this insurance company because the commissioner and his predecessors in office knew of the practices which the commissioner determined, and the court in this proceeding concluded, to be hazardous; that, knowing of these practices in years gone by, the commissioner failed to take over the company and permitted it to continue its business.

[9] To state the contention is to state its impossibility. To govern themselves, the people act through their instrumentality which we call the State of California. The State of California functions through persons who are for the time being its officers. The failure of any of these persons to enforce any law may never estop the people to enforce that law either then or at any future time. It would be as logical to argue that the people may not proceed to convict a defendant of burglary because the sheriff perhaps saw him and failed to stop him or arrest him for another burglary

committed the night before. State ex rel. Fishback v. Globe Casket & Undertaking Co., 82 Wash. 124, 143 P. 878, L.R.A.1915B, 976; Department of Insurance v. Church Members R. Ass'n, 217 Ind. 58, 26 N.E.2d 51, 52, 128 A.L.R. 635; Mullan v. State, 114 Cal. 578, 587, 46 P. 670, 34 L.R.A. 262.

The order denying the motion to vacate the order appointing a conservator is affirmed.

YORK, P. J., and DORAN, J., concurred.

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52 Cal.App.2d 326

CAMINETTI v. STATE MUT. LIFE INS. CO.

Civ. 13165.

District Court of Appeal, Second District, Division 1, California.

May 28, 1942.

1. Receivers ⚷154(2)

Generally, where an application has been made for appointment of a receiver for a corporation, attorneys' fees and expenses in resisting such application, if made in good faith and upon reasonable grounds, may become a valid claim against receiver, and whether such fees and expenses are to be allowed rests in sound discretion of the court, and, if allowed, the question as to amount thereof is likewise addressed to sound discretion of the court.

2. Receivers ⚷147, 154(2)

The claim of officers of a corporation in receivership or of attorneys employed by them to be paid out of funds in hands of receiver is not an absolute right, but it is entirely in discretion of court administering the fund to determine the good faith and justification for such application and, if warranted, the amount to be allowed.

3. Insurance ⚷64

Where superior court's ex parte order vesting title to a mutual life insurance company's assets in insurance commissioner, in his official capacity, was proper, denial of petition by company's counsel for an allowance of attorneys' fees to be paid out of assets for services in presenting company's case against commissioner was not an abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceedings by A. Caminetti, Jr., as Insurance Commissioner, etc., against the State Mutual Life Insurance Company, a corporation. From an order denying a petition for an allowance of attorneys' fees, the State Mutual Life Insurance Company, a corporation, appeals.

Affirmed.

See, also, Cal.App., 126 P.2d 165.

Sherman & Sherman, Robert W. Kenny, Morris E. Cohn, and W. B. Thomas, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

Counsel for the insurance company in the cases of A. Caminetti, Jr., Insurance Commissioner of the State of California v. State Mutual Life Insurance Co., Civ. No. 13165, Cal.App., 126 P.2d 165, and A. Caminetti, Jr., Insurance Commissioner of the State of California v. National Guaranty Life Co., Civ. No. 13166, Cal.App., 126 P.2d 170, petitioned the superior court for an allowance of attorneys' fees to be paid out of the assets of the insurance company in each case. The legal services involved preparing and presenting to the superior court the case for the company as against the insurance commissioner. The court made its order denying the petition, from which this appeal has been taken.

[1, 2] The rule to be here applied is to be found in the case of Anderson v. Great Republic L. Ins. Co., 41 Cal.App.2d 181, at page 191, 106 P.2d 75, 80, as follows: "It is a general rule that where an application has been made for the appointment of a receiver for a corporation, attorneys' fees and expenses in resisting such application, if made in good faith and upon reasonable grounds, may become a valid claim against the receiver. Whether such attorneys' fees and expenses are to be allowed rests in the sound discretion of the court, in view of all the facts and circumstances. Note 89 A.L.R. 1531. If allowed, the question as to the amount thereof is likewise addressed to the sound discretion of the court. The claim of the officers of a corporation or of attorneys

employed by them to be paid out of the funds in the hands of the receiver is not an absolute right, but it is entirely in the discretion of the court administering the fund to determine, first the good faith and justification for such application, and second, if warranted, the amount to be allowed."

[3] In view of the facts detailed in our opinion affirming the decision of the lower court in Civ. No. 13165 and Civ. No. 13166, there was no abuse of discretion on the part of the trial court in denying counsel fees.

The order denying the petition for allowance of attorneys' fees is affirmed.

YORK, P. J., and DORAN, J., concurred.

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52 Cal.App.2d 835

CAMINETTI v. NATIONAL GUARANTY LIFE CO.

Civ. 13166.

District Court of Appeal, Second District, Division 1, California.

May 28, 1942.

Insurance 🔑64

Evidence warranted conclusion that payment of $30,000 a year out of a mutual life insurance company's funds to company's president as salary was "hazardous" to policyholders within the statute authorizing the Superior Court in such case to vest the assets of the company in the insurance commissioner and a breach of the "fiduciary relation" which president sustained to mutual members whom he represented. St.1935, pp. 540, 541, 671–681, §§ 1011, 1012, 10810–10940.

See Words and Phrases, Permanent Edition, for all other definitions of "Fiduciary Relation" and "Hazardous".

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceedings by A. Caminetti, Jr., as Insurance Commissioner, etc., against National Guaranty Life Company, a corporation. From an order of the superior court refusing to vacate an order appointing a conservator, National Guaranty Life Company, a corporation, appeals.

Affirmed.

See, also, Cal.App., 126 P.2d 171.

Sherman & Sherman, Robert W. Kenny, Morris E. Cohn, and W. B. Thomas, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

On this appeal the points involved and discussed are identical with those in A. Caminetti, Jr., Insurance Commissioner of the State of California v. State Mutual Life Insurance Co., Civ. No. 13165, Cal. App., 126 P.2d 165. Therefore, it is unnecessary to again repeat what has been said in that case.

The same individual who was executive vice-president of the mutual insurance company in the case of Civ. No. 13165 was president of the mutual insurance company in this case. He secured and controlled the proxies in the corporation in the same manner. By his direction, the board of directors voted him a salary of $30,000 a year. This was over 7 per cent of the net premium income of the company and over 6 per cent of its income from all sources. It was the payment of this salary which the insurance commissioner asserts as the principal reason for the take-over of the company.

In this case appears a clear illustration of a practice followed by the president of this company of buying and selling the right to control and manage mutual insurance companies. This right to manage was dealt with as men deal with chattels, real or personal.

"Q. (Under cross-examination): Did you find out who had control during that day, or any part of the next, and before you actually agreed to go into the company? A. (By Charles W. Harrison, president): No. I was told that Mr. B. D. Malone was the controlling factor. It seems that he and W. D. Dilbeck were working together. * * * Well, I was waiting for the board of directors to meet; they were supposed to meet at a certain time, and I asked Mr. Malone what was causing the delay of the meeting, and he told me that he had run into a snag, or some similar remark like that. * * * He said that Mr. Baillie, who had been working on some plan with him regarding the National Guaranty Life, had agreed for his fee in the matter to be less on his general agency contract, but Mr. Malone had now told him since he was getting other people into the picture to try to rehabilitate the company, that Mr. Baillie didn't feel like stepping out of the picture until he was reimbursed for his trouble.

"Q. Mr. Baillie, as I understood your testimony yesterday, was the attorney for the company? A. No. He was an attorney. I didn't even know at that time that Baillie was an attorney.

"Q. He was not an officer of the company? A. No. * * *

"Q. You had had some experience with insurance companies of this type, had you not? A. Oh, yes.

"Q. You knew if you had sufficient proxy votes you could elect or select your own board of directors didn't you? A. Yes.

"Q. You knew if you did that that board of directors would elect the officers you designated, didn't you? A. Yes. * * *

"Q. Did you know at the time, that is on or about June 23rd or June 24th, 1936, that Mr. Baillie was in reality the financial editor of the Herald-Express? A. I knew it on the 24th. * * *

"Q. Did Mr. Malone ever go to work for the corporation as a general agent? A. No.

"Q. Did he ever pay back the $5,000.00? A. No.

"Q. Or any portion of it? A. No, sir.

"Q. Have you ever made a demand on Mr. Malone for the $5,000.00? A. No, sir.

"Q. Did you ever ask him for it? A. No, sir.

"Q. You know, don't you, or you knew at the time that Mr. Malone was going to give this $5,000.00 to Mr. Baillie? A. Yes, he so told me that he had to raise $5,000.00. That is correct."

For the same reasons as set forth at length in Civ. No. 13165, the order appealed from, denying the motion to vacate the order appointing a conservator, is affirmed.

YORK, P. J., and DORAN, J., concurred.

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52 Cal.App.2d 838

CAMINETTI v. NATIONAL GUARANTY LIFE CO.

Civ. 13166.

District Court of Appeal, Second District, Division 1, California.

May 28, 1942.

Insurance ⚷64

Where superior court's ex parte order vesting title to a mutual life insurance company's assets in insurance commissioner, in his official capacity, was proper, denial of petition by company's attorneys for an allowance of attorneys' fees to be paid out of assets for services in presenting company's case against commissioner was not an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceedings by A. Caminetti, Jr., as Insurance Commissioner, etc., against National Guaranty Life Company, a corporation. From an order of the superior court refusing an allowance of attorneys' fees, National Guaranty Life Company, a corporation, appeals.

Affirmed.

See, also, Cal.App., 126 P.2d 170.

Sherman & Sherman, Robert W. Kenny, Morris E. Cohn, and W. B. Thomas, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

This is an appeal from an order denying a petition for allowance of counsel fees. It was briefed and presented to this court together with A. Caminetti, Jr., Insurance Commissioner of the State of California v. State Mutual Life Insurance Co., Cal.App., 126 P.2d 169, also appealing from an order denying a petition for allowance of attorneys' fees, this day decided.

For the same reasons set forth in that case, the order appealed from is affirmed.

YORK, P. J., and DORAN, J., concurred.

52 Cal.App.2d 328

STATE MUT. LIFE INS. CO. v. CAMINETTI.

Civ. 13139.

District Court of Appeal, Second District,
Division 1, California.
May 28, 1942.

Appeal and error 🔑781(4)

Where term of certificate of authority had expired, questions involved on insurance company's appeal from judgment denying petition for a writ of mandate to compel insurance commissioner to issue certificate were "moot", and appeal would be dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Mandamus proceedings by the State Mutual Life Insurance Company, a corporation, against A. Caminetti, Jr., as Insurance Commissioner, etc. From a judgment denying the petition, State Mutual Life Insurance Company, a corporation, appeals.

Appeal dismissed.

Sherman & Sherman, Robert W. Kenny, Morris E. Cohn, and W. B. Thomas, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

This is a companion case to A. Caminetti, Jr., Insurance Commissioner of the State of California v. State Mutual Life Insurance Co., Civ.No. 13165, Cal.App., 126 P.2d 169. Upon stipulation both cases were consolidated for trial in the superior court. The briefs filed in this court apply to both cases.

In this case State Mutual Life Insurance Company petitioned the superior court for a writ of mandate directed to the insurance commissioner requiring him to issue a certificate of authority for the continuance of business by its former management. The trial court rendered judgment denying said petition.

If it were necessary, the judgment could be affirmed for the reasons stated in Civil No. 13165. We have examined the findings and hold they are sufficient to sustain the judgment.

In any event, the case is moot. The petition for writ of mandate was based upon the refusal of the insurance commissioner to issue a certificate of authority for the period commencing July 1, 1940, and terminating July 1, 1941. The corporation prayed for the issuance of an alternative writ of mandate directing the insurance commissioner to issue a renewal certificate of authority authorizing the corporation to continue in business for the period July 1, 1940, to July 1, 1941, or to issue an extension of the corporation's certificate of authority from August 15, 1941, or to show cause why he had not done so. It does not appear from the record that an alternative writ was in fact issued and the corporation did not pray for the issuance of a peremptory writ. The term of the one-year certificate of authority has now expired, and therefore the questions involved on the appeal from the judgment denying the petition for a writ of mandate have become moot.

The appeal from the judgment is dismissed.

YORK, P. J., and DORAN, J., concurred.

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52 Cal.App.2d 838

NATIONAL GUARANTY LIFE CO. v. CAMINETTI.

Civ. 13140.

District Court of Appeal, Second District.
Division 1, California.
May 28, 1942.

Appeal and error 🔑781(4)

Where term of certificate of authority had expired, questions involved on insurance company's appeal from judgment denying petition for a writ of mandate to compel insurance commissioner to issue certificate were "moot", and appeal would be dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Mandamus proceedings by National Guaranty Life Company, a corporation, against A. Caminetti, Jr., as Insurance Commissioner, etc. From a judgment denying the petition for a writ of mandate, National Guaranty Life Company, a corporation, appeals.

Appeal dismissed.

Sherman & Sherman, Robert W. Kenny, Morris E. Cohn, and W. B. Thomas, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

This is a companion case to A. Caminetti, Jr., Insurance Commissioner of the State of California v. National Guaranty Life Co., Cal.App., 126 P.2d 171. The case is moot for the same reason set forth in State Mutual Life Insurance Co. v. A. Caminetti, Jr., as Insurance Commissioner in and for the State of California, Cal.App., 126 P.2d 172, this day decided.

The appeal from the judgment is dismissed.

YORK, P. J., and DORAN, J., concurred.

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52 Cal.App.2d 255

BENNETT v. CHANDLER et al.

Civ. 3006.

District Court of Appeal, Fourth District, California.

May 25, 1942.

Rehearing Denied June 23, 1942.

Hearing Denied July 23, 1942.

1. Witnesses 🔑275(2)

Where plaintiff suing for injuries in automobile accident testified on direct examination as to consuming intoxicating liquors before and during the trip, and on cross-examination indicated that the first drinks were taken within five hours of the time the trip began, denying further cross-examination as to where plaintiff was the night before and whether he had had anything to drink within 12 hours prior to the time of the drinks referred to improperly restricted cross-examination.

2. Appeal and error 🔑205, 1048(6)

In action for injuries sustained by plaintiff in an automobile accident, limitation on cross-examination of plaintiff as to consumption of intoxicating liquors prior to the time the trip was taken was not prejudicial where no offer of proof was made and where it did not appear that the plaintiff was under the influence of intoxicants at the time of the accident.

3. Trial 🔑350(7)

In action for injuries sustained when automobile containing plaintiff collided with truck, submission of special interrogatory as to whether plaintiff was driving automobile rested in trial court's discretion, which was not abused by refusing to submit the interrogatory.

4. Automobiles 🔑245(67)

In action for injuries sustained when automobile containing plaintiff and owner collided with truck, evidence whether plaintiff or owner was driving automobile at time of collision presented question for jury.

5. Appeal and error 🔑1002

Conflicts in evidence are within sole province of trier of facts for determination.

6. Appeal and error 🔑1002

The appellate court must affirm judgment regardless of conflicts in evidence when judgment is supported by substantial and material evidence.

7. Appeal and error 🔑1005(3)

The decision of trial judge passing on motion for new trial and fully considering conflicts in and weight to be given the testimony has an appealing force to an appellate court.

8. Appeal and error 🔑1001(1)

Where testimony, in light of undisputed facts, is so inherently improbable as to constitute no evidence at all, rule that amount of credit to be given the positive testimony of witness is solely question for trial tribunal does not apply, and where circumstances show that story told by litigant and his witnesses cannot by any possibility be true, or where their testimony is inherently impossible, appellate court will reverse judgment.

9. Appeal and error 🔑1001(1)

In reviewing the evidence, appellate court must recognize that certain facts are controlled by immutable physical laws, and will not permit a verdict to change such facts.

10. Appeal and error ⚷1001(1)

An appellate court must exercise great care in applying the tests of common sense and common knowledge of physical laws to a given set of facts, and must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over testimony of apparently credible witnesses, and the mere fact that admitted circumstances make story of witnesses seem improbable will not justify reversal on ground that verdict is contrary to evidence.

11. Automobiles ⚷245(67)

In action for injuries sustained when automobile containing plaintiff collided with approaching truck, evidence whether plaintiff, in driving, assuming such to be the fact was contributorily negligent, was for jury.

12. Automobiles ⚷172(5)

The statute relating to necessity of driving on the right half of and as close as practicable to the right curb or edge of roadway was enacted for benefit of motorists traveling in the same direction. Vehicle Code, § 525, St.1937, p. 619.

13. Trial ⚷296(3)

In automobile accident case, the omission in instruction relating to defendant's negligence, of essential elements of proximate cause, was cured by other instructions correctly stating general rule of proximate cause and placing on plaintiff the burden to prove by preponderance of evidence that defendant's negligence was the proximate cause and to consider all the instructions as a whole.

14. Automobiles ⚷246(47)
Trial ⚷296(3)

In action for injuries sustained when automobile containing plaintiff collided with approaching truck, instruction relating to statutory duty of driving on right side of highway was error, inasmuch as such statute was only applicable to motorists traveling in same direction, but was not prejudicial, where such instruction was followed by instruction relating to statutory duty of motorists proceeding in opposite directions. Vehicle Code, § 525, St.1937, p. 619; Vehicle Code, § 527, St.1935, p. 182; Const. art. 6, § 4.

15. Trial ⚷217

In automobile accident case, refusal to give defendants' requested instruction that insurance company was not a party to the action was not error, notwithstanding that jurors were asked on their voir dire examination, as to whether they owned stock, bonds or other evidence of indebtedness issued by automobile insurance companies, where such question was proper.

16. Appeal and error ⚷1032(3)

Appellants must show that they were prejudiced by the omission to give any instructions before they are entitled to complain thereof on appeal.

◆

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action for injuries sustained in automobile accident by Harry E. Bennett against Floyd B. Chandler and others. From the judgment, the defendants appeal.

Affirmed.

C. Ray Robinson, of Merced, Ray W. Hays and Wm. M. Miles, both of Fresno, and Willard B. Treadwell, of Merced, for appellants.

L. M. Linneman, of Dos Palos, and Rae B. Carter, of Fresno, for respondent.

GRIFFIN, Justice.

This action involves an injury occurring to plaintiff and respondent occasioned as a result of a collision between a Chevrolet coupe and a Chevrolet truck (a tractor-semi-trailer type).

The testimony of respondent Bennett shows that on December 18, 1939, he left San Francisco for Madera with one Donahue, in Donahue's car, at about 5 o'clock p. m., to visit Donahue's wife who lived in that city. Originally Donahue was driving the car. Bennett later drove. As they left Gilroy, Donahue drove due to the fact that he was more familiar with that particular road. According to his testimony he, Bennett, sat beside Donahue and due to the fact that a cold draft came under the right door which was sprung, Bennett chose to sit in the middle of the seat close to the driver to avoid the draft; as they thus proceeded easterly from Los Banos on highway 152 he, Bennett, was "dozing" a little; that they had been traveling about 40 to 45 miles per hour but due to spots of fog they slowed down occasionally to 25 or 30 miles per hour; that he was awakened when Donahue mentioned something about lights; that he "sat up straight to see what he (Donahue) had commented on"; that the fog had cleared and he noticed the paved portion of the highway was equally divided by a white center line; that the Donahue car was well on the south or right side of the line at the time; that the lights on the coupe were burning and that about 110 or 112 feet in front of him he noticed the Chevrolet truck and trailer; that the truck was then angled diagonally across the road, i. e., the tractor part was completely on the south half of the road and the trailer was partly on the north half; that Donahue "swung" his car to his left or to the north half of the highway to avoid striking the truck which occupied practically all of the south half; that the pavement was 21 feet wide with 6-foot shoulders; that the right side of the coupe collided with the north side of the truck about 9 feet back of the driver's cab; that he "cringed away from the side of the impact" toward the driver Donahue; that he did not remember anything thereafter for two days until he gained consciousness in the hospital. He maintained at all times that he was not driving the car after it left Gilroy and that Donahue was driving.

Practically the entire right side of the coupe was caved in and demolished. The steering wheel was both bent and broken. Blood spots were found on the back cushion almost directly behind the driver's seat. Donahue was killed in the accident and died immediately. The doctor who examined Donahue and also signed the death certificate testified that he "had obviously had a crushed chest" because "pressure upon it very definitely showed a cave-in, and you could easily compress his chest and notice a cracking"; that he completely examined Bennett and found no scarring or bruising of any kind on his chest or body; that he had only severe head injuries and injury to his hand.

[1, 2] Bennett testified on direct examination that about noon on December 18th he drank two pint bottles of beer in San Francisco; that at 4 p. m. he had two "Scotch and soda's" before he ate; that he felt no effects from them; that he met Donahue and that on the road they stopped at Palo Alto; that Donahue had coffee and he had a bottle of beer; that at Gilroy they each had a bottle of beer; that at Los Banos they stopped and each had only coffee and hamburgers. On cross-examination Bennett was asked: "Q. What time did you have these first drinks in San Francisco, Mr. Bennett? * * * A. * * * Approximately 12:30." Counsel for appellants then asked him where he had been the night before and if he had anything to drink within twelve hours prior to the time he took the two bottles of beer in San Francisco. The trial court sustained an objection to this question on the ground that it was not material or proper cross-examination in the absence of any showing that "drinking will effect a person for 12 hours." Appellants assigned this ruling as erroneous and prejudicial. We see no particular merit to this argument. The question first propounded and respondent's answer thereto rather indicates it was the first drink that Bennett had that day. Appellants made no offer of proof that he had drinks before that time. None of the witnesses who saw respondent at the time of the accident or thereafter testified that he was under the influence of liquor or that they even smelled liquor upon his breath. While a broader latitude should have been allowed in the cross-examination, no offer of proof was made and it has not been shown how appellants would be prejudiced by the ruling. After the reception of the evidence above related the court denied a motion for nonsuit. Considering respondent's evidence, the ruling was proper.

Appellant Chandler then testified that he was agent of appellant Smith; that he was driving the truck and trailer westerly on highway 152 at about 30 miles per hour; that the truck weighed 15 tons loaded; that the over-all length of the truck was 40 feet and that it carried 18 wheels; that about 1½ miles west of the Dos Palos "Y" the fog lifted; that "I straightened around the curve beyond the 'Y' and went for a short ways, and I seen a pair of headlights approaching and they were quite a considerable distance from me. They were on their own side of the highway, on the south lane. As we neared, kept coming together, closer together, I imagine 200 or 250 feet apart, this approaching car suddenly swerved to the left, straight across the highway at approximately a 45-degree angle. * * * Well, I seen that I could not avoid a collision so I cut my outfit to the left * * * and about that time we came together. * * * He was so close to me I would have run completely over the car if I had not tried to avoid hitting him"; that appellants' "outfit turned over" south of the highway; that respondent's car was upright about 4 feet north of the center line of the highway; that he looked in the Donahue car and saw "they were drove back into the seat with just their heads and shoulders lying on the seat. * * * The rest of them were down on the floor board * * * with their heads and shoulders on the flat of the seat * * * their position in the car was as if they were sitting there, never moved, one on one side of the car and one on the other"; that Bennett was on the left side under the steering wheel; that the older man (Donahue) was on the right-hand side of the seat. Seven other witnesses testified similarly as to the position of the men in the Donahue car after the accident and that Bennett was removed from under the steering wheel from the left side of the car and that his trousers or foot was caught in the brake or clutch; that Donahue was dead and his body was removed from the right side of the car. Upon this evidence the jury returned a verdict for $7,000 in favor of respondent Bennett. No question is raised as to the amount of the damages.

Appellants moved for judgment notwithstanding the verdict and for a new trial. Both were argued fully and were denied. It is now vehemently claimed by appellants that "the testimony of the plaintiff falls into the category of either perjury or the testimony of a person whose memory or mentality was so affected by the use of intoxicating liquor that he did not know what he was doing and, accordingly, his testimony, which is obviously false, is to be so judged" and that the appellate court should so determine.

[3, 4] The trial court fully instructed the jury upon the rules of law applicable if it should find that Bennett was not driving the car and the rules of law applicable if it should find that he was driving it, which included the contributory negligence, proximate cause and sudden peril rules offered by appellants. It refused to give a special interrogatory directed to the jury to ascertain if Bennett was or was not driving the car. Appellants assigned this refusal as error. The refusal to submit the special interrogatory under the circumstances here related was discretionary. Mayfield v. Fidelity, etc., Co., 16 Cal.App.2d 611, 61 P.2d 83. No abuse of discretion appears. Olmstead v. Dauphiny, 104 Cal. 635, 38 P. 505. The jury was therefore presented with the testimony of respondent and the circumstances tending to show that Donahue was driving the car and the circumstances shown by the evidence tending to indicate, by the position of the occupants of the car after the accident, that Bennett was driving it. The number of witnesses testifying as to the position of the occupants of the car after the accident might well lead one to believe that Bennett was driving the car. A finding to this effect would have been substantially supported, but it cannot be said as a matter of law that a contrary finding would not also be supported by the evidence and circumstances here related. At most it created a substantial conflict, first, for the determination of the jury, and second, for the determination of the trial judge on a motion for new trial. The weight to be given the testimony was a matter directed solely to them. The trial judge's reaction to appellants' evidence was reflected in his remarks to counsel for appellants when the motion for new trial was heard. He said, after Mr. Robinson stated: "* * * in my opinion there was a man here (Bennett) who was obviously lying * * *. The Court (interrupting): You have said that so often, I have to disagree with you there * * * frankly, Mr. Robinson, I don't pay much attention to parrot witnesses if I may call it that. I don't pay much attention to a long string of witnesses who say the same thing down the line. It has no probative value." Regardless of the position of the parties in the car at the time of the collision, we are not unmindful that it is within the realm of possibility that persons seated in a car may change positions under a terrific force of impact. What actually occurred in the instant case was a question of fact for the determination of the jury. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301; Fox v. Sherwood, 7 Cal.App.2d 265, 45 P.2d 1026; Bixby v. Pickwick Stage Co., 131 Cal. App. 739, 21 P.2d 972.

[5, 6] This court had before it for consideration in Donato v. Lopopolo, 20 Cal. App.2d 409, 66 P.2d 1256, a conflict in the evidence as to who was driving the car at the time of the accident. We there held, as we must here, that we are not concerned with mere conflicts in evidence. Such conflicts are within the sole province of the trier of fact for determination and we must not disturb such finding when it is supported by substantial and material evidence.

[7-11] When the trial judge has passed on a motion for new trial and fully considered the conflicts in and the weight to be

given the testimony, it has an appealing force to an appellate court. Where the testimony, in the light of the undisputed facts, is so inherently improbable and impossible of belief as to, in effect, constitute no evidence at all, the rule that the amount of credit to be given to the positive testimony of any witness is solely a question for the trial tribunal, does not apply. De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059. Undoubtedly, an appellate court in reviewing the evidence is bound to exercise its intelligence and in doing so must recognize that certain facts are controlled by immutable physical laws. It cannot permit a verdict to change such facts. When circumstances show that the story told by a litigant and his witnesses cannot by any possibility be true, or when their testimony is inherently impossible, the appellate court will not hesitate to reverse the judgment to the end that the cause may again be submitted to the determination of a jury or trial judge. On the other hand, it is the duty of an appellate court to exercise great care in applying the tests of common sense and common knowledge of physical laws to a given set of facts. Experience and observation teach that strange things sometimes happen in the world of physical phenomena and accidents sometimes appear to happen in a manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal on the ground that the verdict is contrary to the evidence. Austin v. Newton, 46 Cal.App. 493, 189 P. 471. Even assuming that the jury determined that Bennett was driving the car, which corresponds with our view of the weight of the evidence, we are then still presented with the additional question whether, from the evidence, we must hold as a matter of law that he was guilty of contributory negligence precluding a recovery. With the apparent right of the jury to believe or disbelieve any part of the testimony, we are unable to say that he was guilty of such acts as constitute contributory negligence as a matter of law barring recovery. This was a question for the jury to determine, which was submitted to them under proper instructions on that subject, which instructions were submitted by appellants.

The most important question presented, under the facts of this case, involves the giving of an instruction in the language of section 525 of the Vehicle Code, St.1935, p. 181, as amended by St.1937, p. 619, relating to the necessity of driving on the right half of and as close as practicable to the right-hand curb or edge of the roadway, which instruction was followed by the further instruction that "* * * it is negligence as a matter of law to violate the provision of law just read to you and therefore, if you believe from the evidence that the defendant Floyd B. Chandler negligently drove his motor truck on the southerly or left-hand side of the road while traveling in a westerly direction in violation of the section just read to you, and that the plaintiff was himself in the exercise of reasonable care, then it is your duty to return a verdict in favor of the plaintiff and against the defendants."

[12] It has been held that this section was enacted for the benefit of motorists traveling in the same direction. Arundel v. Turk, 6 Cal.App.2d 162, 44 P.2d 383; Polk v. Weinstein, 12 Cal.App.2d 360, 55 P.2d 588; Lewis v. Western Truck Line, 44 Cal. App.2d 455, at page 468, 112 P.2d 747.

[13] It is further pointed out that the instruction lacks the essential fundamental elements of proximate cause. (19 Cal.Jur. 636, § 67.) This latter portion, however, may be and is cured by the fact that the trial court in another instruction correctly stated the general rule of proximate cause and specifically gave appellants' instructions to the effect that the burden of proof was upon respondent to prove by a preponderance of the evidence that defendants were negligent and that such negligence was a proximate cause. This instruction was followed by a general instruction that the jury were not to "select a single instruction or a portion of any instruction, and base your verdict thereon. All of the instructions which the court has given you or will give you in this matter, must be considered by you as a whole, and each in its relation to the other, all in determining any issue in this case."

It was error to give the instruction based upon section 525 of the Vehicle Code as that section was not, under the authorities, applicable to the case before us. This instruction was followed, however, by reading section 527 of the Vehicle Code, St.1935, p. 182, relating to vehicles proceeding in opposite directions.

[14] The all-important question then arises whether or not the error was such as would compel a reversal notwithstanding section 4, article VI of the Constitution. In the case of Lewis v. Western Truck Line, supra, we were confronted with this same question. In that case the court erroneously gave an instruction based upon section 525 of the Vehicle Code which was followed by an instruction based upon section 527 of that code. We there held that the giving of the instruction in the language of section 525 of the Vehicle Code under the evidence of that case, which also presented a close question of the negligence of the defendant, was not prejudicial. We cited many cases in support of this conclusion. We must therefore conclude in the instant case that the giving of the erroneous instruction was not prejudicial.

Lastly, appellants contend that the court erred in refusing to give certain offered instructions. Among them was one which read: "In the questions asked of you concerning your qualifications to sit as a juror, some mention was made of the matter of insurance. I instruct you that you cannot bring in a verdict against any insurance company. I further instruct you that no insurance company is a party to this action." On voir dire counsel for respondent asked the jurors certain questions about their interest, if any, in insurance companies. The general question propounded to the jurors and their answer was: "May I ask you * * * whether or not you or any member of your immediate family own any stocks, bonds or other evidence of indebtedness issued by any company whose business in whole or in part is that of insuring motor vehicles for negligence? A. We have not." Counsel for appellants admit that "it is proper to ask prospective jurors on their voir dire examination whether they are stockholders, etc., in any insurance company writing public liability insurance and whether the members of their families are members or work for such companies," but contend that in spite of the propriety of these questions, it is incumbent on the trial court and it is the trial court's duty to instruct the jury that no insurance company is a party to the action where the trial court is requested to give such instruction. Citing Dermer v. Pistoresi, 109 Cal.App. 310, 293 P. 78; Elmore v. County of Lassen, 10 Cal.App.2d 229, 234, 51 P.2d 481; Nichols v. Nelson, 80 Cal.App. 590, 596, 252 P. 739; Girard v. Irvine, 97 Cal.App. 377, 275 P. 840.

[15, 16] The cases cited by appellants are not authority for their claim. In each of the cited cases the trial court gave the instruction requested after certain claimed improper questions were propounded which subtly intimated the existence of insurance in the case. It was there held that the giving of the instruction was proper. In the instant case there was no showing that the questions were improper or that appellants were entitled to an instruction that no insurance company was a party to the action. Chandler v. Benafel, 3 Cal.App.2d 368, 39 P.2d 890. Appellants must show that they were prejudiced by the omission to give any instruction. Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Wallace v. King, 27 Cal.App.2d 174, 181, 80 P.2d 523. If it could be held that the questions propounded were improper, a different conclusion might result. 56 A.L.R. 1540, 1543.

We have examined the other claimed errors in refusing to give other instructions offered and have fully considered the other points presented. They are without merit.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

52 Cal.App.2d 184

GOSSMAN v. GOSSMAN et al.

Civ. 12796.

District Court of Appeal, Second District, Division 3, California.

May 22, 1942.

Hearing Denied July 20, 1942.

1. Divorce 🔑151

An order entered in the minutes granting a new trial on the ground of insufficiency of the evidence and errors of law made during the trial, and limiting the issues for the new trial to the matter of division of community property between husband and wife who had obtained an interlocutory decree of divorce, met the requirements of statute as amended in 1939 requiring orders granting new trials on ground of insufficiency of evidence to so specify in writing and to be filed within ten days. Code Civ.Proc. § 657.

2. Trial 🔑404(2)

A "conclusion of law" does not lose its character as such because placed among the findings of fact, and a "finding" may be regarded as "finding of fact" although mistakenly placed among the conclusions of law.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law" and "Finding of Fact".

3. Trial 🔑404(2, 3)

"Ultimate facts" are the logical conclusions derived from certain primary facts evidentiary in their character, whereas "conclusions of law" are those presumptions or legal deductions which, the facts being given, are drawn without further evidence, the distinction being that "presumptions of law" are reduced to fixed rules, whereas "ultimate facts" being merely natural presumptions are derived wholly and directly from circumstances of the particular case by the common experience of mankind without the aid of any rules of law.

See Words and Phrases, Permanent Edition, for all other definitions of "Presumption of Law" and "Ultimate Fact".

4. Divorce 🔑254

Trial court's determination, in divorce action, as to character of property and the amount to which each party was entitled when a decree was granted on the ground of extreme cruelty, involved a "finding of fact" rather than a "conclusion of law", so that court would not be authorized to enter a new judgment modifying prior judgment in such respect under statute authorizing entry of new judgment to conform with corrected conclusions of law. Code Civ.Proc. §§ 663, 663a.

5. Divorce 🔑252

A just division of community property between the parties when marriage is dissolved on the ground of extreme cruelty is expressly made by statute to depend on the exercise of judicial discretion based on all the facts and the conditions of the parties. Civ.Code, § 146.

6. Divorce 🔑252

Where marriage is dissolved on the ground of extreme cruelty, "judicial discretion" to assign community property to respective parties is broad and inclusive but only within the limits of fixed legal principles, and, in order to exercise such discretion, all the material facts in evidence must be both known and considered, together with the legal principles essential to an informed, intelligent and just decision. Civ. Code, § 146.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Discretion".

7. Divorce 🔑254

Wife's motion in divorce action for entry of a different judgment with respect to division of alleged community property, if made under statute providing for vacation of judgment for correction of erroneous conclusions of law and entry of a different judgment in conformity with corrected conclusions, would not require a re-exercise of judicial discretion as to what would be a just division of the property, but called only for the amendment of erroneous conclusions of law.

8. New trial 🔑159

A motion for new trial is directed to a decision rendered after trial and involves the issues therein determined, and it is only in the light of the particular decision by which the movant is aggrieved that the correctness of the determination of such issues can be tested. Code Civ.Proc. § 656.

9. Trial 🔑387(1)

The "decision" in a case tried without a jury normally consists of written findings of fact and conclusions of law separately stated and filed with the clerk, and is the actual determination of the lawsuit. Code Civ.Proc. § 632.

See Words and Phrases, Permanent Edition, for all other definitions of "Decision".

10. Judgment 🔑1, 256(1)

A "judgment" is the formal expression and evidence of the actual decision of a lawsuit, and should be entered in conformity with such decision. Code Civ.Proc. §§ 632, 664.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

11. Judgment 🔑191

The "judgment" is deemed "rendered" when the decision is filed, its rendition being a "judicial act" while its entry is "ministerial". Code Civ.Proc. §§ 632, 664.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Act", "Ministerial Act", and "Render".

12. Appeal and error 🔑933(1)
New trial 🔑6

Trial court, if it has jurisdiction to entertain a motion for new trial, has broad discretion in passing upon such motion, and an order granting new trial is presumed to be correct. Code Civ.Proc. § 656.

13. Divorce 🔑151

Where new judgment entered upon wife's motions for new trial and for vacation of prior judgment and entry of a different judgment in conformity with corrected conclusions of law made such a different disposition of community property of parties whose marriage was dissolved on the ground of extreme cruelty as to indicate that court had either received additional evidence or had re-examined the evidence before it, record disclosed that new judgment was entered pursuant to statute relating to motions for new trial, even though such motion was denied, and hence new judgment was subject to husband's motion for new trial. Code Civ.Proc. §§ 632, 656, 657, 659, 662, 663, 663a, 664; Civ.Code, § 146.

14. Divorce 🔑151

Where new judgment entered on motion of wife who had obtained an interlocutory decree of divorce on the ground of extreme cruelty made an entirely different disposition of community property from that provided for in two prior judgments and considerably more prejudicial to husband, court had jurisdiction to grant motion of husband and others for a new trial on the ground of insufficiency of the evidence and errors of law made during trial, notwithstanding similar motion directed to first judgment had been denied; such denial not being "res judicata" of right to new trial after entry of the third judgment. Code Civ.Proc. §§ 632, 656, 657, 659, 662, 663, 663a, 664; Civ.Code, § 146.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Divorce action by Olive Magdeline Gossman against Otto E. Gossman, wherein plaintiff was awarded an interlocutory decree of divorce on ground of extreme cruelty and community property was divided between plaintiff and defendant. Certain other parties were joined as defendants. From an order granting defendants' motion for a new trial and an order denying plaintiff's motion to vacate such order, plaintiff appeals.

Orders affirmed.

Morris Lavine, of Los Angeles, for appellant.

Victor H. Harvey, of Los Angeles, for respondents.

SCHAUER, Presiding Justice.

This matter is before us on an appeal by plaintiff from (1) an order granting defendants' motion for a new trial, and (2) an order denying plaintiff's motion to vacate such order granting a new trial. As three judgments were successively entered in this case, the second superseding the first, and the third superseding the second after it was vacated on plaintiff's motion, and as proceedings in connection with each of the three must be considered in disposing of the questions involved, a chronological epitome of such proceedings will assist in depicting the situation.

Chronology of Pertinent Proceedings

Findings of fact and conclusions of law filed	August 18, 1939
First judgment entered	August 21, 1939
Defendants' motion for new trial (addressed to first judgment) filed	August 28, 1939
Defendants' motion for new trial denied, judgment being ordered modified	October 17, 1939
Second judgment entered	October 19, 1939
Plaintiff files motion for new trial (addressed to second judgment) and notice of intention to move for different judgment under Code Civ. Proc. secs. 663 and 663a	October 30, 1939
Plaintiff's motion for new trial denied and motion for different judgment granted	December 1, 1939
Third judgment entered	February 7, 1940
Defendants' motion for new trial (addressed to third judgment) filed	February 21, 1940
Defendants' motion for new trial granted	April 1, 1940
Plaintiff's motion to vacate order of April 1 filed	April 23, 1940
Plaintiff's motion to vacate order of April 1 denied	May 1, 1940
Plaintiff's notice of appeal from order granting defendants' motion for new trial and from order denying motion to vacate same, filed	May 9, 1940

Material Facts

It is important to note that this is a divorce action; that there are no children of the union; that by the *second judgment*, which is not materially different from the *first*, plaintiff was awarded an interlocutory decree of divorce on the ground of extreme cruelty and that community property of aggregate value in excess of $50,000 was divided between plaintiff wife and defendant husband, plaintiff being given the family dwelling house and furniture, an automobile, some shares of stock in a corporation (value $1,800), $1,000 cash, and the defendant being ordered to pay plaintiff $100 per month for two years and until the further order of the court, and the defendant husband was awarded all of the remainder of the property of the spouses including his one-third interest in a partnership of which he was (and at the time of his marriage to plaintiff had been) a member. The *third judgment* entered on plaintiff's motion, purportedly without taking additional evidence, was radically different from both the *first* and the *second judgments*. By it plaintiff was awarded substantially *all* of the community property (of a value in excess of $50,000) *including the husband's interest in the business and assets of the partnership, his sole source of income*, and the husband was awarded property of the value of only $1,600 and was also ordered to pay plaintiff's attorney's fees in the sum of $790.

[1] The order granting a new trial on defendants' (certain other parties were joined as defendants) motion after entry of the third judgment limited the issues for the new trial "to the matter of community property." Such order was by minute entry timely entered, and recited that "motion for new trial is granted on the grounds of insufficiency of the evidence and errors of law made during the trial. * * *" This order, so entered in the minutes, meets the requirements of Code of Civil Procedure, section 657, as amended in 1939. (Cox v. Tyrone Power Enterprises, Inc., (1942) 49 Cal.App.2d 383, 121 P.2d 829.) It was made by the Honorable Emmet H. Wilson, judge of the Superior Court of Los Angeles County, the previous trial and new trial proceedings having been had before the Honorable Raymond McIntosh, judge of the Superior Court of Sierra County, who had been temporarily assigned to Los Angeles County but who was absent from that county at the time of the presentation of defendants' motion for a new trial as addressed to the third judgment. From the facts recited it seems likely that one of the purposes in making the new trial order was to afford the court an opportunity to re-examine the issue of fact as to what constituted a fair and equitable division of the community property. Furthermore, it may be that the court felt that the evidence should be re-examined on the issue of fact as to whether defendant husband's interest in the partnership, which plaintiff admitted he owned before his marriage to her, was of community or separate character in whole or in part. On defendants' first motion for a new trial such motion may well have been denied as to this issue because the defendant husband *was not prejudiced thereby* since under the decision then outstanding and the judgment (*first judgment*) based thereon that property was awarded to him. But on the hearing of the motion addressed to the *third judgment* the situation was different; all of this property had been awarded to plaintiff.

Appellant's Contentions

Plaintiff contends (1) that the trial court was without jurisdiction to entertain or determine defendants' motion for a new trial made after the third judgment was entered, her theory being that the court's jurisdiction to consider and grant a motion of defendants for a new trial was exhausted when it entertained and denied defendants' motion made after the *first* judgment was entered; (2) that the decision on defendants' first motion for a new trial became the law of the case and was binding on the court. Plaintiff amplifies her position by pointing out that the trial court filed only one set of (formally entitled) findings of fact and conclusions of law—that which preceded the first judgment—and asserts that the second and third judgments were predicated upon the same original findings and conclusions except as the conclusions were altered (Roberts v. Hall, (1905) 147 Cal. 434, 437, 82 P. 66) as evidenced by the judgments. Therefore, the plaintiff argues, since the findings of fact remain the same, and since the court determined on defendants' original motion for a new trial that defendants were not aggrieved by the facts found and were not entitled to a re-examination of any issue of fact involved therein, the power of the court to consider that matter has been exhausted and it is rendered res judicata.

Furthermore, it is urged on behalf of plaintiff, that the trial court in vacating the second judgment and ordering the third one entered merely exercised judicial discretion and proceeded exclusively under sections 663 and 663a of the Code of Civil Procedure, which provide for a motion to vacate a judgment, to correct erroneous conclusions of law and to enter a new judgment in conformity with the corrected conclusions. From an order for such a judgment or from the new judgment itself an appeal may be taken (California Delta Farms v. Chinese American Farms, (1927) 201 Cal. 201, 203, 255 P. 1097), but these sections contain no such provision as that found in section 662 of the Code of Civil Procedure, which declares the powers of a trial court on a motion for new trial to include the right to "modify the judgment, in whole or in part" and also provides that "Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code," said sections 657 and 659 being those declaring the grounds on and the procedure by which a new trial may be obtained. From this position plaintiff steps to her next argument, which is that a motion for a new trial is an inappropriate remedy where the relief sought is not a re-examination of an issue of fact but the correction or modification of conclusions of law. Plaintiff's propositions of law, generally speaking, are not challenged, but neither of her points can be sustained on the record before us and the argument in amplification thereof proves to be specious in that the assumed factual premise is not sound. The slight modifications of the *first judgment* as evidenced by the *second* are immaterial to this appeal and may be disregarded, but the *third* judgment, as previously mentioned, is materially different from either the first or the second. It involves not merely different conclusions of law or a re-exercise of judicial discretion based on established facts but a substantially different finding of facts (stated within itself) on the issue of what constituted a fair and equitable division of the community property of the parties.

The Findings of Fact and Conclusions of Law

In the findings of fact and conclusions of law originally filed the court found as a fact "That $100 per month is a reasonable sum for plaintiff's support." Furthermore, in the same document, but mislabeled under the heading "Conclusions of Law," but which heading is not controlling (Linberg v. Stanto, (1931) 211 Cal. 771, 776, 297 P. 9, 75 A.L.R. 555), the court found:

"That the plaintiff is entitled to be awarded as her sole and separate property of the community property enumerated in the foregoing findings, the following:

"(a) One dwelling house located at 860 West [sic] Florence Avenue, in the City of Los Angeles, County of Los Angeles, State of California, and the parcel of real property to which said house is affixed, free and clear of all delinquent Home Owner's Loan payments to date;

"(b) Household furniture and furnishings located at 860 West Florence Avenue, of the approximate value of $300;

"(c) One 1934 Buick sedan of the value of $200, free and clear of all encumbrance;

"(d) Seven hundred (700) shares of stock in the Manchester Avenue Company, formerly the Potrero Country Club, of the value of $1,800, to be free and clear of all encumbrances;

"(e) One thousand dollars ($1,000) lawful money of the United States, to be paid by said defendants, and for which payment each of said defendants and said partnership business and real estate should be separately and jointly liable;

"(f) Payment of all sums which this Court has heretofore during the pendency of this action ordered said defendant Otto E. Gossman *g*o pay to said plaintiff and for which payment each of said defendants should be individually and jointly liable;

"(g) Payment to plaintiff or plaintiff's attorney, of the sum of $750 as attorney's fees, and that each of said defendants be individually and jointly liable for the payment of said sum;

"(h) That the plaintiff *w*hould receive from the defendants the sum of $100 per month for a period of two years, and until the further order of court, said payments to begin on the 1st day of August, 1939."

[2, 3] It is sometimes difficult to distinguish between findings of fact and conclusions of law. As pointed out in 24 Cal.Jur. at page 961, and as reiterated in many decisions, "A conclusion of law does not lose its characteristic as such because placed among the findings of fact, and a finding may be regarded as one of fact although mistakenly placed among the conclusions of law." In Levins v. Rovegno, (1886) 71 Cal. 273, at pages 275–276, 12 P. 161, at page 162, is found an able exposition of the distinction between findings of fact and conclusions of law:

"The line of demarcation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases.

"It is quite easy to say that the ultimate facts are but the logical conclusions deduced from certain primary facts evidentiary in their character, and that conclusions of law are those presumptions or legal deductions which, the facts being given, are drawn without further evidence.

"This does not, however, quite meet the difficulty. We deduce the ultimate fact from certain probative facts by a process of natural reasoning. We draw the inference or conclusion of law, by a process of artificial reasoning; but this last process is often in such exact accord with natural reason, that the distinction is scarcely appreciable.

"If ultimate facts were found only from direct evidence to the very fact, the distinction between them and conclusions of law would be easily drawn; but, as they are to a great extent presumed from the existence of other facts, they are conclusions reached by argument, by reason,—are results deduced from an inferential process, in which the evidentiary facts become the premises, and the ultimate fact the conclusion; and this process by which ultimate facts or presumptions of fact are reached, differs from presumptions of law only in this: that the latter 'are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong;' the former, being, 'merely natural presumptions, are derived wholly and directly from the circumstances of the particular case, by the common experience of mankind, without the aid or control of any rules of law whatever.' 1 Greenl.Ev., §§ 44-46."

In Estate of Woods, (1937) 23 Cal.App.2d 187, at page 190, 72 P.2d 258, at page 260, we find the following: "Under the heading conclusions of law, the following appears: 'That an order should be rendered in this cause adjudging and declaring that the following described properties were, at the time of the death of Timothy L. Woods, the community property of Timothy L. Woods and Hattie E. Woods, his wife (enumerating the parcels).' This statement should have been placed among the findings of fact. It is said in Estate of Hill, 167 Cal. 59, 63, 138 P. 690, 692: 'But an allegation or finding that a person is the owner of certain property is none the less an allegation or finding of an ultimate fact. Smith v. Acker, 52 Cal. 217; Murphy v. Bennett, 68 Cal. 528, 9 P. 738; Gill v. Driver, 90 Cal. 72, 27 P. 64. And the same considerations apply to an averment or finding that certain property owned by a married person is separate or community property. The evidence from which this ultimate fact is determined is not to be set forth in a pleading nor need it be found by the court.' In Maskuns v. Maskuns, 93 Cal.App. 27, 268 P. 1093, 1094, it was held that the trial court determined an ultimate fact when among the conclusions of law it decreed 'that the remaining one-half of said property is the community property of this plaintiff and defendant.' It was pointed out that 'a finding of fact loses none of its force merely because it has been inadvertently included among the conclusions of law.' Matter of Forrester, 162 Cal. 493, 123 P. 283."

[4] So also it is held that a finding of indebtedness is not a conclusion of law, but the statement of an ultimate fact. (Nisbet v. Rhinehart, (1935) 2 Cal.2d 477, 482, 42 P.2d 71.) From the rules stated and illustrated in the aforementioned cases it follows that the determination by the trial court in a divorce action of the character of property and the amount to which each party is entitled, when a decree is granted on the ground of extreme cruelty, involves a finding of fact rather than a conclusion of law.

The document labeled Findings of Fact and Conclusions of Law was not itself directly amended as respects either findings of fact or conclusions of law but the court in the *third judgment* proceeds to find and adjudicate "that of said community property [described in the complaint] the plaintiff is awarded and she is adjudged to be the owner of the following." Here follows a description of substantially all of the property described in the pleadings. Whereas the *second judgment* had awarded property of a value of nearly $50,000 to the defendant husband the *third judgment* awarded to plaintiff *all of the property of the parties except* for one lot valued at $1,100 and one automobile valued at $500—an aggregate of only $1,600 in value left to the defendant and against that, or out of or from some unknown source, he was ordered to pay plaintiff an additional sum of $790 for attorney's fees. The award to the plaintiff wife by the third judgment stripped defendant of substantially all his resources including his one-third interest in the partnership which, as before noted, he had possessed before marriage and which constituted his sole source of income.

Character of Proceedings Basic to Third Judgment

[5] By what judicial process the trial judge on the same trial arrived at the third judgment after having previously arrived at the first and second the record is mystifying. Obviously the drastic change from the *second* judgment to the *third* judgment must have been based on something more potent than any correction of conclusions of law. By the provisions of section 146 of the Civil Code it was the duty of the court, on dissolution of the marriage on the ground of extreme cruelty, to assign the community property "to the respective parties in such proportions as the court, *from all the facts of the case, and the condition of the parties,* may deem just." (Italics added.) Presumptively the assignment of the property found to be community in character was made in the first and second judgments after determination of "all the facts of the case, and the condition of the parties." A *just* decision of it depended not on the whimsy of the trial judge but on the exercise of judicial discretion based on "all the facts of the case, and the condition of the parties."

[6] The character of the proceeding leading to the third judgment is not to be confused by loosely ascribing it to the power of judicial discretion. Courts have often asserted that such power is broad and inclusive. That assertion is true, but it is true only within the limits of fixed legal principles. (Brill v. Fox, (1931) 211 Cal. 739, 743, 297 P. 25.) Such power cannot enlarge its own boundaries or support acts requiring other legal bases. Even within its legal limits the power is not unbridled. The mere fact that a court may have jurisdiction to make an order does not equip it to exercise *judicial discretion.* Its acts must not only be confined within the field of *discretion* but must also be of a character within the bounds of the limiting adjective "judicial." To exercise that power all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent, and just decision. On that basis then, and guided thereby, it gives latitude to the trial judge to express his own convictions in the declaration of rights and application of remedies.

Mr. Bowers, in his "Judicial Discretion of Trial Courts," (1931) section 10, pp. 14 and 15, defines the term as follows: "It is that power of decision, exercised to the necessary end of awarding justice, and based upon reason and the law, but for which decision there is no special governing statute or rule. * * * Discretion implies that in the absence of positive law or fixed rule, the judge is to decide by his view of expediency or of the demands of equity and justice."

The term "judicial discretion" was defined in Bailey v. Taaffe, (1866) 29 Cal. 422, 424, as follows: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice."

The Supreme Judicial Court of Massachusetts defined the term in Davis v. Boston Elevated R. Co., (1920) 235 Mass. 482, 126 N.E. 841, 843, as follows: "By such expression is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just."

In his work, "The Nature of the Judicial Process," Justice Cardozo wrote (p. 141): "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." Certainly a decision rendered in disregard of fundamental facts upon which the parties were relying or based on facts not adduced at the trial and unregulated by those principles which are recognized as being inherent in the true concept of judicial discretion would not be a *judicial decision* in the true sense.

[7] A motion for *correction of conclusions of law* (which is the gravamen of proceedings under section 663 and 663a of the Code of Civil Procedure) based on established facts does not call for a re-exercise of judicial discretion as to what is a *just* division of property; it calls only for the amendment of erroneous conclusions of law. The determination of the division of community property in a divorce action based on extreme cruelty is not a mere conclusion of law; it necessarily entails consideration of "all the facts * * * and the condition of the parties." Civ. Code, § 146. Evidence which might well have been sufficient to sustain the *first* and *second* judgments could fall far short of supporting the *third;* in fact the conclusion seems well nigh inescapable that *if the evidence was sufficient to justify the decision portrayed by the first and second judgments it must have been insufficient to justify the third.* The resolution of issues which had not been prejudicial to defendant husband under the first or second judgments became distinctly prejudicial under the third. Yet plaintiff is urging the proposition that because defendants had asked and been denied a new trial with respect to the first judgment, they should be barred from seeking a new trial as against the decision expressed in the third. Such proposition cannot be sustained under the facts here.

[8] A new trial is "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee." Code Civ.Proc. § 656. It is implicit in the proceeding that it be *"after a trial and decision."* Manifestly it is not until after a *decision* has been rendered that a party can ascertain whether he is aggrieved thereby or wants a new trial. If he does consider himself aggrieved the issues which he wants re-examined are those involved in the particular decision to which he objects, and it is only in the light of *that decision* that the correctness of the determination of those issues can be tested. (See Bond v. United Railroads, (1915) 169 Cal. 273, 276, 146 P. 688.)

[9-11] The "decision" in a case tried without a jury normally consists of written findings of fact and conclusions of law, separately stated, and filed with the clerk, Code Civ.Proc. § 632; such "decision" is the actual determination of the lawsuit. The judgment is the formal expression and evidence of that decision and should be *entered* in conformity with it, Code Civ. Proc., § 664. The judgment is deemed *rendered* when the *decision* is filed; its *rendition* is a judicial act, its *entry* is ministerial. First National Bank of Fresno v. Dusy, (1895) 110 Cal. 69, 75–76, 42 P. 476. It has already been remarked that the *decision* (written findings of fact and conclusions of law, separately stated) originally filed by the trial court preceding entry of the *first judgment* herein has never been expressly amended or superseded either by interlineation or by the filing of a new document entitled "Findings of Fact and Conclusions of Law" and the court's two subsequent decisions, insofar as they differ from the first decision, are evidenced only by minute entries and by the formal written judgments which were signed and filed.

It must also be pointed out, as further evidence of the true character of the proceedings leading to the third judgment, that in the last two paragraphs of such judgment defendant husband "is also ordered to *restore* and deliver to plaintiff * * * the said seven (7) shares of stock in the Manchester Avenue Company, formerly the Potrero Country Club. * * *

"Defendant is also ordered to *restore* to Mrs. Gossman all community furniture taken from the premises at 860 West Florence Avenue * * * since the filing of the complaint herein, or in lieu thereof, to pay her the sum of One Hundred Dollars ($100) in cash." The original complaint does not contain and the record discloses no amended or supplemental complaint containing any averments appropriate to the relief so ordered and this third judgment, entered February 7, 1940, solemnly recites that it is based on evidence taken at the original trial, beginning "February 28, 1939, and continued to and including March 2nd, 1939" and that it is "in accordance" with the "findings of fact and conclusions of law" that such judgment is rendered. An inspection of the original formally entitled Findings and Conclusions discloses no basis for the orders mentioned. The obvious and necessary conclusion is that evidence was taken or at least that the evidence already received was re-examined by the trial judge on plaintiff's motion for a new trial and for a new and different judgment which resulted in the third judgment.

[12] We have depicted at length the seeming irregularities in the various proceedings in connection with the three judgments because it was that record which was presented to the judge on defendants' motion for a new trial after the *third judgment* was entered. His order granting the motion is presumed to be correct and his discretion in the premises, if the motion was entertainable at all, was a broad one. (Estate of Armstrong, (1937) 8 Cal.2d 204, 209, 64 P.2d 1093; Laverne v. Dold, (1936) 17 Cal.App.2d 180, 183, 61 P.2d 497; Pettigrew v. O'Donnell, (1939) 32 Cal.App.2d 502, 503, 90 P.2d 93. There is no contention that his order was erroneous if he had jurisdiction to make it and was not bound by the law of the case. In view of the perplexing character of the record before us as to the procedure by which the third judgment was reached this case impresses us as being one in which the presumptions supporting the trial court's grant of a new trial on the probably more inclusive record before it are entitled to particularly great weight.

From what has been recited it appears that as a basis for the *third judgment* plaintiff filed and presented her *motion for a new trial* as well as her motion under Code of Civil Procedure sections 663 and 663a to correct the *conclusions of law,* vacate the prior judgment, and enter a new and different judgment. The record discloses that plaintiff's motion for a new trial was denied and her motion under sections 663 and 663a was granted. But this does not mean that the order modifying and changing the judgment was not made pursuant to the authority vested in the trial court on a motion for new trial by the terms of section 662 of the Code of Civil Procedure. The authority, within the limits stated, may be exercised *in ruling on the motion* whether it be granted or denied. That section provides that "In ruling on such motion [for a new trial], in a cause tried without a jury, the court may * * * *change or add to the findings, modify the judgment,* in whole or in part, *vacate the judgment,* in whole or in part, and grant a new trial on all or part of the issues, or, in lieu of granting a new trial, may vacate and set aside the findings and judgment and *reopen the case for further proceedings and the introduction of additional evidence* with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered. *Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code."* (Italics added.)

[13, 14] In view of the fact that, as heretofore shown, the court, on hearing plaintiff's motions, and prior to the rendition of the *third judgment,* evidently did reopen the case and receive further evidence or at least did re-examine the evidence before it—a procedure which it could not follow under sections 663 and 663a (Stanton v. Superior Court, (1927) 202 Cal. 478, 487, 261 P. 1001; Jones v. Clover, (1937) 24 Cal.App.2d 210, 212, 74 P.2d 517; Howe v. Deck, (1941) 46 Cal.App.2d 569, 577–578, 116 P.2d 155)—it becomes obvious that the court was proceeding under section 662 and that the *third judgment* is subject to the provisions of Code of Civil Procedure sections 657 and 659. Likewise it is obvious that the ruling of the trial court denying defendants original motion for a new trial as addressed to the first judgment has no application here. Under the circumstances shown, the subsequent third judgment superseded for all purposes the prior judgments. McCaleb v. McCaleb, (1917) 177 Cal. 147, 152, 169 P. 1023; Amell v. Amell, (1937) 10 Cal.2d 153, 155, 73 P.2d 888. The trial court had jurisdiction to entertain defendants' motion for a new trial addressed to the third judgment and it was not bound by any prior ruling in the case.

What has been said herein effectively disposes also of plaintiff's appeal from the order denying her motion to vacate the order granting defendants' motion for a new trial. Both the order granting the new trial and the order denying the motion to vacate the same are affirmed.

SHINN and PARKER WOOD, JJ., concurred.

TURNER et al. v. DONOVAN.

Civ. 12921.

District Court of Appeal, Second District.
Division 3. California.
May 25, 1942.
Hearing Denied July 23, 1942.

1. Judgment 🔑**910(3)**

A cause of action upon a judgment does not "accrue" until the judgment becomes final. Code Civ.Proc. §§ 312, 336, subd. 1; § 1049.

See Words and Phrases, Permanent Edition, for all other definitions of "Accrue".

2. Judgment 🔑**910(3)**

Where judgment entered in 1931 was affirmed on appeal and remittitur filed in 1935, an action on judgment brought in 1939 was not barred by the five year statute of limitations, since the limitations began to run from the date on which the judgment became final which was in 1935. Code Civ.Proc. §§ 312, 335, 336, subd. 1; §§ 681, 685, 1049.

3. Judgment 🔑**910(3)**

Where judgment entered in 1931 was affirmed on appeal in 1935, execution of which was not stayed pending appeal, an action on the judgment brought in 1939 was maintainable even though under statute plaintiff was entitled to an execution or to revive the judgment. Code Civ.Proc. § 336, subd. 1; §§ 681, 685.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by John W. Turner and others against James Donovan on a judgment. From a judgment in favor of plaintiffs, defendant appeals.

Affirmed.

James Donovan in pro. per.

Vernon Bettin, of Los Angeles, for respondents.

PARKER WOOD, Justice.

In a prior action between these parties a money judgment in favor of plaintiffs was entered in October, 1931. Defendant appealed. Execution was not stayed, and upon levy of execution while the appeal was pending the judgment was satisfied partially. The judgment was affirmed, and the remittitur was filed on March 15, 1935.

The complaint in the present action, based upon the prior judgment, was filed in December, 1939. The answer denied only the allegation that the judgment became final on March 15, 1935 (when the remittitur was filed), and alleged that it became final for all purposes of this action when the prior judgment was entered in October, 1931.

As affirmative defenses, the answer alleged: (1) that the judgment was enforceable under section 681 of the Code of Civil Procedure at any time within five years after entry thereof; that if, by reason of the appeal, the time until March 15, 1935, must be excluded from the five years within which execution may issue, then the judgment was still enforceable and this action may not be maintained; (2) that more than five years have elapsed from the date of entry of the judgment, and plaintiffs have an enforceable judgment under section 685 of the Code of Civil Procedure, and this action may not be maintained since it is a suit upon the same cause of action; and (3) that the time within which an action might be commenced under section 336 of the Code of Civil Procedure expired in October, 1936 (five years after entry of judgment), and any right of action is barred by the statute of limitations under said section 336.

The court found that the action was not barred by the statute of limitations, and rendered judgment for plaintiffs. Defendant appeals upon the judgment roll.

The principal question presented upon this appeal is whether the action is barred by the provisions of section 336, subdivision 1, of the Code of Civil Procedure. This section must be considered in connection with section 335 of that Code, which is: "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:" Then follows section 336, which is in part: "Within five years: 1. An action upon a judgment * * * of any state within the United States." The inquiry arises as to when the period of five years commenced.

Appellant contends that it commenced at the time of the entry of the judgment in October, 1931; that a right of action, if any, based upon the judgment expired in October, 1936, and therefore was barred by the statute of limitations.

Respondents contend that such an action can be based only upon a judgment finally determining the controverted matters; that said period therefore commenced at the time the judgment became final, when the remittitur was filed in March, 1935, and the five years' statute of limitations had not expired when the complaint herein was filed in December, 1939.

[1,2] Before an action based upon the former judgment could be commenced properly, it was necessary that the cause of action should have accrued. The cause of action did not accrue until the issues between the parties had been determined finally.

Section 312 of the Code of Civil Procedure provides: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued * * *." Section 1049 of the same Code states: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

In Feeney v. Hinckley, 1901, 134 Cal. 467, 66 P. 580, 86 Am.St.Rep. 290, the action upon a judgment was commenced more than five years and less than six years after the entry of the judgment. No appeal was taken from the prior judgment, but the time within which an appeal could be taken was one year. On demurrer it was claimed that the action was barred by said section 336. The court said (134 Cal. at page 467, 66 P. at page 580, 86 Am.St.Rep. 290): "If the five years commenced to run from the date of entry, the demurrer was properly sustained. If, however, * * * it commenced to run only when [the judgment] became a finality; when the rights of the parties were fixed by it; when it was admissible in evidence for or against either of them; when, in short, a cause of action had accrued,—then, clearly, in case an appeal from the judgment be taken, the five years cannot be said to have commenced to run until final determination following such appeal, or, in the event that no appeal be taken, then only when the time within which such an appeal might be taken has fully elapsed."

In that case it was stated further (134 Cal. at page 470, 66 P. at page 581, 86 Am.St.Rep. 290): "It is the established rule and doctrine, then, that action will lie only upon a final judgment, and that in the generality of cases only such a judgment is admissible in evidence. If the five-years statute of limitations is to commence to run from the date of the entry of judgment, the anomalous condition is presented of a right of action which may be barred before the cause of action has accrued."

It was held that the action was not barred, the court stating further (134 Cal. at page 470, 66 P. at page 581, 86 Am.St.Rep. 290): "* * * the statute begins to run only when the right of action has accrued, and this, as has been said and shown, is after final determination on appeal, in the event that an appeal has been taken, or after passage of the time in which an appeal might be taken in the event that none has been."

The case of Feeney v. Hinckley, supra, decided in 1901, has been quoted with approval at various times, including a comparatively recent date as hereinafter shown.

In Willard v. Dobbins, 1923, 191 Cal. 287, 294, 216 P. 1008, 1011, it is said: "A cause of action upon a judgment does not accrue until the judgment becomes final. Feeney v. Hinckley, * * *."

In Stulz v. Bacon, 1939, 35 Cal.App.2d 648, 649, 96 P.2d 369, it is said: "However it is settled law that the statute of limitations begins to run only after the date the judgment becomes final. Feeney v. Hinckley, * * *."

The case of Jones v. Summers, 1930, 105 Cal.App. 51, 53, 286 P. 1093, 1094, states: "It has repeatedly been held that a cause of action upon a judgment does not accrue until the judgment becomes final, and that the statute of limitations does not commence running in such cases until the expiration of the time for appeal."

It was stated in Trenouth v. Farrington, 1880, 54 Cal. 273, and other early California cases, that the statute begins to run from the entry of the judgment. The issue presented in those cases, however, was whether the statute began to run from the date of rendition or from the date of entry of the judgment. The actions were within the five year period if the time began to run from the date of entry, but not within it if the time began from the date of rendition. It therefore appears that such statement, that the statute runs from the entry, was limited in its application to an issue quite different from that involved in Feeney v. Hinckley, supra, and in the present case.

In support of his contention, appellant relies in part upon cases of other states, including Utah, Montana, Washington, Nevada, Alabama, North Carolina and Kansas. It is conceded in Freeman on Judgments, 5th

Ed., vol. 2, § 1071, that the rule in most jurisdictions is that the statute of limitations begins to run from the date of entry of the judgment, but it is concluded therein that the California rule set forth in Feeney v. Hinckley, supra, is the theoretically correct and preferable rule. It is there stated (p. 2229): "It would seem upon principle that a judgment should not be available as a cause of action until it has become a final and conclusive adjudication and merger of the claim or cause of action sued upon."; and (p. 2230): "* * * the same reasons which have induced some courts to hold that the pendency of an appeal without supersedeas or stay or the mere unexpired right of appeal prevents a judgment from becoming an estoppel or bar, should equally prevent a judgment from becoming actionable under the same circumstances, since the evil consequences would be the same in both cases. It cannot be said, however, that the position here taken is established by the authorities, since they have rarely considered the matter from exactly this point of view." It is there stated further (p. 2230), referring to Feeney v. Hinckley, and other California cases: "* * * the right to or pendency of an appeal defeats the operation of the judgment as an estoppel and prevents an action upon it."

The judgment became final for the purposes herein involved when the remittitur was filed in March, 1935, and therefore this action was not barred by the statute of limitations.

[3] Appellant's alleged defenses that this action may not be maintained for the reason that respondents had a judgment which was enforceable by execution under section 681 or section 685 of the Code of Civil Procedure, cannot be sustained. The question here is not whether respondents were entitled to an execution under one of these sections; or whether they were entitled to revive the judgment under section 685. The fact that one may be entitled to enforce an existing judgment by execution does not prohibit him from maintaining an action to obtain a new judgment for the balance due upon the former judgment. The "* * * enforcement of a judgment by execution and by action cannot properly be placed upon the same basis since they are different both in theory and results." Freeman on Judgments, supra, § 1071, p. 2231.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

20 Cal.2d 410

SHEWARD et al. v. VIRTUE et al.
L. A. 18271.

Supreme Court of California.
June 2, 1942.

1. Negligence ⚷27

A duty of care exists on part of manufacturer regardless of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured, to place life and limb in peril.

2. Negligence ⚷27

Freedom from negligence does not inure to the manufacturer because it purchased parts from another which were defective.

3. Negligence ⚷134(4)

In action for personal injuries sustained by customer in beauty parlor resulting from the collapse of a chair manufactured by defendant from parts purchased from others, evidence justified judgment against defendant on ground that a defect in chair leg existed while it was being handled by defendant's employees in the process of making the chair, that the defect was discernible if careful examination had been made, and that no such examination was made.

4. Negligence ⚷27

The question whether manufacturer of chair was negligent, as respects injuries sustained by beauty shop customer from collapse of chair, in failing to discover defects in parts purchased from others, was not determined by evidence of tests for discovering defects made by other manufacturers of similar articles, since the general practice or custom would not excuse manufacturer's failure unless such practice or custom was consistent with due care.

5. Negligence ⚷27

If the defective condition of any part of a manufactured article could have been disclosed by reasonable inspection and tests, and such inspection and tests are omitted, the manufacturer is negligent as regards its duty to consumers lawfully using such article.

In Bank.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Robert L. Sheward and others against Phillip M. Virtue and others for personal injuries resulting from the collapse of a chair. From a judgment in favor of plaintiff, against the named defendant, the named defendant appeals, and from an order granting a new trial as to another defendant, plaintiff appeals.

Affirmed.

For prior opinion, see 120 P.2d 142.

Murchison & Clopton, R. Bruce Murchison, Richard C. Hart, and John B. Myers, Jr., all of Los Angeles, for appellants.

Betts & Garrison and Maynard Garrison, all of Los Angeles, for respondents.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for respondent Bullock's Inc.

SHENK, Justice.

The plaintiffs, husband and wife, had judgment on a verdict for $4,750 against the defendants Virtue Brothers and Bullock's Inc. for personal injuries suffered by the wife. The trial court granted a motion for new trial on behalf of Bullock's Inc., and denied a similar motion on behalf of Virtue Brothers. The plaintiffs have appealed from the order granting a new trial to Bullock's Inc., and Virtue Brothers have appealed from the judgment.

The wife, referred to herein as the plaintiff, sustained the injuries when a leather upholstered metal chair in the beauty parlor of Bullock's Inc. collapsed while she was sitting in it, and she was thrown to the floor. Virtue Brothers manufactured the chair and it was sold to Bullock's Inc. for use in the beauty parlor. The principal question arises on the appeal of Virtue Brothers and is concerned with the standard of care required of the manufacturer under the facts of the case.

[1] No serious contention may be made by Virtue Brothers that they did not owe a duty of care toward the plaintiff in the manufacture of the chair because privity of contract between them was absent. The courts of this state are committed to the doctrine that the duty of care exists in the absence of privity of contract not only where the article manufactured is inherently dangerous but also where it is reasonably certain, if negligently manufactured or constructed, to place life and limb in

peril. Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481; O'Rourke v. Day & Night Water Heater Co., Ltd., 31 Cal.App.2d 364, 366, 88 P.2d 191. The Kalash case involved a defective rung in a ladder. The present case involves a defective leg in a chair. A completed chair is ready for use when it leaves the factory and the manufacturer does not expect it to be subjected to new tests for the discovery of defects before such use. In the case of S. Blickman, Inc., v. Chilton, Tex. Civ.App., 114 S.W.2d 646, it was recognized that a counter chair was such an article as required the exercise of due care in its manufacture. The rule is as applicable to a defective chair as to a defective ladder. If there is any difference it is in the extent of the injuries which might be expected to result from negligent manufacture.

[2] Virtue Brothers received rough iron leg castings moulded to their own patterns by another firm. It is conceded that freedom from negligence does not inure to the manufacturer because it purchased parts from another which were defective. Kalash v. Los Angeles Ladder Co., supra; MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, Ann.Cas.1916C, 440. Each batch of fifteen to twenty-five rough castings was polished on a rotator by one or more employees. They were then moved into the hands of other employees for submersion in a nickel sulphate solution, for buffing, for chromium plating, and for alkaline cleansers. The employees received no specific instructions to inspect the material for defects. Each man examined his work and if a defect appeared the casting was withdrawn from the batch. In the words of the defendant Virtue, "we told our men to do their work. We do not tell them to look for defects * * * but if a man finds a defect it is understood that it should have been brought to our attention."

The leg of the chair which collapsed showed an old crack discolored by acid immersions and oxidation. It was in evidence that such a fracture is not filled in the process of plating because of the presence of air bubbles, and that such a crack would become more apparent after plating. Fine grain castings of this type are subject to cooling or shrinkage cracks if in the casting and cooling processes a sufficient difference in temperature exists to prevent a state of equilibrium in the tension and compressive stresses; therefore, if the outside of the casting is cooled more rapidly than the inside a fracture such as the one here involved would be likely to occur.

[3] On their appeal Virtue Brothers contend that the evidence does not support the verdict. The evidence is sufficient, however, to support the implied finding of the jury that the defect existed when the casting was in the possession of the manufacturer and while it was being handled by its employees in the necessary processes before it became a part of a completed chair; that the defect was discernible if a careful visual examination had been made; that no careful or any examination for fractures was made; that the manufacturer was negligent in failing to make such an examination and that its negligence was the proximate cause of the plaintiff's injuries.

[4] Virtue Brothers further contend that a determination of the question whether they were negligent must be resolved by evidence of tests for discovering defects made by other manufacturers of similar articles. They argue that they should not have been required to make tests which were not customarily made by other manufacturers; that in the absence of evidence of what other manufacturers did to discover defects and that these appellants did not apply such tests, they may not be found guilty of negligence. Evidence of that character was not introduced at the trial of this case. In fact the evidence was that no tests or special examinations for fractures were made by Virtue Brothers. Assuming that other manufacturers likewise made no special examination to discover fractures, such a custom would not excuse the failure of these appellants. A somewhat similar contention was rejected in the case of Hughes v. Warman Steel Casting Co., 174 Cal. 556, 561, 163 P. 885. In Robinet v. Hawks, 200 Cal. 265, 274, 252 P. 1045, this court said that the doctrine of customary usage does not apply to the question of legal duty under the law of negligence, or that the continuance of a careless performance of a duty would transform a party's negligence into due care. Likewise in Anstead v. Pacific Gas & Electric Co., 203 Cal. 634,

638, 265 P. 487, a like contention was answered, with citation of authorities, by the statement that the general practice or custom would not excuse the defendant's failure unless it was consistent with due care. More recently in Mehollin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855, this court said that one may not justify a failure to use ordinary care by showing that others in the same business practiced a similar want of care.

[5] The appropriate standard of care applicable to the facts of the present case is expressed in O'Rourke v. Day & Night Water Heater Co., Ltd., supra, to the effect that if the defective condition of the part could have been disclosed by reasonable inspection and tests, and such inspection and tests had been omitted, the defendant has been negligent. In Smith v. Peerless Glass Co., Inc., 259 N.Y. 292, 181 N.E. 576, it was held that reasonable care consisted of making the inspections and tests during the course of manufacture and after the article was completed which the manufacturer should recognize were reasonably necessary to secure the production of a safe article. Language in cases such as Kalash v. Los Angeles Ladder Co., MacPherson v. Buick Motor Company, Smith v. Peerless Glass Co., Inc., supra, referring to standards of care adopted by other manufacturers or the duty to use customary methods to detect defects, is not to be taken as requiring evidence of standards in use by others before the jury may find negligence in the particular case. Such evidence may be pertinent where the circumstances do not otherwise disclose the fact of negligence. But if, as stated, the evidence justifies the jury's finding that the defendants omitted to apply any standard of reasonable inspection or other simple test which would have revealed the defect, and that the omission constituted negligence, the negligence would not be excused because other manufacturers did not make such tests. The language of the cases relied on by these appellants recognizes the duty of the manufacturer to exercise due care.

The plaintiffs apparently have not seriously pursued their appeal from the order granting the motion for a new trial on behalf of Bullock's Inc. They do not contend that there was any abuse of discretion on the part of the trial court in granting the motion.

The order granting the motion for a new trial as to Bullock's Inc., is affirmed. The judgment in favor of the plaintiffs and against Virtue Brothers is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 415

ADAMS v. TALBOTT (DUNGAN, Intervener).

S. F. 16404.

Supreme Court of California.

June 2, 1942.

1. Appeal and error 🔑419(1)

Where judgment provided that plaintiff should hold realty as trustee for defendant, and should reconvey realty to defendant on payment of certain sum, and for entry of decree quieting title in plaintiff on defendant's failure to make such payment, and trial court entered order denying plaintiff's motion for judgment quieting her title, plaintiff's appeal "from the judgment" would be treated as an appeal from the order, since defendant would not be misled thereby in view of allegation in plaintiff's account as trustee that judgment had not been appealed and had become final.

2. Appeal and error 🔑419(1)

Notices of appeal are liberally construed to effect a hearing on the merits, and the words "judgment" and "order" are treated as interchangeable.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment" and "Order".

3. Appeal and error 🔑344

If judgment of June 21, 1939, providing that plaintiff should hold realty as trustee for defendant, and should reconvey realty to defendant on payment of certain sum, and for entry of decree quieting title in plaintiff on defendant's failure to make such payment, was interlocutory, order of October 23, 1939, denying plaintiff's motion for judgment quieting her title, was a final adjudication of the issues, so that appeal from order on November 9, 1939, was timely.

4. Appeal and error ⚷82(1)

If judgment providing that plaintiff should hold realty as trustee for defendant and should reconvey realty to defendant on payment of certain sum, and for entry of decree quieting title in plaintiff on defendant's failure to make such payments, was final judgment, subsequent order denying plaintiff's motion for judgment quieting her title was "special order made after final judgment" and was appealable. Code Civ. Proc. § 963, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Order Made After Final Judgment".

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In Bank.

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Action by D. Adams against Paul Talbott to quiet title to realty. The defendant filed an answer and cross-complaint seeking a reconveyance of the property theretofore transferred to the plaintiff upon a trust agreement for his benefit, and alleging a breach of that agreement by the plaintiff. J. M. Dungan, a creditor of the defendant, intervened. From an order granting defendant's motion to strike plaintiff's notice of appeal and to terminate proceedings on appeal, the plaintiff appeals.

Order reversed.

For prior opinions, see 117 P.2d 17, 118 P.2d 23.

Garth V. Lacey, of Salinas, and George Olshausen, of San Francisco, for appellant.

J. P. Mandl and Stanley K. Lawson, both of Salinas, for respondents

SHENK, Justice.

This is an appeal from an order granting defendant's motion to strike plaintiff's notice of appeal and to terminate proceedings on appeal.

The plaintiff commenced an action against the defendant on January 12, 1938, to quiet title to certain real property. The defendant filed an answer and a cross-complaint seeking a reconveyance of the property theretofore transferred to the plaintiff upon a trust agreement for his benefit, and alleging a breach of that agreement by the plaintiff.

Dungan, a creditor of the defendant, intervened to protect certain creditor's rights in any property in which defendant might have an interest. The court found the facts and concluded that a trust in the property existed in favor of the defendant, and that the plaintiff should account as trustee thereof. Judgment thereon was entered on June 19, 1939. The judgment provided that the plaintiff hold the real property as trustee for the defendant and that she reconvey it to him upon the condition that the defendant pay to her the sum of $4,909.97, together with accruals to be determined by the court on the final account of the trustee. The judgment provided that in the event of failure to perform the condition within ninety days from the entry of judgment the plaintiff would be entitled to a decree quieting her title in the property. Notice of entry of judgment was served on the plaintiff on June 21, 1939. The plaintiff filed a "First and Final Account of Trustee and Application to Settle said Account and Dismiss Trustee," on October 10, 1939. On October 16, 1939, the court entered its order that the trust estate was indebted to the plaintiff as trustee in the sum of $2,893.50, and settling and approving the trustee's account. On October 17, 1939, the plaintiff filed a notice of motion for a judgment quieting her title upon the ground that the defendant had not complied with the condition stated in the judgment. On October 23, 1939, the court entered an order denying the motion based upon a finding that the defendant had been ready, willing and able and had offered to comply with the condition within the ninety-day period, and that the plaintiff forthwith reconvey the property pursuant to the judgment of June 21, 1939.

On November 9, 1939, the plaintiff filed a notice of appeal "from the judgment rendered in favor of the defendant," a request to prepare a transcript, and a notice of intention to deposit the deed with the county clerk pursuant to section 944 of the Code of Civil Procedure. The defendant moved to strike from the records the notice of appeal, the request for a transcript, and the notice of intention to deposit the deed and for an order terminating the proceedings on appeal, on the ground that the time had expired within which the plaintiff could prosecute an appeal. On December 15, 1939, the trial court granted the motion and terminated the proceedings on the ground that the appeal was from the judgment of June 19, 1939, and that the time for appeal from that judgment had expired prior to the filing of the notice of appeal. The plaintiff's motion to strike that order was denied. The plaintiff prosecutes the present appeal from the order of December 15, terminating the proceedings on her appeal from the judgment.

The defendant contends that the plaintiff's appeal filed on November 9, 1939, was from the judgment of June 19, 1939, and was therefore filed too late. Further, that if the judgment of June 19, 1939, be considered interlocutory and not final, an appeal would not lie therefrom.

[1-4] The fact that the plaintiff's notice of appeal stated that it was taken "from the judgment" does not compel a conclusion that it was intended as an appeal from the judgment of June 19, 1939, rather than from the order of October 23, 1939. Notices of appeal are liberally construed to effect a hearing on the merits, and the words "judgment" and "order" have been treated as interchangeable. Kellett v. Marvel, 6 Cal.2d 464, 58 P.2d 649; Estate of Smead, 215 Cal. 439, 10 P.2d 462; Title Guar. & Trust Co. v. Lester, 216 Cal. 372, 14 P.2d 297. There are no facts which would justify a conclusion that the defendant was misled. On the contrary in her account filed on October 10, 1939, the plaintiff alleged that no appeal had been taken from the judgment of June 19, 1939, and that it had become final. It then becomes unnecessary on the present appeal to determine whether the judgment of June 21, 1939, was interlocutory or final, for in either event the order here appealed from cannot stand. If the judgment of June 21, 1939, was interlocutory, the order of October 23, 1939, became a final adjudication of the issues and the appeal therefrom was proper and timely. If the judgment of June 21, 1939, was the final judgment, the order of October 23, 1939, would be a special order made after final judgment and be appealable. § 963, subd. 2, Code Civ. Proc.

The trial court was therefore in error in terminating the proceedings on appeal on the ground that the appeal was filed too late.

The order is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 399

PEOPLE v. COLEMAN.

Cr. 4402.

Supreme Court of California.
May 28, 1942.

1. Criminal law 🔑1166½(6)

In prosecution of husband for murder of wife, no prejudice to defendant could be inferred because jury consisted of ten women and two men, and one woman alternate.

2. Homicide 🔑179

In prosecution of husband for murder of wife, defendant was not entitled to have all testimony on issue of insanity before the jury on trial of issue of not guilty, as affecting punishment. Penal Code, §§ 1016, 1020, 1026.

3. Criminal law 🔑48

The standard of accountability for crime is nature and quality of the act, not mental age of an adult criminal.

4. Criminal law 🔑1159(1)

When jury imposes the extreme penalty in exercise of its discretion, its determination cannot be disturbed by reviewing court.

5. Criminal law 🔑1159(2)

Where evidence of intoxication was presented and jury was permitted to consider such evidence to determine whether defendant had intent to commit the crime charged, conviction will not be disturbed if facts support implied finding that defendant had the specific intent.

6. Criminal law 🔑1159(2)

Conviction will not be disturbed where there is substantial and credible evidence on insanity hearing to support verdict of sanity.

7. Homicide 🔑286(1)

In prosecution for murder, on trial of plea of not guilty, jury was properly instructed on issue of intent.

8. Homicide 🔑294(1)

In murder prosecution, on trial of plea of not guilty by reason of insanity, jury was properly instructed on the test of legal insanity.

9. Criminal law 🔑48

The test of legal "insanity" is whether defendant had reasoning capacity sufficient to distinguish between right and wrong concerning the particular act he was doing; knowledge and consciousness that what he was doing was wrong and would subject him to punishment.

See Words and Phrases, Permanent Edition, for all other definitions of "Insanity".

10. Homicide ⇐230

In prosecution of husband for murder of wife, record supported implied finding of jury that defendant formed specific intent of murder before commencing trip to place of murder, and that such intent continued to control his act.

11. Criminal law ⇐624

In murder prosecution, evidence on insanity hearing supported implied finding that defendant's prolonged habitual drinking did not result in insanity.

◆

In Bank.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

John Lawrence Coleman was convicted of first-degree murder, and he appeals automatically.

Affirmed.

Crawford R. Bonter, Arthur B. Dunne, and Dunne & Dunne, all of San Francisco, for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and H. Pitts Mack, Deputy Dist. Atty., both of San Diego, for respondent.

SHENK, Justice.

This is an automatic appeal from a judgment of conviction of first degree murder imposing the death penalty on the defendant. See § 1239, Penal Code.

The defendant killed his wife, Myrtle May Coleman, in San Diego county, on June 5, 1941, by shooting her with a .38 caliber revolver. He was immediately taken into custody and was charged with the commission of the offense. On his arraignment he pleaded not guilty and not guilty by reason of insanity. In conformity with the provisions of section 1026 of the Penal Code he was tried first on his plea of not guilty. The jury brought in a verdict of guilty as charged without recommendation. The defendant thereupon went to trial before the same jury on his plea of not guilty by reason of insanity. The jury found that he was sane at the time of the commission of the crime. The imposition of the death penalty followed.

At the trial the defendant was represented successively by two attorneys appointed by the court. At the close of the trial he expressed dissatisfaction with the second attorney for the reason that said attorney was of the opinion that the defendant had no grounds for a new trial. The court permitted the defendant personally to argue the motion for a new trial. The motion was denied. On the appeal counsel was appointed by the court to prepare briefs in behalf of the defendant. Those briefs have been filed. They present fully and ably the arguments in support of all points in the defendant's behalf. In addition the defendant himself has submitted certain matters occurring in the course of the trial which are claimed by him to justify a new trial.

[1] None of the matters presented by the defendant in his own behalf is germane to any possible ground for a new trial. Neither are they relevant to the question whether he has had a full, fair and impartial trial. No prejudice to him may be inferred because the jury consisted of ten women and two men, and one woman alternate. Other matters urged by him in person do not require special notice.

The facts disclosed on the trial of the issue of not guilty are undisputed.

The defendant was born in Chicago, and at the time of trial was forty-nine years of age. He had been previously married and was the father of two sons. The deceased was his third wife. He was in the United States Army on the Mexican border in 1915. He served on the Chicago police force for about six years. For eighteen years he was occupied as a bartender and as an automobile salesman. He gambled and drank heavily. About a year and a half before the homicide he was treated in a hospital for delirium tremens.

In May 1935 the defendant came to San Diego. He was working as a bartender at the San Diego Fair when he met the deceased. They married in November 1937. During this period the defendant was unemployed a large part of the time. The deceased objected to his working as a bartender. They bought a ranch on which the defendant worked for a year and a half. It proved unprofitable. They disposed of it and took up their residence again in the City of San Diego. The deceased operated a beauty shop, known as "Peggy's Beauty Salon" in Coronado near the Hotel Del Coronado. She too had previously been married. In 1935 the defendant loaned her $500 to assist her in obtaining a divorce from her husband. In 1936 he loaned her the further sum of $300 to assist her in the operation of her business. Other money matters between them grew out of the deceased's pawning two diamond rings belonging to the defendant, and the payment by her of a balance for his hospital treatments.

In March 1941 the spouses separated and the wife contemplated divorce proceedings. She and the defendant signed an instrument prepared by the wife, whereby she agreed to pay the defendant $200 in settlement of all claims. She paid him $175 at the time and signed a thirty-day note for the balance. She orally promised to pay him $150 in small amounts as he needed it from money which she was holding for him. The defendant signed a general appearance in the divorce action and the interlocutory decree was entered on April 25, 1941. He thereupon went to Texas and to his home in Chicago where he recovered from an illness. He returned to San Diego on the night of May 22, 1941, and called up his wife. There was no answer. He went to her residence and waited until about midnight when she drove to her garage in a new car. The defendant accosted her and she screamed. The defendant left the scene and later called her on the telephone. He insisted that she meet him downtown at a designated waffle shop. She met him accompanied by a police officer who took him into custody on a battery charge. He pleaded guilty and on May 29th received a suspended sentence. On that day he talked to Mrs. Coleman and told her that he was going to Long Beach to look for work and he wanted the pawn tickets for his rings and some of the money which she still owed him. She promised to get the rings out of pawn when she had sufficient money for the purpose, and to send him what she could spare on the following Saturday if he did not locate a job. She exacted a promise on his part that if he came back he would not come to Coronado or cause her any trouble.

At Long Beach the defendant sought employment without success. While he was there he was drinking heavily and ran short of funds. He traded some personal effects at one place for the .38 caliber revolver and at another place purchased twelve cartridges. On June 5, 1941, he boarded a bus bound for San Diego. He carried the revolver in a hand bag. He also had a bottle of whiskey in his pocket. While he was drinking liquor in the Laguna Beach bus station the bus left without him. He then made the rounds of the Laguna Beach drinking places. He testified that he remembered nothing after an argument with a Laguna Beach bartender over a twenty-five cent charge for a bottle of beer until he awoke after dark to find himself in the Coronado jail on a charge of murdering his wife.

The defendant's purpose in going to San Diego was to get the money owing to him from his wife. He arrived in San Diego about 4:30 on the afternoon of June 5th. He entered a yellow cab with his travelling bag and requested the driver to take him to the Hotel Coronado. The driver did not know the route to the hotel and the defendant directed him. When they arrived at the hotel grounds, the defendant asked the driver to proceed to the rear of the grounds. There the defendant paid the driver and dismissed him. The defendant crossed shrubbery, a fence and the road back of the hotel. His bag was found the next day in that part of the grounds. The defendant next appeared in "Peggy's Beauty Salon." He asked where Peggy was. He was told she was in a rear booth having her hair combed. He entered the booth. Mrs. Coleman turned and said, "you have been drinking." The attendant saw the muzzle of the gun extending from the defendant's coat pocket in his right hand. She ran to the hotel. Mrs. Coleman was left alone in the booth with the defendant. Three or four shots and a woman's scream were heard. Mrs. Coleman made her way to an alley back of the beauty shop. The defendant followed her and began hitting her with the barrel of the gun. A beauty shop attendant opened the door of a real estate office and Mrs. Coleman stepped through the door. The defendant followed and hit her again. She collapsed, and he leaned over her. Someone straightened him up, and he threw the gun under a desk. He said: "She got what was coming to her." The defendant made no attempt to get away but stood slouched against a wall. Within five minutes an officer appeared and took him in custody. As he was being driven away he pointed to Frank Martin, proprietor of a nearby barber shop, and said, "you are the next."

Mrs. Coleman was taken to a hospital where she died. Her body showed four bullet wounds, two in the arm, one in the abdomen, and one in the back.

At the police station the defendant was examined by a physician and found to be untidy, unshaven, his speech coherent, but he showed the influence of alcohol in his eyes, tongue, and throat, and in his walk. He stated to an officer that he had shot his wife; that he had been drinking for three days; that he intended to kill Frank Martin, the barber, first, and then his wife, but that it did not work out as he had planned.

On the trial of the issue of insanity the following appeared: The defendant was born in 1892. His academic education ceased when he was in the seventh grade. He left home at the age of sixteen or seventeen, and took up the occupation of bartender. He had had the usual children's diseases, and in addition sustained a head injury by being hit by a "two by four," which rendered him unconscious. At another time he was beaten by a gang and thrown into a basement. In one affray while he was a policeman he was stabbed in four places. The scars of those injuries were visible.

The defendant started to drink at the age of seventeen and became a heavy drinker. He had delirium tremens the first time in 1924 or 1925 and about six times in the ten-year period prior to 1940. He noticed that after treatment for this difficulty his memory was not different or affected but that instead of being cured he became progressively worse.

His relations with the deceased were happy up to the time of their separation. On the trial of the insanity plea he related the cause of separation. He and the deceased had lived together for a year and a half before their marriage in 1937. About October, 1940, he appeared unexpectedly in the beauty shop just before closing time. Frank Martin, the barber, came in shortly thereafter. Due to the fact that his wife had permitted the operators to leave earlier than usual, and because of the apparent embarrassment of Martin and Mrs. Coleman, the defendant suspected her infidelity. His suspicions increased when she daily made excuses for delaying her departure from the shop beyond the customary closing time. He watched her for some time without gaining any tangible evidence. Finally she confessed her relations with Martin and they agreed upon the divorce and settlement.

The defendant testified fully regarding past illnesses, injuries, and events in his life, also that there were insanities and suicides in his family. The physical and psychological effects of his drinking, his divorce and separation were also given in detail. The jury heard testimony of doctors who examined him and who gave their opinion, on the one side that he was insane, and on the other that he was sane at the time of the homicide.

The defendant does not contend that the evidence was insufficient to sustain the finding of the jury that he committed the homicide. He does not and indeed could not seriously contend that the evidence of his mental condition was such that he should be relieved of responsibility for his criminal act. His principal contention is that the jury should have had before it on the trial of the issue of not guilty the testimony on the insanity issue; that otherwise it could not determine with justice to him the degree of the crime or the punishment which should be meted out to him. It is his theory that in following the procedure required by section 1026 of the Penal Code the punishment should not be fixed by the jury until after the insanity hearings; that the jury should have before it all the testimony which might bear on the matter of the exercise of the jury's discretion to return a recommendation of life imprisonment with the verdict of guilty of murder in the first degree. He points out that in cases where the defendant enters the sole plea of not guilty by reason of insanity the trial court fixes the punishment after the evidence relating to the issue of insanity has been received. It is argued that on the trial of the plea of not guilty the instruction that the defendant is, for the purposes of that plea, conclusively presumed to be sane eliminates any consideration of mental abnormalities not amounting to a complete defense of legal insanity, but which still may show the lack of capacity to form the specific intent to commit first degree murder; and that the jury should be permitted on that plea to consider all of the evidence bearing on the mental condition of the defendant at the time of the commission of the crime.

[2] The foregoing contentions are not new. They were made in other cases determined after the amendment of sections 1016 and 1020 of the Penal Code and the enactment of section 1026 of the same code all in 1927. It may not properly be contended that the procedure prescribed by those sections was not followed in the present case. Those enactments were incorporated in the law of this state for the obvious purpose of providing a remedy against what was deemed to be a grave defect in the administration of the criminal law when the question of the insanity of the defendant was injected into the case. They were declared to be valid in 1928 in the case of People v. Troche, 206 Cal. 35, 273 P. 767, and have been upheld in a line of unvarying decisions for the last thirteen years and more, some of which are the following: People v. Leong Fook, 206 Cal. 64, 273 P. 779; People v. Valenzuela, 7 Cal.2d 650, 62 P.2d 142; People v. Boggs, 12 Cal. 2d 27, 82 P.2d 368; People v. French, 12 Cal.2d 720, 87 P.2d 1014; People v. D'Angelo, 13 Cal.2d 203, 88 P.2d 708; People v. Cordova, 14 Cal.2d 308, 94 P.2d 40; People v. Smith, 14 Cal.2d 541, 95 P.2d 453.

In the intervening years the legislature has not seen fit to change those laws in any substantial respect, and not at all in the respects of which the defendant in this case now complains.

[3] The arguments for the defendant derive their encouragement from certain dissenting opinions, first in People v. Troche, supra, which set forth the views advanced by the defendant herein. Fundamentally the opposing views expressed in the decided cases are addressed to the desirability of the legislative policy, rather than to the question of deprivation of constitutional rights under the established system. As stated in People v. Perry, 195 Cal. 623, 234 P. 890, the standard of accountability is the nature and quality of the act and not the mental age of an adult criminal. The contention was rejected that degrees of mental irresponsibility induced by injury, drugs, or disease, short of legal insanity, should be considered as mitigating circumstances. It was held that the exercise of the jury's discretion was confined to a consideration of the facts and circumstances attending the commission of the crime, and after such consideration if any doubt be engendered as to the punishment to be imposed, the jury should not impose the extreme penalty.

In People v. Hickman, 204 Cal. 470, 268 P. 909, 270 P. 1117, it was determined that the 1927 amendments to the Penal Code requiring a separate hearing on each plea did not take any constitutional rights from the defendant who pleaded not guilty and not guilty by reason of insanity. It was pointed out that the purpose of the statute was to overcome some of the abuses which had crept into the administration of justice in criminal cases and that, under proper pleas, the defendant may submit all the evidence which could have been presented before the effective date of the amendments in mitigation of, excuse, justification or exoneration for the act; likewise that the amended statute did not take away the defense of insanity, nor did the change in procedure in any way change or affect the rule concerning the burden of proof. See, also, People v. D'Angelo, supra.

In People v. French, supra, [12 Cal.2d 720, 87 P.2d 1022], this court quoted with approval the general rule "that insanity * * * is either a complete defense or none at all, and * * * there is no degree of insanity sufficient to acquit of murder but not of manslaughter." It was said: "The insanity of a defendant cannot be used for the purpose of reducing his crime from murder in the first degree to murder in the second degree. If responsible at all in this respect, he is responsible in the same degree as a sane man, and if he is not responsible at all he is entitled to an acquittal on both degrees." Obviously an insane person accused of a crime would be inhumanely dealt with if his insanity were considered merely to reduce the degree of his crime or the punishment therefor. In the Troche case it was also pointed out that whether the issue of guilt or the issue of insanity should be tried first was a matter to be determined by the legislature in the absence of any constitutional prohibition. That case was followed in People v. Leong Fook, supra, where it was observed that the intent with which the homicide was committed must be manifested by the circumstances connected with the offense, and that evidence relating to the character and previous habits of the defendant was not admissible solely for the purpose of enabling the jury to assess the punishment at death or life imprisonment; that the proof of insanity in the nature of things was separable from the facts and circumstances attending the commission of the homicide and such as existed antecedently to the commission of the homicide and disconnected with the facts and circumstances which immediately precede, attend and follow its commission.

[4] In People v. Valenzuela, supra, the defendant was sentenced to pay the extreme penalty after adverse verdicts of the jury on pleas of not guilty and not guilty by reason of insanity. In that case, as here, the question was presented whether mental weaknesses or infirmities, not amounting to the insanity or irresponsibility which would be a complete exoneration, were proper matters for the consideration of the jury in determining whether punishment should be life imprisonment or death. A unanimous court concluded that detached or dissociated acts culled from the life of the accused were not admissible in evidence except on the hearing on the issue of insanity. The same contention was made in People v. French, supra, and rejected on the authority of People v. Troche, supra, and other cases. There the nature of the abuse sought to be corrected by the 1927 amendments was more fully stated at page 740 of 12 Cal.2d, at page 1024 of 87 P.2d in the following language: "Under the general plea of not guilty, prior to the amendments of the statute, evidence relevant to the issue bearing upon mental competency, but which had no relevancy to the issue of not guilty, was presented to the jury under the plea of not guilty and there is reason to believe that in many cases evidence as to mental competency in its almost illimitable field of exploitation had the effect of over-exciting the emotions of jurors by the introduction of matters not relevant to the question of guilt, to the extent of mitigating punishment in cases where it was not merited. Under the former system two issues were submitted in a single action. The intermingling of these issues provable by different degrees of proof may have caused some confusion in the minds of the jury. To remove such a possibility, as well as to prevent the jury from being influenced by matters which were solely relevant to the issue of insanity, may have constituted considerations which account in a measure for the changes made in the statute." In that case the opinion was expressed that a plea to reduce the punishment from death to life imprisonment was one to be relegated exclusively to the field of executive clemency, and that the judicial modification authorized by statute did not comprehend the power to reduce the penalty for first degree murder from death to life imprisonment. When, therefore, in the exercise of its discretion, the jury has seen fit to impose the extreme penalty, its determination cannot be disturbed by the reviewing court. See, People v. Valenzuela, supra, 7 Cal.2d page 653, 62 P.2d 142; People v. Martin, 12 Cal.2d 466, 471, 85 P. 2d 880; People v. Hall, 199 Cal. 451, 456, 457, 249 P. 859.

In People v. Cordova, supra, it was said that it was immaterial at what point the insanity hearing was held, because the evidence received thereon could be considered for proper purposes only and could not be used to measure the severity of the punishment to be imposed. In that case the defendant urged the contention here made, that the variation in procedural steps in the case where both pleas were entered, and the case where the defendant pleaded only not guilty by reason of insanity, created an unjust and unreasonable discrimination in favor of the defendant in the latter case. The contention was rejected on the ground that in neither case could the evidence on the plea of insanity be taken into consideration in determining the degree of the crime or the punishment, and that it was not reasonably to be supposed that a court, in determining the punishment after the insanity hearing, would base its decision on factors not properly before it for the purpose, but that it would be presumed to have wisely exercised the discretion conferred upon it.

[5, 6] Where evidence of intoxication was presented to the jury and under appropriate instructions the jury was permitted to consider the evidence for the purpose of determining whether the defendant had the intent to commit the crime charged, the verdict and judgment will not be disturbed

if the facts are sufficient to support the implied finding that the defendant had the specific intent (People v. Boggs, supra; People v. Smith, supra), and where there is substantial and credible evidence on the insanity hearing to support the verdict of sanity. People v. Greig, 14 Cal.2d 548, 95 P.2d 936.

[7-11] On the trial of the plea of not guilty in the present case the jury was properly instructed on the issue of intent. On the trial of the plea of not guilty by reason of insanity, it was properly instructed as to the test of legal insanity, namely, whether the defendant had reasoning capacity sufficient to distinguish between right and wrong concerning the particular act he was doing—knowledge and consciousness that what he was doing was wrong and would subject him to punishment. People v. Troche, supra, 206 Cal. at page 46, 273 P. 767; People v. Kimball, 5 Cal.2d 608, 610, 55 P.2d 483; People v. Valenzuela, supra, 7 Cal.2d at page 652, 62 P.2d 142; People v. French, supra, 12 Cal. 2d at page 730, 87 P.2d 1014. There is here an abundance of credible evidence to support the verdicts of the jury. Even if the jury believed the defendant's testimony that he had no recollection of what transpired after he left Laguna Beach until he awoke in the Coronado jail, there is sufficient in the record to justify the implied finding of the jury that the defendant formed the specific intent before he commenced the trip to San Diego, and that such intent continued to control his act. People v. Norwood, 39 Cal.App.2d 503, 505, 103 P. 2d 618. It may be noted without further discussion that there was sufficient evidence on the insanity hearing to support the implied finding of the jury that the prolonged habitual drinking of the defendant and the effects thereof did not result in his insanity.

The record discloses that the defendant has had a full and fair trial. The court received evidence of all facts and circumstances which the defendant offered to show lack of specific intent and to mitigate the punishment, and correctly instructed the jury that it could consider such evidence for the appropriate purposes.

We find no error or prejudice to the defendant's substantial rights by reason of any of the instructions given or because of the conduct of the trial in separate hearings on the pleas entered by the defendant.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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52 Cal.App.2d 379

BESSINGER v. GROTZ.

Civ. 13282.

District Court of Appeal, Second District, Division 3, California.

May 29, 1942.

Rehearing Denied June 26, 1942.

See 127 P.2d 66.

1. Appeal and error ⇨78(5)

A judgment decreeing that plaintiff have leave to redeem property sold to defendant under judgment foreclosing a mortgage, appointing a referee to take an accounting of all sums received by defendant from use and occupation of property, and directing entry of final judgment thereafter, was an "interlocutory judgment" and was not appealable. Code Civ.Proc. § 707.

See Words and Phrases, Permanent Edition, for all other definitions of "Interlocutory Judgment".

2. Appeal and error ⇨78(5)

Where a decree fixes the liability and rights of parties and refers the case to a master or subordinate tribunal for a judicial purpose such as the statement of an account on which a further decree is to be entered, the decree is not a "final decree" and is not appealable.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Decree".

3. Appeal and error ⇨80(3)

Where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of a decree, the decree is a "final decree" and is appealable; but, where anything further in the nature of judicial action on the part of the court is essential to a final determination of the parties' rights, the decree is an "interlocutory decree".

See Words and Phrases, Permanent Edition, for all other definitions of "Interlocutory Decree".

4. Appeal and error ⚿792

An attempted appeal from a nonappealable order should be dismissed by the reviewing court on its own motion.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Frederic H. Bessinger against Myrtle A. Grotz to compel an accounting and disclosure of rents and profits allegedly received by defendant. From a judgment for plaintiff, defendant appeals.

Appeal dismissed.

James R. Jaffray, of Los Angeles, for appellant.

Robert N. Baker, of Santa Monica, and Gordon L. Howden, of Los Angeles, for respondent.

SHAW, Justice pro tem.

Plaintiff is a judgment debtor whose real property was sold to defendant under a judgment foreclosing a mortgage. He brought this action under section 707 of the Code of Civil Procedure, as a preliminary step to a redemption, to compel an accounting and disclosure of rents and profits alleged to have been received by defendant. Judgment was given for plaintiff, from which defendant appeals.

The trial court made findings which state the facts upon which plaintiff's right to redeem depends, including plaintiff's demand on defendant for a statement of rents and profits and defendant's failure to furnish it, and also find that during the period for redemption defendant made a contract to sell the property to persons, some of whom were in possession as plaintiff's tenants at the time of sale, and received installment payments, the amounts of which are not set forth, under said contract, but do not state that any rents and profits were received by defendant. In its conclusions of law the court directed the appointment of a referee to take an accounting from defendant. The judgment appealed from is entitled "Interlocutory Judgment for Accounting," decrees that plaintiff have leave to redeem, appoints a referee, directs him "to take from the defendant * * * an accounting of all sums received by her * * * from the use and occupation of the property," and orders "that when such accounting is and has been rendered and received and settled that a final judgment be entered, fixing, in accordance with the findings and conclusions of law herein, the sum for which said property may be redeemed by plaintiff. * * *" It also decrees that all sums received by defendant under the contract above mentioned are for the use and occupation of the property.

[1, 2] We have come to the conclusion that this judgment is unquestionably what it purports to be, a mere interlocutory judgment, and is not appealable. In Pomper v. Superior Court, 1923, 191 Cal. 494, 496, 216 P. 577, where the question was whether a judgment was appealable, the court thus stated the rule: "The general rule is that where a decree is made fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose, such, for instance, as the statement of an account, upon which a further decree is to be entered, the decree is not final [citing authorities]." This rule has been approved and followed in Gunder v. Gunder, 1929, 208 Cal. 559, 561, 282 P. 794; Middleton v. Finney, 1931, 214 Cal. 523, 526, 6 P.2d 938, 78 A.L.R. 1104; Hollar v. Saline Products, Inc., 1935, 3 Cal.2d 80, 81, 43 P.2d 273; and many other cases.

[3] In Lyon v. Goss, 1942, 19 Cal.2d 659, 670, 123 P.2d 11, 17, the rule is again declared, in these words: "As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory." Further judicial action is essential here to a final determination of the rights of the parties, and by either of these statements of the rule the judgment is interlocutory and not appealable. The appeal must therefore be dismissed.

[4] This point has not been raised by the respondent, or discussed by the parties,

but in case of an attempted appeal from a nonappealable order, it is the duty of this court on its own motion to dismiss the appeal. Collins v. Corse, 1936, 8 Cal.2d 123, 124, 64 P.2d 137; Johnson v. Solomons, 1932, 124 Cal.App. 43, 46, 12 P.2d 140.

The appeal is dismissed.

SCHAUER, P. J., and PARKER, WOOD, J., concurred.

52 Cal.App.2d 443

MILLER v. MILLER.

Civ. 13462.

District Court of Appeal, Second District, Division 2, California.
June 1, 1942.

1. Divorce ⚷59
In divorce action the jurisdiction of court cannot be based upon stipulation of parties.

2. Divorce ⚷249(1)
In divorce action, the authority of court to transfer property of either party to the other or otherwise dispose of it is purely statutory. Civ.Code, § 139.

3. Divorce ⚷244, 308
The purpose of statute authorizing court to require husband to give reasonable security for making of payments ordered in divorce action is to provide a practical method of assuring continued compliance with order for payments made pursuant to statute granting court authority to compel husband to provide for maintenance of child and to make suitable allowance for support of wife. Civ.Code, §§ 139, 140.

4. Divorce ⚷308
The purpose of the law authorizing court to require husband to give reasonable security for making payments ordered in divorce action for maintenance of child is to continue in effect after divorce the same legal obligation of support which father owes to children from their birth to their majority where the marriage continues throughout that period. Civ.Code, §§ 139, 140.

5. Divorce ⚷308
Portion of divorce decree requiring husband to keep up insurance policy naming minor child of the parties as beneficiary was in excess of court's power, since it did not provide for "maintenance" of the child. Civ.Code, §§ 139, 140.

See Words and Phrases, Permanent Edition, for all other definitions of "Maintenance".

◆

Appeals from Superior Court, Los Angeles County; John Beardsley, Judge.

Divorce action by Anne Miller against Wallace Owens Miller. From a part of the judgment, and from an order modifying the judgment, defendant appeals.

The portion of the judgment appealed from reversed.

A. G. Ritter, of Los Angeles, for appellant.

Mark F. Jones, Jr., and W. L. Engelhardt, both of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

This is an appeal by defendant from that portion of an interlocutory decree of divorce which provides as follows: "It is further ordered and adjudged that defendant keep up the $5,000 insurance policy now in effect in favor of the minor child of the parties hereto and pay the premiums regularly, as security for support of the minor as herein ordered." A separate appeal was also taken from the action of the trial court in adding the last ten words of the above, to wit: "as security for support of the minor as herein ordered." This was done "by the court's own motion" some twenty-four days after the judgment had been signed and docketed. It is contended that the addition of these words did not constitute a correction of a clerical error nor action to make the decree speak the truth of the court's determination at the time of the making of the decree, and that therefore the court was without jurisdiction to so alter the decree.

Counsel for respondent, upon the oral argument, concedes that this latter appeal is well taken, but contends that the words so added neither aid nor detract from the decree, which he contends is valid. He points out that the trial court in a divorce action has broad powers; that the appeal is on the judgment roll alone and therefore there is nothing to show that defendant did not stipulate to the above provision, and that if he did he would not now be in a position to complain. It is neither contended nor conceded that any such stipulation was in fact made.

[1, 2] The jurisdiction of the court cannot be based upon stipulation of the parties, whether such stipulation be in fact or fancy. "The authority of the court, in actions for divorce, to transfer the property of either party to the other, or otherwise to dispose of it, is purely statutory * * *." Simpson v. Simpson, 80 Cal. 237, 241, 22 P. 167, 168.

The authority for the court's action in ordering appellant to keep up the insurance policy, payable to the minor in the event of appellant's death, must be found, if at all, in Civil Code sections 139 and 140, which read:

"139. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects.

"Remarriage. Upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support but such remarriage shall not affect his duty to provide for the maintenance of the children of his marriage.

"140. The court may require the husband or wife, as the case may be, to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

In Tremper v. Tremper, 39 Cal.App. 62, 65, 177 P. 868, 869, it is said: "But, where the statute on the subject was no broader than section 139, Civil Code, supra, the decisions are to the effect that the trial court should have made an allowance in money, and had no power to divide the properties in kind." In McKannay v. McKannay, 68 Cal.App. 701, 705, 230 P. 214, 216, the court cites Tremper v. Tremper, supra, and many other cases, in support of the following statement: "The law limits the power of the court in making provision for the support of the children to an allowance in money * * * and while it may require the husband to give reasonable security for the payment of such allowance * * * even by declaring that the allowance shall be made a lien upon the husband's property * * * it cannot award the property to either spouse subject to trusts in favor of the children."

[3-5] It is obvious that in the instant case the portion of the order complained of does not provide for maintenance of the child, who is named as beneficiary in the insurance policy, nor, of course, of the wife, who is not mentioned therein. In no way does it provide for supplying food or clothing or housing, or any other necessity. Nothing can be derived from the order until the death of appellant, which may not occur until long after the minor has attained his majority and the obligation of appellant to support him has ceased. It seems clear that the purpose of section 140 of the Civil Code is to provide a practical method of assuring the continued compliance with the order for payments made pursuant to section 139, supra, in the same sense that a mortgage secures the payments provided for in a promissory note. In other words, it is incidental to section 139. The word "security," as there used, does not contemplate protection against the possibility of death by the building up of an independent insurance estate. The purpose of the law is to continue in effect after divorce the same legal obligation of support which the father owes to the children from their birth to their majority, where the marriage continues throughout that period. This obligation does not include any legal duty on the part of the father to take out an insurance policy on his life in favor of each child. It may be a desirable thing for him to do, just as any other type of saving against future eventualities is commendable, but there is no law to compel it. It can hardly be contended that the law places upon the divorced parent any greater obligation toward his children than he has in the absence of divorce. It follows that the entire portion of the decree appealed from, and providing for the keeping up of the insurance policy, is in excess of the power of the court.

It is therefore ordered that the portion of the judgment appealed from be reversed. This disposes of both appeals.

MOORE, P. J., and McCOMB, J., concurred.

52 Cal.App.2d 453

MATSUDA et al. v. LUOND et al.

Civ. 2838.

District Court of Appeal, Fourth District, California.

June 2, 1942.

1. War 🔑10(2)

A Japanese subject residing in California at outbreak of war between United States and Japan, had right, after outbreak of war, to appear in appellate court by his counsel and defend judgment which he obtained prior to such war, in absence of presidential proclamation denying access to federal or state courts to Japanese citizens who were actual bona fide residents of United States for several years before the war. Trading with the Enemy Act § 2, 50 U.S.C.A. Appendix § 2(c).

2. Appeal and error 🔑1011(1)

Conflicts in the evidence are addressed to the trier of facts.

3. Appeal and error 🔑989

On appeal from judgment for plaintiffs, appellate court will confine its summary of conflicting evidence on questions of negligence and contributory negligence to that which supports findings and judgment, and will disregard other contradictory evidence.

4. Automobiles 🔑168(2), 201(2), 245(40)

Exceeding the prima facie speed limit is not "negligence" as a matter of law, but excessive speed may be negligence as a matter of fact, and if it proximately causes an accident, will support a judgment against the guilty party. Vehicle Code, § 513, St.1935, p. 177.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

5. Automobiles 🔑245(44, 59)

Evidence whether automobile driver sued for injuries sustained by occupants of truck at intersectional collision was negligent in respect to speed, and whether such negligence was proximate cause of collision, presented questions of fact for trier of facts. Vehicle Code, §§ 511, 513, St.1939, p. 2108, St.1935, p. 177.

6. Evidence 🔑595

An "inference" is a deduction which the reason of the trier of facts may make from proven facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Inference".

7. Appeal and error 🔑931(1)

In reviewing sufficiency of evidence to support a judgment, appellate court must resolve all conflicts in evidence in favor of prevailing party and must draw all legitimate and reasonable inferences from the evidence in his favor.

8. Automobiles 🔑172(5)

The provision in Vehicle Code relating to driving on right side of highway was passed for benefit of motorists traveling in the same direction. Vehicle Code § 525, St. 1939, p. 2197.

9. Automobiles 🔑245(80)

Driver of truck colliding with automobile at intersection, stopping front of truck six feet from stop sign at a point where driver had a view of highway for 600 feet to his left and undetermined distance to his right, was not contributorily negligent as a matter of law, where there was neither a crosswalk nor a limit line on side road as it entered the intersection toward which truck driver was traveling on the side road. Vehicle Code § 577, St.1939, p. 1608.

◆

Appeal from Superior Court, San Diego County; Roy D. McPherrin, Judge.

Action by Buntaro Matsuda and others against Joe Luond and others for injuries suffered in an automobile accident. From a judgment for the plaintiffs, the defendants appeal.

Affirmed.

Monroe & McInnis, of San Diego, for appellants.

Dempster McKee, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment awarding each plaintiff, separately, damages for injuries suffered in an automobile accident which happened at about 9 o'clock on the morning of June 29, 1940, on Highway 101, a little less than a mile north of Encinitas in San Diego County.

Buntaro Matsuda is a foreign-born Japanese subject who was, and had been, a resident of San Diego County. Toshi Matsuda, 17 years of age, and Satoshi Matsuda, 15 years of age, his sons, were both born in this country and are citizens of the United States. On July 25, 1940, Buntaro Matsuda was appointed guardian ad litem of his sons and as such brought this action for them.

After a state of war was declared between Japan and the United States, Koichi Nakamura, an American citizen of Japanese ancestry, was appointed general guardian of the minors and has been substituted in the action in the place of the guardian ad litem.

The first question to be considered is the right of Buntaro Matsuda, a subject of a country with which we are at war, to appear in this action.

It may be stated that, historically, as a general rule, an enemy has been denied access to the courts of this country during a time of war. Caperton v. Bowyer, 14 Wall. 216, 20 L.Ed. 882. However, the former rigorous rule has been much relaxed by the definition of an enemy.

Section 2 of the Trading With the Enemy Act, passed October 6, 1917, 50 U.S.C.A. Appendix, § 2, defines the word "enemy." Buntaro Matsuda belongs to the class dealt with in subdivision c of that section which provides as follows:

"Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy'."

[1] So far as we are advised, the President has not issued a proclamation denying access to federal or state courts to citizens of Japan who are and have been for several years before the outbreak of war, actual bona fide residents of the United States. Until such a proclamation is issued declaring such a person to be an enemy, it seems clear that Buntaro Matsuda has the right to appear in this court by his counsel and defend the judgment which he obtained on May 21, 1941. His right to collect his portion of the judgment after it becomes final is a question neither presented nor decided here.

On January 31, 1942, the Attorney General of the United States issued a release which concluded as follows:

"Accordingly, it is important to note that no native, citizen, or subject of any nation with which the United States is at war and who is a resident in the United States is precluded by federal statute or regulations from suing in federal courts or state courts."

The same conclusion was reached by the Hon. Emmet H. Wilson, judge of the Superior Court of Los Angeles County, in a carefully considered opinion filed in In the Matter of the Application of Erwin Heinrich Kohn, for change of name. He cites the following cases as supporting his conclusions: Arndt-Ober v. Metropolitan Opera Co., 102 Misc. 320, 169 N.Y.S. 304, affirmed 182 App.Div. 513, 169 N.Y.S. 944; Hughes v. Techt, 188 App.Div. 743, 177 N.Y.S. 420, affirmed in Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166, certiorari denied 254 U.S. 643, 41 S.Ct. 14, 65 L.Ed. 454; Heiler v. Goodman's etc., Co., 92 N.J.L. 415, 105 A. 233, 3 A.L.R. 336; State v. Darwin, 102 Wash. 402, 173 P. 29, L.R.A.1918F, 1012; Krachanake v. Acme Mfg. Co., 175 N.C. 435, 95 S.E. 851, L.R.A.1918E, 801, Ann.Cas. 1918E, 340; Posselt v. D'Espard, 87 N.J.Eq. 571, 100 A. 893; Mittelstadt v. Kelly, 202 Mich. 524, 168 N.W. 501.

[2, 3] The evidence in this case is sharply conflicting on the questions of negligence and contributory negligence. As conflicts in the evidence are addressed to and settled by the trier of fact, we will confine our summary of the evidence to that which tends to support the findings and judgment and will disregard other contradictory evidence.

Highway 101 runs in a general northerly and southerly direction at the place of the accident. It was paved and four traffic lanes were marked on it, with a double line in its center, except at street intersections. The two easterly lanes were used by northbound vehicles and the two westerly lanes by southbound traffic. There was a row of cypress trees growing on the easterly side of the pavement. At the place of the accident the highway was intersected at right angles by an unimproved road. School or pedestrian crossings were marked across Highway 101 on the northerly and southerly sides of the intersection. There was a stop sign on the northerly side of the unimproved road which was probably about 2 feet easterly from the edge of the pavement.

Buntaro Matsuda owned a 1930 Model A Ford truck which his two sons were using on the morning of the accident to drive from their home about one-half mile easterly from Highway 101 to a Japanese language school situated westerly from the intersection. Toshi Matsuda was driving the truck westerly over the unimproved road. His younger brother was sitting on the seat beside him. He stopped the truck about 6 feet easterly from the stop sign and waited for a southbound car to clear the intersection. He looked to the south and saw the automobile owned by defendant Joe Luond and driven by defendant Lena Furrer approaching from the south and distant between 500 and 600 feet from him. This car was traveling in the traffic lane lying easterly of and next to the double line. He proceeded into the intersection at a speed of about five miles an hour. After he was on the pavement he again looked to the south and saw the defendants' car approaching in the same traffic lane at a speed which he estimated at fifty-five miles an hour and which was then distant 200 or more feet from him. Elsewhere in his testimony he estimated the speed of the defendants' car at between fifty-five and sixty miles an hour. His brother estimated its speed at between fifty and sixty miles an hour.

The two vehicles came together at about the point of the intersection of the double center line of the pavement with the center line of the northerly pedestrian crossing. The right front of defendants' automobile struck the left side of the truck at about the front edge of the door of the cab. At the time of the impact the front wheels of the truck were on the westerly side of the double center line of the pavement. The force of the impact turned the truck completely around and tipped it over on its side so that when it came to rest it was facing east. The wheels of defendants' car left tire marks on the pavement for a distance of 72 feet from the point of impact. These tire marks show that Mrs. Furrer turned the car rather sharply to her left just before the impact so that her left front wheel was either on, or westerly of, the double center line when the vehicles collided. The two youths were seriously injured. The award to Buntaro Matsuda was for damages to his truck and expenses resulting from the injuries to his sons.

Defendants argue that there was no evidence of negligence on the part of Mrs. Furrer that was a proximate cause of the accident. This argument is based on her testimony that she was driving at a speed of not more than forty-five miles an hour; that the two boys appeared suddenly on the road in front of her, too close for her to avoid the collision, and on the assumption that the only evidence contradicting her testimony as to her speed was the evidence of her statement to witnesses, which she denied making, that her speed was fifty miles an hour. This assumption completely overlooks the testimony of Toshi and Satoshi Matsuda on this question which we have already outlined. This evidence was before the trial judge and he was privileged to accept it as true. Therefore, he could have concluded that just before the collision Mrs. Furrer was driving over fifty miles, and as much as sixty miles an hour.

The prima facie speed limit on Highway 101 at that time and place was forty-five miles an hour, if the intersection was not an obstructed one, and twenty-five miles an hour if it was an obstructed intersection, which some of the evidence suggests. § 511, Vehicle Code, St.1939, p. 2108. All references to that code will be as it existed on the date of the accident.

[4, 5] While exceeding the prima facie speed limit is not negligence as a matter of law (§ 513, Vehicle Code, St.1935, p. 177), excessive speed may be negligence as a matter of fact and if it proximately causes an accident will support a judgment against the guilty party. Under the circumstances here the questions of the negligence of Mrs. Furrer, and proximate cause, were questions of fact addressed to the trial judge and were settled by his finding that she was negligent and that her negligence proximately caused the collision. Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26; Mason v. Crawford, 17 Cal.App.2d 529, 62 P.2d 420.

It is argued that as the complaint alleged negligence in general terms, and as the findings followed the pleadings, we are left to speculate on whether the trial judge considered the speed at which Mrs. Furrer was driving was negligence which was a proximate cause of the collision. This argument entirely overlooks the duty of an appellate court to draw reasonable inferences from the evidence.

[6, 7] An inference is a deduction which the reason of the trier of fact may make from proven facts. Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886. In reviewing the sufficiency of the evidence to support a judgment, it is the duty

of an appellate court to resolve all conflicts in the evidence in favor of the prevailing party and to draw all legitimate and reasonable inferences from the evidence in his favor. Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123. With these rules before us we must conclude that the evidence justifies an inference that the speed at which Mrs. Furrer was driving was negligence that was a proximate cause of the accident.

[8] Defendants maintain that it was not negligence per se for Mrs. Furrer to drive in the traffic lane immediately to her right of the double center line of the pavement instead of in the other traffic lane on the right edge of the pavement as plaintiffs maintain was required by the provisions of section 525 of the Vehicle Code, St.1939, p. 2197. It has been held that this section of the Vehicle Code was passed for the benefit of motorists traveling in the same direction. Arundel v. Turk, 6 Cal.App.2d 162, 44 P.2d 383; Polk v. Weinstein, 12 Cal.App.2d 360, 55 P.2d 588; Lewis v. Western Truck Line, 44 Cal.App.2d 455, 112 P.2d 747.

Defendants maintain that Toshi Matsuda was guilty of contributory negligence as a matter of law because he did not make his boulevard stop at the point required by section 577 of the Vehicle Code, St.1939, p. 1608, which provides as follows:

"The driver of any vehicle upon approaching any entrance of a highway or intersection signposted with a stop sign as provided in this code, except as otherwise permitted or directed in this code, shall stop before entering the nearest crosswalk or, if none, then at a limit line when marked, otherwise before entering such highway or intersection."

It is admitted that there was neither a crosswalk nor a limit line on the side road as it entered the intersection. Therefore the only provision of the section applicable here is the one requiring a vehicle to be stopped "before entering such highway or intersection."

[9] Both youths testified that the stop was made when the front of the truck was about 6 feet from the stop sign, and at a point where the driver had a view of the highway for 600 feet to his left and an undetermined distance to his right. This must be held to be substantial compliance with the provisions of the section. This substantial compliance with the law defeats the claim of negligence per se, and the finding that there was no contributory negligence negatives any inference of negligence as a matter of fact, if any such reasonable inference might have been drawn from all the evidence.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

ROHDE v. ROHDE.

Civ. 13551.

District Court of Appeal, Second District,
Division 1, California.
June 6, 1942.

Divorce 🔑186

A divorce judgment would be modified where the attorneys had filed in the reviewing court their stipulation asking that the judgment be modified, and examination of record on appeal showed a good cause for such modification.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action for divorce by Nellie Rohde against Alfred Rohde. From a judgment for the plaintiff, the defendant appeals.

Affirmed as modified.

Henry E. Phister, of Los Angeles, for appellant.

Joseph Henry Wolf, of Los Angeles, for respondent.

PER CURIAM.

The attorneys in the above entitled action having filed in this court their stipulation asking that the judgment in said cause be modified in part, and an examination of the record on appeal showing good cause therefor; the trial court is hereby directed to modify the interlocutory decree entered in said cause by striking therefrom all except the first three paragraphs of said decree, and to amend the last three words of said third paragraph to read "approved and affirmed," instead of "disapproved and disaffirmed."

As so modified, the judgment of the trial court is affirmed, the remittitur to issue forthwith, each party to pay his own costs on appeal.

52 Cal.App.2d 387

PAUL A. MOSESIAN & SONS, Inc. v. DANIELIAN.

Civ. 3016.

District Court of Appeal, Fourth District, California.

May 29, 1942.

Hearing Denied July 27, 1942.

1. Trespass 🔑40(5)

Complaint, alleging that defendant entered upon plaintiff's land without leave and cut down certain peach trees growing thereon belonging to plaintiff, and the value thereof, and that by reason of statute referred to in complaint defendant became liable to pay treble damages, stated a cause of action for general damages. Civ.Code, § 3346.

2. Appeal and error 🔑193(6)

Where plaintiff in complaint for destruction of peach trees merely referred to statute allowing treble damages in such cases and defendant answered without interposing demurrer for uncertainty or otherwise, defendant could not complain of uncertainty for first time on appeal. Civ.Code, § 3346.

3. Waters and water courses 🔑242

In action against owner of easement for irrigation canal for destruction of peach trees on the servient tenement, evidence sustained finding that trees did not interfere with easement and their removal was wrongful and malicious warranting treble damages. Civ.Code, § 3346.

Appeal from Superior Court, Fresno County; Glenn L. Moran, Judge assigned.

Action by Paul A. Mosesian & Sons, Incorporated, against Elizabeth Danielian for ordinary and treble damages for destruction of peach trees on plaintiff's land. From judgment for plaintiff, defendant appeals.

Affirmed.

C. T. Walton and M. G. Gallaher, both of Fresno, for appellant.

L. Kenneth Say, of Fresno, for respondent.

GRIFFIN, Justice.

In this action respondent seeks to recover from appellant ordinary as well as treble damages under section 3346 of the Civil Code. The complaint alleges generally that plaintiff is and was the owner of the real property involved, i. e., N. ½ of the S. E. ¼ of the S. W. ¼ of sec. 30, T. 15 S. R. 23 E., M. D. B. & M.; that defendant on June 4, 1939, entered upon the land and without leave did cut down and tear out forty-nine peach trees growing thereon belonging to plaintiff of the value of $980; that plaintiff lost said trees and thereby the defendants by force and effect of section 3346 of the Civil Code forfeited and became liable to pay plaintiff treble the amount of said damages. It sought judgment in the sum of $2,940, which amount included the treble damages pleaded. Defendant answered, without demurring, either generally or specially, admitted plaintiff was the owner of the land described but alleged that the ownership was subject to an easement owned by appellant across a portion of the above-described land; that by this easement she was a joint owner of an irrigation ditch, with the right to convey through that ditch water for the purpose of irrigating land belonging to her which adjoined the land of the plaintiff described in its complaint; and that under the terms of the easement the appellant was entitled to convey water through the irrigation ditch without interference and was entitled to maintain and repair the irrigation ditch and keep it in a condition suitable for conducting water through that ditch, and to remove any obstructions which may have been found in or upon the banks of the irrigation ditch which interfered with or impeded the flow of water through it. Appellant then admitted that on June 4, 1939, she removed from the bank of the irrigation ditch approximately forty-four peach trees growing thereon. She then alleged that the peach trees impeded and interfered with the flow of water through the irrigation ditch to her land and claimed that they constituted an obstruction which she was entitled to remove; that the said trees were not removed wrongfully or maliciously by her but were removed solely for the purpose of protecting the easement and to prevent the obstruction of the ditch.

The court found that the allegations of the complaint were generally true except that the actual damage amounted to $150 for the value of the trees removed and that respondent was entitled to treble damages totaling in all the sum of $450. In respect to appellant's answer the court found that "it is not true that the defendant * * * removed from the bank of the irrigation ditch * * * approximately 44 peach trees which were growing upon the bank of said irrigation ditch, and it is true that the defendant removed 49 of said peach trees instead of 44 peach trees as alleged therein; that it is not true that said peach trees impeded or interfered with the flow of water through said irrigation ditch to the land of the defendant and constituted an obstruction which the defendant was entitled to remove; that it is not true that said trees interfered with the use and enjoyment of said easement * * *; that it is not true that said trees were not removed wrongfully or maliciously by this defendant; that it is not true that said trees were removed solely for the purpose of protecting the easement of the defendant and to prevent their obstruction of said irrigation ditch."

[1] Judgment was entered for respondent in the sum of $450. Defendant appealed. Appellant now contends that the complaint does not state a cause of action for any amount or for treble damages. The complaint stated a cause of action for general damages and by reference to section 3346 of the Civil Code appellant was apprised of the nature of the cause of action and the amount claimed. No demurrer was interposed for uncertainty or otherwise.

[2] It is clear from appellant's answer that she was defending a cause of action based upon section 3346 of the Civil Code for treble damages. The trial court proceeded under, and evidence was taken upon that theory. Findings were accordingly made. Appellant cannot now complain of this claimed uncertainty for the first time on appeal. Daggett v. Gray, 110 Cal. 169, 42 P. 568; Kreling v. Kreling, 118 Cal. 413, 50 P. 546; Sly v. Abbott, 89 Cal.App. 209, 215, 264 P. 507; Wagoner v. Silva, 139 Cal. 559, 73 P. 433; Hatton v. Gregg, 4 Cal. App. 542, 88 P. 594; Hillyer's Annotated Forms of Pleading and Practice, vol. 10, § 10,272. There is but little conflict in the evidence in this case upon the matters which are material to the issues.

In 1904 one T. Danielian, father of appellant, had title to the land which appellant now owns. Appellant acquired it in 1908. The adjacent lands were owned by three others, viz., Bedrosian, Simonian and Ahroonian. About that time the owners of these tracts, all in section 30, entered into an agreement whereby they established a right-of-way for a ditch 25 feet wide, and provided the means by which the ditch was to be cared for and the manner of its use. Afterwards, on April 11, 1908, the owners of the land entered into another contract concerning the care, repairs, tending and use of that ditch by them. In 1904 an engineer surveyed the 80 acres that comprised the land on both sides of the ditch and established a line as the then owners wanted it and established the ditch on that line. The ditch was placed 15 feet north of the government survey line between the respectively owned lands in that 80 acres. The parties desired the ditch line established where it would make an even division of the north half and the south half of the cultivable lands of the owners rather than the government survey line dividing the two tracts, which was 15 feet south of the ditch line. Water ran through the ditch as thus established during the times T. Danielian and appellant owned the property. After the ditch was constructed in 1904, there were peach trees planted on the north levee of the ditch by the then owner Simonian, predecessor to respondent. Those trees were taken out and removed in 1935 by respondent and in March, 1936, it planted forty-nine other peach trees on or near the same levee, which were planted nearly in the same place where the other peach trees had been planted. The appellant in this case believed that the cultivation of the trees by the respondent, in some places, broke down the levee and that the presence of the trees interfered with the free flow of the water through the ditch. On one occasion in 1938 she procured the justice of the peace to cite the superintendent before the justice's court and there the justice sought to establish peace and ordered that the ditch bank be replaced. This was not done. Thereafter appellant and her foreman, admittedly, proceeded to and did plow the trees up. This action followed.

[3] There was testimony that the trees never obstructed the flow of water in the ditch in any manner. All the trees were growing upon respondent's land and belonged to it. In view of the court's implied finding that the trees, as thus located, did not interfere with the appellant's use and enjoyment of her easement and that the trees were removed wrongfully and maliciously by her, we are impelled to affirm the judgment. The evidence would support such a conclusion.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

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52 Cal.App.2d 395

EPPSTEIN v. CITY OF BERKELEY.

Civ. 11737.

District Court of Appeal, First District, Division 2, California.

June 1, 1942.

1. Municipal corporations 🔑812(6)

In view of the express provisions of the statute, the designating of claimant's address in claim against city for personal injuries allegedly resulting from defective sidewalk was a "condition precedent" to maintenance of personal injury action against city. Gen.Laws 1937, Act 5149, § 1; Act 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

2. Municipal corporations 🔑741(3)

The city is powerless to waive a compliance with the statute relating to claims for personal injuries against municipalities. Gen.Laws 1937, Act 5149, § 1.

3. Municipal corporations 🔑741(1)

Actual knowledge on part of city officials of facts required to be stated in claim against city for personal injuries does not dispense with filing of a proper claim required by statute. Gen.Laws 1937, Act 5149, § 1.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Dorothy Eppstein against City of Berkeley for injuries sustained when plaintiff fell on alleged defective sidewalk. From a judgment sustaining demurrer to amended complaint without leave to amend, the plaintiff appeals.

Affirmed.

Cornish & Cornish, of Berkeley, for appellant.

Appelbaum & Mitchell, of Oakland, and Fred C. Hutchinson, City Atty., of Berkeley, for respondent.

STURTEVANT, Justice.

To the first amended complaint of the plaintiff the defendant interposed a demurrer and also filed a motion to strike. Later the trial court sustained the demurrer without leave to amend and ordered that the motion to strike be dropped from the calendar. From the judgment on sustaining of demurrer the plaintiff has appealed.

The plaintiff sued to recover damages for injuries sustained when she tripped and fell on an alleged defective sidewalk. In her complaint she alleged that the defendant is a municipal corporation; that it maintains among others a sidewalk over and upon the southerly edge of Rose Street in the city of Berkeley; that on the 3rd day of February, 1940, said sidewalk was in defective condition; that on said date plaintiff as a pedestrian was walking along and over said sidewalk, caught her foot in the broken portion, fell and was injured; that she suffered certain physical injuries and specified the same; that by reason of the injuries she was damaged in the sum of $2,500; that on the 29th day of April, 1940, she presented to the clerk of the defendant corporation a claim in writing, a copy of which she annexed to her complaint; that subsequent to said 29th day of April the defendant rejected said claim; and, continuing, she inserted the following allegations: "That subsequent to the 3rd day of February, 1940, and prior to the 29th day of April, 1940, plaintiff advised defendant orally of the circumstances set forth herein and her name and address;

that thereupon and prior to the 29th day of April, 1940, a representative of the City of Berkeley came to the home of affiant and personally discussed with affiant the circumstances hereinabove set forth; that at all times mentioned in the complaint, and now, the residence of plaintiff and her whereabouts has been known to defendant, and plaintiff has been accessible to defendant, nothwithstanding plaintiff failed and neglected to include her address in the claim attached hereto, and marked Exhibit 'A,' and defendant suffered no prejudice by reason of the omission thereof." The claim contained no specification of address. To that complaint the defendant interposed a demurrer which was both general and special.

[1, 2] In the trial court the defendant contended, and in this court it contends, that the claim filed by the plaintiff with the clerk of the defendant corporation was insufficient because it did not specify the address of the claimant. In support of that contention the defendant claims that the plaintiff's right to sue the defendant for the tort alleged is purely statutory. Stats. 1923, p. 675, Deering's Gen.Laws 1937, Act 5619. It also relies on the provisions of a statute enacted in 1931, page 2475, Deering's Gen.Laws, 1937, Act 5149, regarding the maintenance of such actions. Section 1 of said statute is as follows: "Claim for damages suffered on public property. Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name *and address* of the claimant, the date and place of the accident and the extent of the injuries or damages received." (Italics ours.) Thereupon it contends that it was a condition precedent that the plaintiff should have stated her address in framing the claim which she presented to the defendant corporation. That contention is well founded. Since this action was commenced, and since the trial court entered its judgment, a similar controversy was presented to the court in the case of Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13. In that case the plaintiff failed to state the place where the accident occurred. The same contention was made which the defendant makes in this case. The trial court sustained the contentions of the defendant and dismissed the action. An appeal was taken to the District Court of Appeal, Second District, Division Two. The question involved was carefully considered by that court and the judgment of the trial court was affirmed. 111 P.2d 382. Later the action was transferred to the Supreme Court and, on December 18, 1941, that court adopted the decision of the District Court of Appeal and added thereto. All of the authorities cited by parties in the instant action were considered. However, after such examination, as shown by the head notes, the court held that the doctrine of substantial compliance is not applicable to a claim against the city for injuries which fails to state the place where the accident occurred and the city is powerless to waive compliance with the statutory provisions relating to the filing of a claim for damages. In principle there is no difference between failing to allege the place where the accident occurred and failing to allege the address of the claimant.

[3] Continuing the plaintiff relies on the paragraph hereinabove set forth. She asserts that the defendant had such knowledge that it was in no manner prejudiced by her failure to set forth her address. However, that point was also involved in Hall v. City of Los Angeles, supra. In that case the plaintiff offered to show that the city council was by letter, written by the city attorney, informed of the place where the accident had occurred, and that the agents of the city had examined the spot and inquired into the facts. But the court held that actual knowledge on the part of the city officials of the facts required to be stated in a claim for damages does not dispense with the filing of a proper claim. It is clear, therefore, that the trial court did not err in sustaining the demurrer interposed by the defendant.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

52 Cal.App.2d 363

WHITNEY v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11660.

District Court of Appeal, First District, Division 1, California.

May 29, 1942.

Hearing Denied July 27, 1942.

1. Judgment ⚷634

A party to action in subsequent proceeding is not bound by judgment in prior proceeding, and doctrine of "res judicata" does not operate as an "estoppel", unless he was a party or privy to such action and the identical issue raised in the subsequent proceeding was determined therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Res Judicata".

2. Judgment ⚷665

In action by Chairman of California State Committee of Communist Party of the United States, against city and county of San Francisco, involving refusal to rent civic auditorium to committee for public meetings, record in previous case showing that another person, as member of Communist Party, instituted action against city and county on behalf of Communist Party as private political club and not as political party organized under laws of California, was insufficient to establish special defense of "res judicata", as not showing that plaintiff in instant action represented the same organization the plaintiff in prior action claimed to represent. Code Civ.Proc. §§ 597, 1908, 1910.

◆

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Action by Anita Whitney, as Chairman of the California State Committee of the Communist Party, etc., against the City and County of San Francisco and others, involving the refusal of the defendants to rent or lease any part of the civic auditorium in the City and County of San Francisco to the California State Committee of the Communist Party for the purpose of holding public meetings. From the judgment, the plaintiff appeals.

Reversed.

Andersen & Resner, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

WARD, Justice.

Plaintiff appeals from a judgment involving the refusal of the city and county of San Francisco to rent or lease to the California State Committee of the Communist Party of the United States of America any part of the Civic Auditorium in the city and county of San Francisco, for the purpose of holding public meetings.

The complaint alleges that plaintiff is a member "and now is the chairman of the California State Committee of the Communist Party of the United States of America"; that the principal office of said committee is the city and county of San Francisco; that the Communist Party of the United States is a duly and lawfully constituted political party of the United States of America, and that said committee is the duly, regularly and lawfully constituted state committee of that party. The complaint further alleges: "That the said Communist Party of the United States of America has for many years last past participated in the national elections of the United States; and has for many years last past participated, and presently does participate, in the California State elections and in the municipal elections of the said city and county of San Francisco; and that said Communist Party of the United States of America is composed of citizens and electors of the United States and of the State of California and of the city and county of San Francisco."

As a separate and affirmative defense the answer alleged that in a prior case for the same cause of action, wherein Oleta O'Connor was plaintiff, a judgment was duly made and given in favor of defendants. Various issues were presented by the pleadings but, under the provisions of Code of Civil Procedure, section 597, defendant, before the trial of any other issues elected to proceed upon the special defense that the action was barred by "a prior judgment and previous adjudication."

On the separate trial upon the special defense of res judicata, the respondents rested after presentation of the judgment roll in the O'Connor case, and the court found: "That this action is barred by said prior judgment. That defendants have judgment herein as against plaintiff. That no trial of other issues in the action shall be had. That defendants have judgment against plaintiff for their costs," etc. This finding was based solely upon the pleadings in the present case and the record in the O'Connor case. In the latter case, "having heard the testimony and having examined the proofs offered," the court found: "That said Communist Party of the United States of which said Oleta O'Connor is a member is a private political club and is not a political party organized under the laws of the State of California. * * * That this action was not commenced by plaintiff for and on behalf of either the Communist State Central Committee of the State of California or the Communist County Central Committee of the City and County of San Francisco, State of California, but was commenced on behalf of the private political club designated by plaintiff in her complaint as the Communist Party of the United States"; whereas the present action was brought by Anita Whitney as the chairman of the California State Committee of the Communist Party of the United States of America, which she alleges is a lawfully constituted and existing political party of the United States of America, and there was no proof offered showing that the organizations in the two actions were identical, or that the plaintiff in each appeared in the same right or capacity.

[1] A party to an action in a subsequent proceeding is not bound by the judgment in a prior proceeding, and the doctrine of res judicata does not operate as an estoppel, unless he was a party or privy to such action and the identical issue raised in the subsequent proceeding was determined therein.

[2] Respondents failed to sustain the special defense of res judicata other than by answer filed, which simply raised an issue. No evidence, as appears from the transcript on appeal, was introduced. Code Civ.Proc., §§ 1908, 1910; Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797; Andrews v. Horton, 8 Cal.App.2d 40, 47 P.2d 496; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; 15 R.C.L., p. 1012, 34 C.J., p. 756, § 1165; 15 Cal.Jur., p. 181, § 215.

The question of whether the Communist Party of the United States of America would in any event be entitled to the use of the city's auditorium is in no way involved in this appeal. That is an issue to be decided in the trial court upon evidence there to be adduced, after determining whether or not the plaintiff herein is entitled to maintain the action in behalf of said party. Our decision herein goes only to the extent of holding that the record before us discloses no evidence to sustain the trial court's finding that the plaintiff herein represents the same organization the plaintiff in the prior action claimed to represent.

Judgment for defendants on the special defense is reversed, the special issue to be retried if deemed advisable.

PETERS, P. J., and KNIGHT, J., concurred.

52 Cal.App.2d 507

RASTELLI et al. v. ZACA MINING CORPORATION.

Civ. 6729.

District Court of Appeal, Third District, California.

June 5, 1942.

1. Mortgages 🔑497(1)

Upon foreclosure, mortgage becomes merged in the decree and terms of the decree govern the parties' rights.

2. Mortgages 🔑507

The officer selling property after mortgage foreclosure acts under the decree and order of sale, and his authority is purely administrative.

3. Mortgages 🔑507

It is not the function of officer making foreclosure sale to interpret the mortgage, and, whether correct or not, the decree and statutes applicable thereto control manner of sale and rights of parties. St.1939, p. 1108, § 2601.

4. Mortgages 🔑514

Where foreclosure decree described mortgaged property as "lands and premises", referred to right of redemption and execution of deed, and clearly showed that foreclosure and sale of realty was intended, sheriff was under duty to sell in accordance with statutes governing sales of realty, though mortgage allegedly manifested intent that the mortgaged property be treated as personalty. St.1939, p. 1108, § 2601.

5. Mortgages ⟹578

On appeal from order setting aside foreclosure sale, reviewing court must accept the foreclosure decree as court finds it, and decree cannot be collaterally attacked.

6. Mortgages ⟹529(7)

Gross inadequacy of price, when coupled with even slight irregularities in making of foreclosure sale, warrants vacating sale.

7. Mortgages ⟹529(7)

Where foreclosure decree manifested intent that mortgaged property be treated as realty, but sheriff did not comply with statutes governing foreclosure sale of realty, and conflicting evidence indicated that property sold for $500 was worth not less than $10,000, setting aside the foreclosure sale was not error. St.1939, p. 1108, § 2601.

Appeal from Superior Court, Alpine County; L. T. Price, Judge.

Action by Steve Rastelli and others against the Zaca Mining Corporation, to foreclose a mortgage, wherein foreclosure sale was had and defendant moved to set aside the sale. From an order setting aside the sale, plaintiffs appeal.

Affirmed.

Ayres, Gardiner & Pike and H. R. Cooke, all of Reno, Nev., for appellants.

Platt & Sinai and Sidney W. Robinson, all of Reno, Nev., and Theodore G. Elges, of San Francisco, for respondent.

PER CURIAM.

This is an appeal from an order setting aside a sale of property made after foreclosure of a mortgage.

On April 1, 1939, respondent borrowed $9,000 from appellants and gave them a promissory note secured by an instrument designated a "Real and Chattel Mortgage." The property was listed therein under two heads. Under the heading of "Real Property" twenty-six mining claims were described. Under the heading of "Personal Property" appeared the following: "All buildings, and improvements located on the above described property or that may hereafter be erected thereon, together with all and singular the appurtenances, hereditaments, water and water rights, pipes, flumes or ditches thereunto belonging, or in anywise appertaining and the reversion and reversions, remainder and remainders, the rents, issues and profits thereof, including the mill thereon, or other machinery or equipment now to be found in or about said property, a partial list of which will be found in the inventory hereto attached and marked Exhibit A. * * * To Have and to Hold all and singular the said premises, together with the appurtenances and personal property hereinabove set forth." In Exhibit A were listed numerous tools and other articles such as are commonly used in working lode claims. This instrument was executed with all the formalities required of both real and chattel mortgages.

On June 17, 1941, appellants commenced an action to foreclose the mortgage. The complaint contained no allegation characterizing the property as either real or personal but a copy of the mortgage was attached as an exhibit and made a part thereof by reference. Respondent answered, admitting the allegations of the complaint, and set up a counterclaim. No findings appear in the record but it is conceded that the court found against respondent on its counterclaim and that there was no express finding as to the character of the property as realty or personalty.

The decree was in the usual form for the foreclosure of mortgages of real property and all the property mentioned therein was listed together, without segregation of any kind, and was referred to as "the *lands and premises* directed to be sold." (Italics added.) The sheriff was directed to sell "so much thereof as may be sufficient to raise the amount due to the plaintiffs * * * and which may be sold separately without material injury to the parties interested * * * in the manner prescribed by law, and according to the course and practice of this Court" and "after the time allowed by law for redemption has expired, to execute a deed to the purchaser or purchasers of the mortgaged premises." There appears to have been no separate order of sale but no point is made because of this departure from the usual practice.

On December 3, 1941, that portion of the property which had been listed in the mortgage under the heading of "Personal Property" was sold by the sheriff for $500 after he had given notice in the manner prescribed for the sale of personalty.

On January 24, 1941, respondent moved to set aside said sale, the motion being made upon the grounds that the property had not been sold as required by law and the decree of the court and that the "price received was shockingly out of proportion to the true value of the property sold." After an extended hearing, the court found that the value of the property sold was not less than $10,000; that by virtue of the provisions of section 2601 of the Public Resources Code, St.1939, p. 1108, the property sold was realty and was not sold according to law and the decree of foreclosure. An order was thereupon made setting aside the sale.

Appellants earnestly contend that the sale was conducted in strict compliance with the law for the reason that the property sold by the sheriff was described in the mortgage as personal property; that said instrument was executed as required for both real and chattel mortgages; that notwithstanding the provisions of section 2601, supra, that "sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine" the parties to a mortgage may, as between themselves, change the character of such property to personalty; and that the recitals in such mortgage are conclusive as to the character of such property.

[1-3] But the foregoing argument ignores the fact that upon foreclosure of a mortgage the latter becomes merged in the decree, following which the terms of the decree govern the rights of the parties Hales v. Snowden, 40 Cal.App.2d 801, 105 P.2d 1015; Rose v. Conlin, 52 Cal.App. 225, 198 P. 653; Trunnell v. Tonole, 104 Or. 628, 208 P. 583; 18 Cal.Jur. 471, and that the officer making a sale of property after foreclosure of a mortgage acts under the decree and order of sale—the decree here is treated as both—and his authority is purely administrative. Spaulding v. Howard, 121 Cal. 194, 53 P. 563. It is not his function to interpret the mortgage, and whether correct or not, the decree and the code sections applicable thereto are controlling as to the manner of sale and as to the rights of the parties. If the court has fallen into error in the making of the decree that error may be corrected by motion or by appeal, whichever is appropriate under the circumstances, but it cannot be done by an administrative officer directed to act under it.

[4] As we have already pointed out, the decree in the instant case was clearly one for the foreclosure and sale of real property. The property was described as "lands and premises" and the directions for the sale referred to the right of redemption and the execution of a deed. Nothing contained therein even intimated that personal property was involved. Considering that twenty-six mining claims and mining equipment were ordered sold, the direction that a portion "may be sold separately" was not inconsistent with a sale of realty. It may be conceded that it was not necessary for the decree to provide for a right of redemption or the giving of a deed; but such directions, when considered with the other terms of the decree, indicated clearly that the court intended to order the sale of realty and the essential fact is that when the decree so described the property it was the duty of the sheriff to sell in accordance with the code sections governing sales of real property.

[5] We are not concerned here with the problem of determining whether or not the decree was correct or what powers the trial court had to correct it if it was erroneous. No motions were made in the court below for that purpose and no appeal was taken from the judgment. The court had jurisdiction of the parties and of the subject-matter of the action. Although no express issue was made as to the character of the property, the question was germane to the subject involved. The court was called upon to interpret the mortgage, to order a sale and to determine for the sheriff whatever facts were necessary for that officer, acting in a ministerial capacity, to carry out the terms of the order. Under such circumstances we must accept the decree as we find it; it cannot be collaterally attacked on this appeal from the order setting aside the sale. (2 Cal.Jur. 837.)

[6, 7] On the hearing of the motion the court found, upon conflicting evidence, that the property sold for $500 was worth not less than $10,000. It has been held many times that gross inadequacy of price, when coupled with even slight irregularities in the making of the sale, is sufficient to warrant the court in vacating such a sale. Sargent v. Shumaker, 193 Cal. 122, 223 P. 464; Bock v. Losekamp, 179 Cal. 674, 179 P. 516; Rauer v. Hertweck, 175 Cal. 278, 165 P. 946; Winbigler v. Sherman, 175 Cal. 270, 165 P. 943; Odell v. Cox, 151

Cal. 70, 90 P. 194. The reason for applying the rule to the instant case is more compelling than in cases of slight irregularity, for here there was a complete failure to follow the directions of the decree and order in the matter of giving notice. Under the terms of the decree respondent had a right to believe that its right of redemption would be protected and it was seriously injured when that right was cut off by a sale of the property as personalty.

The order is affirmed.

52 Cal.App.2d 366

NEUSTED v. SKERNSWELL.

Civ. 12100.

District Court of Appeal, First District,
Division 2, California.
May 29, 1942.

1. Appeal and error ⚷345(1)

Where defendant filed notice of appeal from judgment but was never notified in writing by plaintiff of entry of order denying his motion for new trial and he never in writing or by oral stipulation waived such notice, trial court erred in granting plaintiff's motion to terminate proceedings on appeal. Code Civ.Proc. § 953d.

2. Appeal and error ⚷345(1)

If affidavit filed in support of plaintiff's motion to terminate proceedings on appeal and served on defendant constituted the requisite statutory notice of entry of order denying defendant's motion for new trial, the entry less than ten days after service of such affidavit on defendant of an order terminating proceedings on appeal was nevertheless erroneous. Code Civ.Proc. § 953d.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Partition proceeding by Julius Neusted against Joseph Skernswell wherein an interlocutory decree in favor of plaintiff was entered and defendant filed notice of appeal. From an order granting plaintiff's motion to terminate proceedings on appeal, defendant appeals.

Order reversed.

Marcel E. Cerf, Robinson & Leland, of San Francisco, for appellant.

Joseph A. Brown and A. E. Cross, both of San Francisco, for respondent.

STURTEVANT, Justice.

The defendant, Joseph Skernswell, has appealed from an order of the trial court terminating proceedings on appeal in the above entitled action. On the 26th day of May, 1941, the trial court entered an interlocutory decree in a partition proceeding in favor of the plaintiff. In that judgment it appointed a referee to state the account between the parties. It also appointed a receiver, made an allowance of $750 attorney fees in behalf of the plaintiff's attorney, and awarded costs in the sum of $239.52 in favor of the plaintiff. The defendant made a motion for a new trial. That motion was denied on July 10, 1941. The defendant filed a notice of appeal from the judgment on July 18, 1941. Except as hereinafter noted the plaintiff never, in compliance with section 953d of the Code of Civil Procedure, served a notice in writing notifying the defendant that an order denying a new trial had been made, nor did the defendant, in writing or by oral stipulation, waive said notice. However, on September 3, 1941, the plaintiff served and filed a notice of motion to terminate proceedings. In support of his motion he served and filed an affidavit of Joseph A. Brown, Esq., his attorney. On September 12, 1941, the trial court granted the motion terminating proceedings. That is the order from which the defendant has appealed.

[1, 2] The defendant recites the foregoing facts and contends that the plaintiff never complied with the provisions of section 953d of the Code of Civil Procedure and therefore the trial court erred in granting the motion. He cites and relies on the following decisions: Attkisson v. Reynolds, 94 Cal.App. 185, 187, 270 P. 686; Kling v. Kimball Pump Co., Inc., 115 Cal.App. 517, 1 P.2d 998; Griffin v. Kent, 206 Cal. 263, 274 P. 56; Savage v. Superior Court, 36 Cal.App.2d 521, 97 P.2d 990. Those authorities clearly sustain his contention. Benson v. Gardner, 14 Cal.2d 526, 528, 531, 95 P.2d 136. In reply the plaintiff quotes from

the above mentioned affidavit "and that defendants made a motion for a new trial, which was denied and * * *." He contends that said recital was notice in writing in compliance with the statute as early as September 3, 1941, but the order appealed from was dated September 12, 1941. It is apparent that the defendant did not have the ten days' notice to which he was entitled. If the plaintiff would rely on the recital contained in said affidavit it is manifest that he should have renewed his motion. The defendant could not be deprived of his ten-day notice. Fink v. Weisman, 43 Cal.App.2d 153, 154, 110 P.2d 484.

The order appealed from is reversed.

NOURSE, P. J., and SPENCE, J., concurred.

OLMO v. OLMO.

Civ. 6640.

District Court of Appeal, Third District, California.

June 5, 1942.

Rehearing Granted June 25, 1942.

1. Partnership 🔑344

A personal judgment cannot be rendered in favor of one partner against the other until all partnership assets have been collected and all the property has been sold and converted into cash.

2. Partnership 🔑344

A personal judgment in favor of one partner against the other cannot be rendered until all of the partnership debts are paid.

3. Partnership 🔑311(5)

In action for dissolution of partnership and an accounting, trial court was justified under the evidence in holding that agreement of settlement whereby defendant retained half interest in partnership, accepted $2,000 in cash, and released plaintiff from all prior claims and demands was procured on fraudulent representations made by plaintiff and relied on by defendant, and trial court properly set agreement aside.

4. Partnership 🔑328(3)

In action for dissolution of partnership and an accounting, finding that partnership continued without interruption from July 1, 1929, until filing of action for dissolution was supported by substantial evidence as against contention that defendant voluntarily withdrew from partnership in May, 1932.

5. Partnership 🔑332

In action for dissolution of partnership and an accounting, if results arrived at by referee who was confronted with an incomplete and imperfect set of books were to plaintiff's disadvantage, plaintiff could not complain of a situation brought about by his own dishonest manipulation while books were in his custody.

6. Partnership 🔑332

In action for dissolution of partnership and an accounting, complaint could not be made of fact that referee's accounting extended back only to October 10, 1929, though trial court had found that partnership was formed on July 1, 1929, where there were no records available to referee relating to partnership affairs before October 10, 1929.

7. Partnership 🔑336(3)

In action for dissolution of partnership and an accounting, evidence did not support finding that partners owed their mother a debt of $6,000.

8. Partnership 🔑311(5)

In action for dissolution of partnership and an accounting, evidence did not support finding that defendant accepted $2,000 in cash under settlement agreement because plaintiff stated that that was the amount of his pilferings from partnership.

9. Partnership 🔑333

In action for dissolution of partnership and an accounting, where evidence showed that notwithstanding his illness, plaintiff managed to keep business running under severe handicaps, finding that during period when plaintiff was ill, he absented himself from business but nevertheless drew a salary of $250 per month should be eliminated, and plaintiff should be given credit for salary in question which was charged against him in accounting.

◆

Appeal from Superior Court, City and County of San Francisco; J. J. Van Nostrand, Judge.

Action by Alfred J. Olmo against Thomas M. Olmo for dissolution of a partnership and an accounting, wherein defendant by cross-complaint sought the same relief. From a judgment for defendant on his cross-complaint, plaintiff appeals.

Judgment reversed with directions.

Lloyd J. Cosgrove, James M. Hanley, and Herbert Chamberlin, all of San Francisco, for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment in favor of respondent upon his cross-complaint in an action for dissolution of a partnership known as Olmo Bros. Draying Co.

As grounds for reversal, appellant makes the following claims:

1. That certain partnership assets were not converted into cash and a debt of $6,000 found by the trial court to be due to the mother of the parties hereto was not paid and therefore a personal judgment could not be rendered against one of the partners.

2. That the court erroneously found that the partnership commenced on July 1, 1929, instead of July 1, 1934, as claimed by appellant.

3. That appellant was relieved of liability by a written release dated July 1, 1934, which release was erroneously set aside by the court for fraud alleged in its procurement.

4. That an illegal method of accounting was adopted by the referee, that he failed to charge respondent for $2,000 paid him for the alleged fraudulent release, and that the accounting extended back only to October 10, 1929, while the court found that the partnership commenced on July 1, 1929.

5. That the evidence will not support certain findings of fact and the findings of fact will not support the judgment.

Both appellant and respondent, by their pleadings, asked for a dissolution and an accounting, so no issue was raised on these questions.

The essential facts are these:

Appellant and respondent, who are brothers, formed a partnership on July 1, 1929. This partnership continued without interruption until some time in May, 1932. At that time appellant told respondent that there were no profits in the business and that he was going to withdraw and thought he would leave San Francisco, where the partnership business was, and go to Los Angeles. In the preceding April, however, he had filed a certificate with the county clerk in San Francisco, stating that he was doing business individually under the name of Olmo Bros. Draying Co. Appellant claims that at that time respondent abandoned his interest in the partnership and voluntarily turned it over to appellant.

Contrary to appellant's statement, there had been some profits in the business, but respondent had left the bookkeeping to his brother and did not know much about that end of the business. He continued to work with appellant, drawing a salary of $150 per month. Appellant also drew a salary from the business.

Notwithstanding his statements, appellant did not leave San Francisco, but continued to operate the business with his brother as before.

In April or May, 1934, respondent being in urgent need of funds, requested appellant to advance him some money from the partnership. Then for the first time, the partners quarreled over money matters, appellant claiming that respondent had no interest in the business.

The business was conducted from the family dwelling house, where the partners lived with their mother and the rest of the family, including an adult sister, Laura, who for some time kept the books of the partnership. Many discussions of the business were held with the whole family participating. Appellant never told any of the members of his family at any time that he had dissolved partnership with his brother, until April or May, 1934.

At this time, Laura Olmo accused appellant of withdrawing large sums of money from the partnership for his own personal benefit and in particular one check for $5,000 for which he made a stub marked only with five crosses. The check book with the questioned stub subsequently disappeared. Also pages were torn out of other books and certain partnership books and papers completely vanished. Appellant offered an explanation of the $5,000 check which proved to be false.

Notwithstanding the fact that appellant claimed respondent had no interest in the partnership, he offered to pay him $5,000 for his purported interest.

At this time respondent was suspicious of the $5,000 withdrawal but did not have definite information that appellant had appropriated it. What he did not know was that at the very time negotiations were pending, appellant had withdrawn an additional $3,000 and placed it in his personal savings account.

The negotiations culminated in a written agreement of settlement effective as of July 1, 1934, whereby respondent retained a half interest in the partnership, was paid $2,000 in cash and released appellant from all prior claims and demands.

Appellant and respondent thereafter operated the business together until January 14, 1935. At that time respondent got into a personal difficulty having no connection with the business and went into hiding for three months. Appellant thereupon brought this action.

The partnership owned some trucks which respondent asserts were sold for storage charged, but there is no evidence to that effect.

[1] The first ground for reversal claimed by appellant is meritorious. No personal judgment can be rendered by one partner against the other until all the assets have been collected and all the property sold and converted into cash. Clark v. Hewitt, 136 Cal. 77, 68 P. 303.

[2] No personal judgment can be rendered against a partner until all of the partnership debts are paid. Nakamura v. Kondo, 65 Cal.App. 211, 223 P. 425; Albery v. Geis, 1 Cal.App. 381, 82 P. 262.

The second and third grounds of reversal urged by appellant are not tenable.

There is abundant evidence that appellant concealed from respondent important information which if known would have caused him to refuse to enter into the agreement of July 1, 1934. In addition to the $5,000 and the $3,000 withdrawals hereinbefore referred to, there were other large, unexplained withdrawals including sums of several hundred dollars at a time which were paid to a real estate firm from whom appellant was buying property.

At the time of most of these withdrawals, a fiduciary relationship prevailed between the partners, respondent trusted appellant and relied upon his representations, express and implied, concerning the management of the business and the profits thereof.

[3] Under the existing circumstances the trial court was justified in holding that the written agreement of July 1, 1934, was procured upon fraudulent representations made by appellant which were relied upon by respondent, and the court's action in setting aside the agreement was entirely proper. Vance v. Supreme Lodge, 15 Cal.App. 178, 114 P. 83.

[4] Appellant claims that respondent voluntarily withdrew from the partnership in May, 1932, but there is little to support that contention except his own testimony. Respondent continued to work with the firm and denied that he ever withdrew. In this he was supported by the other members of the family who testified that they were never informed of any change in the partnership relation. There is substantial evidence to support the finding that the partnership continued without interruption from July 1, 1929, until the filing of the action for dissolution.

[5] We find little substantial merit in the fourth ground for reversal urged by appellant. The referee was confronted with an incomplete and imperfect set of books, which had been partially destroyed and mutilated while in the custody of the appellant. Where records were missing, he resorted to a system of computations based upon average receipts and expenditures which was the best method he could pursue under the circumstances. If the results arrived at have been to appellant's disadvantage, he cannot complain of a situation brought about by his own dishonest manipulation. Freeman v. Donohoe, 65 Cal.App. 65, 223 P. 431.

In this connection it is true that neither in the referee's report nor in the findings has respondent been charged with the $2,000 which he was paid under the voided written agreement of July 1, 1934. However, in a roundabout way he has had approximately this sum deducted from his judgment. The judgment found due to respondent was $8,095.94. There was $3,910.62 cash on hand with the partnership. The judgment directed that the cash be paid to respondent and that the difference of $4,185.32 be docketed as a personal judgment against appellant. Of course, respondent by virtue of his partnership interest was already entitled to half of the cash on hand, so by the method of payment prescribed he receives $1,955.31 less than the amount found to be due him, which nearly offsets the $2,000 item. The findings and judgment are incomplete and incorrect on this point and while the final result is approximately proper, they should be corrected.

[6] The referee's accounting extended back only to October 10, 1929, while the court found that the partnership was formed on July 1, 1929. But there were no records available to the referee back of October 10, 1929, so it was impossible for him to go back of that date.

There is some merit in the final ground for reversal urged by appellant. That this is true has been indicated by observations previously made herein.

[7] The finding that there was a debt of $6,000 due to the mother of the partners is not completely supported by the evidence. There is evidence that she had advanced them considerable money but nowhere in the briefs on file has it been pointed out that the sum of these advances reached that total. At least the major portion of this debt had outlawed. Respondent acknowledged the debt while appellant repudiated it. This question should be correctly and definitely determined by the trial court and a proper finding made.

There was evidence as to capital contributions made by the partners but no finding on that subject.

[8] A finding that respondent accepted the $2,000 because appellant stated that that was the amount of his pilferings from the partnership, is not supported by the evidence. Appellant never admitted any pilferings but claimed that he was the sole owner of the business and entitled to do as he pleased with its assets, and he did all he could to cover up his illegal withdrawals, which were in excess of $8,000 over the amount to which he was entitled.

[9] There is a finding that during a period when appellant was ill, he absented himself from the business, but nevertheless drew a salary of $250 per month. Apparently this salary was charged against him in the accounting. The evidence shows that notwithstanding his illness, he spent quite a little time with the business, both at the office and at home, and managed to keep it running under severe handicaps. This finding should be eliminated and appellant should be given credit for the salary in question.

There are some inaccuracies in other findings but they are not of sufficient importance to merit discussion here.

The record in this case is voluminous and it seems neither necessary nor expedient to order a complete new trial.

The judgment is reversed with directions to the trial court to vacate the findings and judgment, and to reopen the case for the taking of such additional evidence as may be necessary to prepare proper findings as indicated herein; also to direct the referee to take additional testimony and to file a supplemental report accounting for the partnership assets and debts, and making the other corrections hitherto suggested.

The trial court is further directed thereafter to file new findings and a judgment which will conform to the views expressed in this decision.

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52 Cal.App.2d 439

PEOPLE v. KNOTT et al.

Cr. 3536.

District Court of Appeal, Second District,
Division 1, California.

June 2, 1942.

Rehearing Denied June 16, 1942.

Hearing Denied June 29, 1942.

1. Receiving stolen goods ⇨8(3)

Evidence of identity of tires and tubes as being part of stolen truck load sustained conviction of receiving stolen property.

2. Receiving stolen goods ⇨8(3)

Evidence that accused was seen in an automobile backing into a garage in which stolen empty tube cartons were found, that he tried to sell tires and tubes which he described as "hot", and that he received $40 from coadventurer from sale of stolen tires, supported conviction of receiving stolen property.

3. Criminal law ⇨412(3)

In prosecution for receiving stolen property, accused's declaration that tires and tubes that he was attempting to sell were "hot" was admissible as a "declaration against interest"; "hot", when used as an adjective to modify a noun whose referent is an article of stolen property, meaning that the article has been stolen, that somebody is looking for it, and that it is dangerous to have it in one's possession.

See Words and Phrases, Permanent Edition, for all other definitions of "Declaration Against Interest" and "Hot".

4. Criminal law ⚷404(4)

In prosecution for receiving stolen property where tires and tubes were identified as having been taken from a stolen truck, displaying the tires and tubes to jury was not error.

5. Criminal law ⚷422(1)

In prosecution for receiving stolen property where evidence established that both accused were acting in a joint enterprise, evidence of conduct, acts, and declarations of one accused was properly received against the other.

6. Criminal law ⚷1171(1)

In prosecution for receiving stolen property, district attorney's eliciting from arresting officer testimony that accused refused to answer queries regarding his wife's name and with whom he had been living did not constitute prejudicial "misconduct".

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

7. Criminal law ⚷770(3)

In prosecution for receiving stolen property, instructions fully and fairly advising jury of the law applicable to the case of the people and of the accused were not improper as failing to submit accused's theory that there was no joint enterprise by accused.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Edward Knott and another were convicted of receiving stolen property, and they appeal.

Affirmed.

Morris Lavine, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice pro tem.

On June 16, 1941, in the halcyon days before our entry into the second world war, a truck driver left his truck, loaded with automobile tires and tubes, parked on the street while he went into a drug store. When he came out, the truck, tires and tubes were gone. So far as the driver is concerned, he disappears from this case because that was the first and the last day that he worked for the corporation which owned the truck. The truck was found next day with no tires or tubes in it, and with all of the distinctive lettering on it painted out.

A few days after the disappearance of the tires, the defendant Knott rented a garage at the rear of a private home and stated that he wanted it for a place in which to store tires. After the garage was rented, the defendants Knott and Chaus were seen several times backing a Chevrolet car into it. After they were arrested, officers who searched the garage found empty cartons for tubes, which were identified as having been in the truck with tubes in them on the day it disappeared.

The defendant Knott sold for less than market prices a number of tires and tubes to different individuals, which tires and tubes were identified at the trial as having been part of the truck load which disappeared.

The defendant Chaus endeavored to sell some tires and tubes to a dealer who turned him down because Chaus told him they were "hot."

Upon being arrested Knott first said he did not know where the tires and tubes came from, then that he had bought them from a man by the name of Burk, and then that he got them from the defendant Chaus; also that he had given Chaus $40 which he had received in payment for some of the tires and tubes which he sold. These tires and tubes were likewise identified as being part of the truck load in question.

Upon the conclusion of the People's case neither defendant took the stand. The jury convicted them both of the crime of receiving stolen property, and they were sentenced to San Quentin. Motions for new trial were made and denied, and both defendants have appealed.

[1] From the recital of facts just given, it is evident that there was ample evidence against the defendants to sustain the verdict of the jury.

[2] Appellant Chaus contends that the evidence against him is not as strong as that against Knott. The circumstances that he was seen in a car backing into the garage

several times, that he tried to sell tires and tubes which he described as "hot," and that he received $40 from Knott from the sale of the stolen tires are sufficient to support the verdict of the jury as against him.

There are some claimed errors of law which require comment:

[3] One particularly stressed on this appeal is that the declaration against interest by the defendant Chaus relative to "hot" tires cannot be evidence against him because the word "hot" does not indicate that property to which it refers is stolen property. The English language is a living, growing, changing thing. Meanings of words change. Sometimes meanings change slowly with lapse of time; sometimes almost over night. Many words are susceptible of different meanings depending upon the context of the sentence in which they are used. The word "hot" may be used to express several very different things. For instance, we speak of a hot water bottle, or of hot weather, or a hot time, or hot air (with at least two very different meanings), or a hot tamale, or hot cargo (with a comparatively new meaning), or even of the lowly hot dog. Without further excursion into the realm of semantics, it may now be said that within the last few years the word "hot" when used as an adjective to modify a noun whose referent is an article of personal property may mean that that article has been stolen, that somebody is looking for it and that it is dangerous to have it in one's possession. The dictionary has already caught up with this meaning of the word. In Webster's Collegiate Dictionary (5th ed., 1942) is to be found the following in defining the adjective "hot": "recently stolen or otherwise illegally obtained, as 'hot' goods or bonds." The word "hot" in the sense it was used in the declaration of the defendant Chaus conveyed the meaning that the tires were stolen and that he knew it. People v. Morris, 124 Cal.App. 402, 12 P.2d 679.

[4] Appellants assert that there was error in parading before the jury a whole truck load of tires and tubes. This is untenable because at least part of them were identified as having been in the stolen truck.

[5] Errors in rulings upon admission of evidence are claimed, principally because evidence against one defendant was received as against the other. This testimony was admitted upon the theory that the two defendants were engaged in a joint enterprise. From the reference already made to it, it is apparent that there was sufficient testimony to sustain the theory of the prosecution that both defendants were engaged in a joint enterprise. That being true, evidence of the conduct, acts, and declarations of one defendant was properly received as against the other.

[6] Misconduct of the district attorney as against the defendant Chaus is claimed because one of the arresting officers testified that after his arrest he was asked what his wife's name was and with whom he was then living, to which the defendant responded, "What difference does it make?" There is no doubt that whomever the defendant may have been living with had nothing to do with the crime for which he was being tried. Inquiry along that line persisted in could result in misconduct on the part of the district attorney. People v. Anthony, 185 Cal. 152, 196 P. 47; People v. Tufts, 167 Cal. 266, 139 P. 78; People v. Derwae, 155 Cal. 592, 102 P. 266. But in the present case the occurrence referred to did not go so far as to prejudice the defendant.

[7] Finally we come to complained-of instructions given and refused by the trial court, complaints based mainly upon the defendants' theory that there was no joint enterprise on the part of both defendants. The instructions complained of were properly given. A reading of the instructions as a whole demonstrates that the jury was fully and fairly advised as to the law applicable both to the case of the People and of the defendants.

The judgment as to both defendants is affirmed.

YORK, P. J., and DORAN, J., concurred.

52 Cal.App.2d 382

BRAKHAGE et al. v. McCASLIN.

Civ. 3015.

District Court of Appeal, Fourth District, California.

May 29, 1942.

1. Quieting title ⚷44(3)

In action to quiet title to land deeded by plaintiff to defendant in lieu of cash deposit to guarantee that an oil well would be spudded in by plaintiff on land leased from defendant, evidence justified decree for plaintiff on ground that the execution of the lease and deed was induced by defendant's false representation that the taxes on land leased for oil drilling purposes were not over $8,000 whereas in fact the amount was in excess of $12,000.

2. Appeal and error ⚷1011(1)

Where there is a substantial conflict in the evidence, the finding of the trial court will not be disturbed.

3. Deeds ⚷74

Where defendant's false representation as to amount of taxes due on his land induced plaintiff to agree to spud in an oil well on the land and to deed other land to defendant as a guarantee of performance on plaintiff's part, plaintiff's acts of assigning the lease and preparing a new agreement with another operator for drilling the well after discovery of the fraud did not amount to a "waiver" of defendant's fraud precluding plaintiff from recovering title to land conveyed, where assignment of the lease and the new agreement had not been delivered.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

4. Fraud ⚷35, 58(1)

Where subsequent acts are relied on as a defense in a case where fraud is clearly established, the act must stand upon the clearest evidence and must evince a purpose to waive or forgive the fraud and must amount to a clear election not to rescind.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by H. J. Brakhage against Lowry B. McCaslin to quiet title to land deeded by plaintiff to defendant in lieu of cash deposits to guarantee that an oil well would be spudded in by plaintiff on land leased from defendant. From a judgment quieting title in plaintiff, defendant appeals.

Affirmed.

Hanna & Morton and B. W. Burkhead, all of Los Angeles, for appellant.

Burke Mathes, of Los Angeles, for respondents.

GRIFFIN, Justice.

Appellant McCaslin acquired an 87½ acre parcel of land in Monterey Park about eleven years ago. He paid no taxes on it thereafter. The property was sold to the state for delinquent taxes several years ago. The taxes and penalties accumulated until October 7, 1939. They then amounted to $12,334.94 on this acreage. They were, in the opinion of the appellant, in excess of the value of the land. Oil activity developed within a few miles of the property. A Mr. Steiger contacted appellant in the month of March, 1939, and was authorized by him to bring persons interested in drilling the property to him. Appellant at that time represented to his agent, Steiger, that the indebtedness was about $8,000, "he didn't state exactly the amount, but he said he thought it was about $8,000" and further stated that, in the event he leased the property, he wanted the sum of $5,000 or the equivalent thereof to guarantee that the well would be spudded in. About April 10, 1939, Steiger contacted respondent Brakhage and represented to him that the indebtedness against the 87½ acres was approximately $8,000 and that McCaslin would require that the sum of $5,000 or the equivalent thereof be placed in escrow to guarantee that the well would be spudded in. Steiger then introduced this respondent to two oil men, Burkholder and Spangler, who agreed to assist the respondent in getting the property drilled if the respondent would make the necessary arrangements to acquire the lease. A few days thereafter Steiger took the respondent Brakhage, Burkholder and Spangler to McCaslin's office. During the course of the negotiations the appellant again stated that the taxes were "approximately $8,000" or "something around $8,000" or "eight thousand, not over eight thousand" and that otherwise "his property was clear." It was testified that at that meeting appellant said: "I have a statement here in my desk, I have looked at it, I have examined it." At that meeting an agreement was reached whereby the appellant was to desposit in escrow (subject to all taxes of record) an oil and gas lease covering 77 acres of the property, in which the respondent was to be named lessee, and respondent was to deposit in the escrow a deed conveying approximately 91 acres of land situated in Kings County to the appellant in lieu of the $5,000 cash deposit. It is this 91 acres located in Kings County which is the subject of the present action.

The court found that at the above-mentioned meeting of the parties the appellant represented to the respondent that the amount owed for taxes and penalties against the Monterey Park property did not exceed $8,000. The escrow was opened about the 27th day of April, 1939. Appellant deposited an oil and gas lease covering the Monterey Park property wherein the respondent was named as lessee. Respondent deposited a grant deed conveying the Kings County property to the appellant. The appellant deposited a quitclaim deed covering the Kings County property in favor of the respondent. The instructions were to the effect that the escrow holder was to record the grant deed conveying the Kings County property from respondent to appellant, then deliver the oil and gas lease to the respondent and, in the event an oil well was spudded in pursuant to the terms of the lease, the escrow holder was then to deliver the quitclaim deed covering the Kings County property to the respondent. In the event the respondent failed to spud in an oil well on the Monterey Park property within the time provided by the lease, the quitclaim deed covering the Kings County property was to be returned to appellant. The escrow instructions were later amended in respect to the title to the Kings County property, the grant deed conveying that property to appellant was recorded, and the oil and gas lease was delivered to the respondent from escrow about August 5, 1939. Thereafter, about August 26, 1939, respondent entered into an agreement with one Prior whereby the latter agreed to cause a well to be drilled upon a portion of the premises described in the lease. About October 1, 1939, Prior obtained a title report which disclosed delinquent taxes in the amount of $12,334.94 (as found by the court and admitted by appellant in his answer) against the 87½ acres of land located in Monterey Park and owned by the appellant, which 87½ acres included the 77½ acres covered by the oil and gas lease. On October 2, 1939, Prior advised the respondent in writing of the reported amount of delinquent taxes against the property. Thereafter respondent made demand on appellant that he either reduce the taxes on the 77½ acres to $8,000 or place them on the ten-year plan. Appellant failed and refused to comply with this demand. Respondent then offered to sell a 1 per cent landowner's royalty in the 77½ acres under lease for the benefit of the appellant and to use the proceeds therefrom to place the taxes against the 77½ acres on the ten-year plan. The appellant refused this proposal.

By letter dated November 6, 1939, respondent authorized appellant to take from the escrow a quitclaim deed executed by respondent in favor of appellant, describing the property covered by the oil and gas lease, and demanded of appellant an order directing the escrow holder to deliver to respondent the quitclaim deed to the 91 acres in Kings County. It was stated that the demand was being made because appellant had represented to him that there was only $8,000 in taxes due on appellant's land and that respondent found over $12,337.94 to be due since 1939. A few days after November 6, 1939, Burkholder and Spangler went to appellant's office in an effort to settle their differences. At that time the appellant told them "It is too bad for you that you didn't bring down the title before, * * * instead of taking his (appellant's) word."

Appellant suggested that they find an operator who would accept the lease with the incumbrances of record. A few days later the respondent and his associates introduced one Hudspeth to appellant. On November 16, 1939, a contract was drawn between Hudspeth as first party and the appellant, the respondent Brakhage, Spangler and Burkholder as parties of the second part. An assignment of lease was prepared wherein the leased property was assigned to Hudspeth. Supplemental escrow instructions were prepared by the appellant wherein the respondent was required to warrant that there had been no representation on the part of the appellant that the respondent would not claim any right, title or interest in or to the Kings County property unless a well was actually spudded in and the surface casing landed on appellant's property in Monterey Park. No oil well was ever spudded in. The respondent did not sign the supplemental instructions. The contract and the assignment of the lease were never delivered by the appellant to either Hudspeth or the respondent. Thereafter, about April 20, 1940, respondent filed this complaint.

The trial court found that appellant "represented to * * * Brakhage that he had a good and merchantable title to the property and that the amount owed for taxes and penalties against the property did not exceed eight thousand dollars ($8,000.00)." Judgment was entered quieting respondent's title to the Kings County property.

[1, 2] Appellant now contends that the evidence does not support the findings above quoted. Although appellant testified that he did not so state, the finding in reference to the representation about the taxes is adequately supported as will be seen by an examination of the quoted evidence. Where there is a substantial conflict in the evidence the finding of the trial court will not be disturbed on appeal. Noll v. Baida, 202 Cal. 98, 101, 259 P. 433; Raymond v. Glover, 144 Cal. 548, 78 P. 3.

[3, 4] The next argument is that the fraud of appellant, if any, was waived by respondent when he agreed to enter into a new contract with Hudspeth. We see no merit to this. In the first place facts in reference to the claimed waiver of the fraud were not pleaded nor was it shown that the agreement was ever delivered or that respondent had signed or agreed upon the final terms of the contract or with the final arrangements. It cannot be said that as a matter of law on this appeal the acts and conduct of respondent amounted to a waiver of the fraud of appellant contrary to the implied finding of the trial court on that subject. Schick v. Equitable Life Assurance Society, 15 Cal.App.2d 28, 35, 59 P.2d 163. Where subsequent acts are relied on as a defense in a case where fraud is clearly established, the acts must stand upon the clearest evidence and must evince a purpose to waive or forgive the fraud, and must amount to a clear election not to rescind. Green v. Duvergey, 146 Cal. 379, 80 P. 234.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

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52 Cal.App.2d 403

SEVIER v. ROBERTS.

Civ. 6663.

District Court of Appeal, Third District, California.

June 1, 1942.

Hearing Denied July 30, 1942.

1. Automobiles ⚷19

Where seller of wholesale candy business, instead of endorsing and delivering to buyer, as required by statute, certificates of ownership of three motor trucks inventoried as assets of the business, deposited such certificates in escrow as security for balance due under the contract of sale, title to the trucks did not pass and seller was not entitled to recover, in action upon the contract, any sum which might be due on account of the sale of such trucks. Vehicle Code, §§ 176, 186, St.1935, pp. 115, 118.

2. Automobiles ⚷19

Endorsement and delivery of certificate of ownership of automobile to transferee may be deemed sufficient compliance with statute on the part of seller to enable him to maintain an action for the purchase price as against the buyer, even though buyer fails to comply with statutory requirement relative to transfer of registration and issuance of a new certificate of ownership and registration in his name. Vehicle Code, §§ 176, 186, St.1935, pp. 115, 118.

3. Sales ⚷48

An illegal act cannot become the basis of a valid consideration for a sale or transfer of property, even though the act is merely malum prohibitum.

4. Automobiles ⚷19

Where seller instead of endorsing and delivering to buyer, as required by statute, certificates of ownership of motor trucks deposited them in escrow as security for payment of balance due on contract of sale, seller could not contend that buyer had "waived" right to their proper endorsement and delivery and hence could not assert absence thereof as a defense to action for the purchase price, since statute makes it the duty of seller to endorse and deliver such certificate to buyer. Vehicle Code, §§ 176, 186, St.1935, pp. 115, 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

5. Sales ⚿87(1)

Where inventory taken in connection with sale of wholesale candy business listed motor trucks at $3,000 but seller contended such figure included value of truck routes for distribution of candy, in action to recover balance due under contract of sale, wherein no recovery on account of sale of trucks could be had, the burden was upon seller to prove that such amount included value other than that represented by the trucks themselves.

6. Automobiles ⚿19

Where title to motor trucks did not pass because of seller's failure to endorse and deliver certificates of ownership as required by statute, seller was entitled to possession of the trucks and was entitled to recover, as an offset against credit allowable on balance of purchase price due under contract of sale of business of which trucks were inventoried as an asset, the reasonable value of the use of the trucks by the buyer. Vehicle Code, §§ 176, 186, St.1935, pp. 115, 118.

7. Sales ⚿188

Where seller agreed to make an adjustment on accounts receivable inventoried as part of wholesale business for all sums not actually due thereunder, it was the duty of seller, upon being apprised of fact that amounts were contested by the debtors, to furnish buyer with satisfactory and conclusive proof of the exact amounts due and owing.

8. Sales ⚿188

Where seller agreed to make an adjustment on accounts receivable inventoried as assets of wholesale business for all sums not actually due thereunder, and it appeared in action to recover balance due on purchase price that amounts due on two such accounts were contested by debtors, it was necessary to determine the exact amounts due thereunder and if found to be less than the amounts at which accounts were inventoried, buyer would be entitled to an appropriate deduction from amount allegedly due on purchase price.

Appeal from Superior Court, Humboldt County; Warren V. Tryon, Judge.

Action by Denver Sevier against C. E. Roberts to recover damages for alleged false and fraudulent representations made by defendant to plaintiff in connection with the sale to plaintiff of wholesale candy business, wherein defendant filed cross-complaint for the balance due on the sale of the business and certain personal property. From a judgment in favor of defendant upon his cross-complaint, plaintiff appeals.

Judgment reversed.

John F. Quinn and Denver Sevier in pro. per., both of Eureka, for appellant.

Blaine McGowan, of Eureka, for respondent.

THOMPSON, Acting Presiding Justice.

This is an appeal from a judgment entered in favor of defendant upon his cross-complaint and against the plaintiff.

The amended complaint of appellant sought damages as against respondent in the sum of $5,418.32 suffered as a result of the alleged false and fraudulent representations made to appellant by respondent in connection with the sale to appellant of a wholesale candy business which had been owned and operated by the respondent.

Respondent denied the allegations of fraudulent representation to appellant and by way of cross-complaint asked for judgment in the sum of $3,135.52, the sum alleged to be due under the contract of sale, together with interest thereon at the rate of 7 per cent per annum from September 16, 1938, the date of the said contract of sale. Respondent also asked judgment for the additional sum of $209.35, alleged to be due and owing from appellant as a result of sale to appellant of certain office equipment, fixtures and other personal property. The judgment from which this appeal is prosecuted was entered in full accordance with the demands of the cross-complaint.

For a considerable period of time prior to September 16, 1938, the date of the execution of this contract of sale, which gives rise to the present litigation, the respondent, C. E. Roberts, conducted in the city of Eureka, and throughout adjacent territory, a wholesale candy business. He was engaged principally in the distribution of candy to the retail trade, which was effected by salesmen who took the products on consignment and made deliveries in their territory by the use of trucks owned by the respondent. Just prior to the sale of this candy business to appellant the respondent had been operating his business in the manner stated and had working for him as salesmen, a Mr. Reynolds, and a Mr. MacMillan. These men had distributed the products of the candy business by the use of two trucks, one a Chevrolet and the other a Dodge, both belonging to the respondent, or at least as the evidence discloses they have continuously been registered in the name of respondent as legal owner. A third truck used in the distribution of the candy products was at all times before and subsequent to the execution of the contract of sale registered in respondent's name as sole owner. On July 9, 1938, approximately two months prior to the execution of the contract of sale of the candy business, a written agreement was entered into between respondent and Wallace MacMillan, one of the aforementioned candy distributors. This agreement provided for the distribution by MacMillan of the respondent's products and also provided for the sale to MacMillan by respondent of one truck which was to be used for distribution purposes. The agreement failed to make any provision for the purchase price of this truck and was also silent as to any payments which were to be made. The respondent testified that Mr. MacMillan was to have paid him $25 a month in satisfaction of the purchase price of this truck.

An agreement in the form of a conditional sales contract was also entered into between respondent and the other distributor mentioned, Mr. E. W. Reynolds. This agreement, executed sometime prior to September 16, 1938, was by the language used, a conditional sale of a motor vehicle, although there was a failure to fill in the blanks describing the vehicle as well as an omission to provide for the purchase price or make any provision for purchase payments. The vehicle contemplated by this agreement was the Dodge truck which Mr. Reynolds used for distribution on his route. The respondent testified that Reynolds was to have made payments of $50 per month on the purchase price of this truck.

The sale of the candy business to appellant, which included the transfer of the three trucks mentioned, was executed in the following form and language:

"Eureka, Calif.
"September 16, 1938

"Clifford E. Roberts does hereby sell, transfer and convey unto Denver Sevier all the wholesale candy business and distributing business for many years and now conducted by him under the name 'C. E. Roberts' in the Counties of Humboldt, Del Norte and Mendocino with headquarters in Eureka, California, and all together stock of merchandise on inventory Sept. 16, 1938 with the three trucks and vehicles used by said Roberts, together with the good will of said business; said business being a wholesale business of *$8135.52* of which said sum of $4000 is hereby paid by check, receipt whereof is hereby acknowledged. The balance the sum of *$4135.52* is to be paid ~~out of the profits of said business without injuring the same,~~ but said sum of $4135.52 shall be paid within one year. * * *

"Denver Sevier
"Clifford E. Roberts"

The name "Sevier" and the initials of Roberts appeared on the contract opposite the language "out of the profits of said business without injuring the same," which provision had been deleted by pen and ink. There was a conflict in the evidence as to the time when this provision was eliminated from the contract. It appears, however, that such provision relating to the payment of the balance of the purchase price for the candy business was eliminated prior to the signing of the contract of sale by the parties.

Prior to the sale of the candy business on September 16, 1938, Mr. Roberts was approached by a Mr. Guthrie, who later managed the business for appellant, and a number of discussions took place in regard to the sale of such business. The appellant was present on some of these occasions. On the day of the execution of the contract, September 16, 1938, which took place at the home of Mr. Roberts, there was present, the respondent, the appellant, Mr. Guthrie, and Mrs. Roberts. The respondent testified contrary to the appellant and Mr. Guthrie, as to any reference being made on this occasion to the trucks. He stated that although the pink slip certificates were at that time in his home, no mention was made of reference to either the pink certificates or the trucks. Mr. Roberts testified that the appellant understood that the three trucks and the distribution routes covered by the trucks were to be "lumped in at the three thousand dollar sum," and that the inventory of the business made up by himself and Mr. Guthrie did not include mention of the routes in computing the figure ($3,000) placed opposite the word "Trucks" because the good will of the routes had no value and he did not know how they could be evaluated. The respondent stated that he gave the contracts for the purchase of the two trucks by MacMillan and Reynolds to appellant and that he intended to place the pink slip certificates in the bank in escrow to be held until appellant had paid the note for the purchase price of the business in full. The pink slips covering title to all three of the trucks were placed in the Bank of Eureka by respondent on December 14, 1938. These certificates of title were accompanied by an instruction that the bank should hold them for delivery to appellant upon his payment of the balance due under the contract of sale of September 16, 1938.

The appellant testified that he was unaware at the time he signed the contract of sale for the purchase of the candy business that either Reynolds or MacMillan had contracts for the purchase of the two trucks mentioned. He stated that respondent informed him that MacMillan and Reynolds were paying $25 and $50 a month respectively as rental money for the use of the trucks and that the contracts in regard to the trucks were simply a matter of convenience for the purpose of placing responsibility in their use with MacMillan and Reynolds rather than upon respondent. The respondent admitted upon examination that he had not informed appellant of the fact that the names of MacMillan and Reynolds were upon the pink certificates as registered owners of the two trucks, even though these pink certificates were at the home of respondent at the time of the execution of the agreement. The appellant, apparently, has not seen any of the three pink certificates at any time, either before or since the signing of the agreement. He testified that he was to have received these pink slips the next day after the signing of the agreement and that he made a number of requests to respondent thereafter for a delivery to him of such pink certificates but that they were not delivered to him.

The $4,000 mentioned in the contract of sale was paid to respondent by check at the time of the signing of the agreement and on the 17th day of October, 1938, the appellant made a further payment of $1,000 under the contract to respondent.

Included in the inventory of respondent's business, which was made up for the purpose of the intended sale to appellant, were two bills receivable, one amounting to the sum of $842.32, represented to be an asset of the business and an alleged indebtedness from E. W. Reynolds for merchandise sold and delivered to him; and the other an alleged indebtedness from Wallace MacMillan in the sum of $337.54 on account of merchandise sold and delivered to him. The appellant alleged fraud in connection with these two accounts listed in the inventory, in that E. W. Reynolds in fact only owed respondent the sum of $200 and Wallace MacMillan the sum of $286.54. The appellant testified in regard to these accounts as follows:

"A. He said that Mr. Reynolds would dispute that amount, probably, claiming that it was not correct, but he would have a settlement with Mr. Reynolds and whatever amount they agreed on would be the amount; if it was less than the $842.32 I was to have a credit, and the same way with Mr. MacMillan."

The testimony of respondent in regard to any adjustment between the parties as to these two accounts is as follows:

"Q. Now you have also listed here in your account, Mr. Roberts, the Reynolds account, $842.32. A. That's right.

"Q. That represented purchases by Reynolds from yourself. Now did you tell Judge Sevier that that account might be subject to deductions? A. I did. * * * I told Mr. Sevier if there was any discrepancy in the accounts either way we stood willing to make the adjustment. * * *

"Q. Did you ever talk to Mr. Reynolds about it? A. I did.

"Q. And why is it, Mr. Roberts you have not had the opportunity [to adjust the account] up to the present time? A. Mr. Reynolds wouldn't cooperate with me. * * *

"Q. And at the present time are you holding this account of $842.32 as far as Mr. Sevier is concerned? A. Yes sir.

"Q. On the ground Mr. Reynolds wouldn't cooperate? A. Yes sir."

The amended complaint alleges that respondent made false and fraudulent representations in that he represented that he was the owner of the two trucks driven by Reynolds and MacMillan, whereas in fact he had sold these trucks to those same parties and was not in a position to sell them to appellant; that he had represented the Chevrolet truck which stood in respondent's name to be in good running order and suitable for the candy business, whereas in fact such truck was in disrepair and not fit for such business; that while promising so to do the respondent has failed to deliver to appellant the pink slip certificates evidencing title to the three trucks; and that respondent made false representations in connection with the Reynolds and MacMillan accounts as heretofore set forth.

As a basis for a second cause of action, the appellant alleges that respondent represented that he was the owner of the two trucks operated by Reynolds and MacMillan and that these two trucks were renting for $25 and $50 a month, respectively, and resulting in an income to the business of $75 per month, whereas these statements made by respondent were not true and were known by respondent to be untrue.

The answer of respondent denies that the three motor vehicles or trucks described in the complaint were listed as being of the value of $3,000 and in this connection alleges that the trucks and selling routes were valued at $3,000. The respondent denied that he was not the legal owner of the trucks, but alleged that there were agreements for the purchase of such motor vehicles, which fact was known by appellant prior to the execution of the contract of sale, and that he was able and willing to deliver the pink slips to such motor vehicles upon the payment by appellant of the balance due upon the purchase price of the candy business. The answer of respondent stated that such pink slips were held as security for the payment of the purchase price. Respondent also denied the allegations contained in the second cause of action.

The respondent alleged by way of cross-complaint that there was due and owing under the contract of sale the sum of $3,135.52, together with interest thereon at the rate of seven per cent per annum from September 16, 1938, and there was also due in addition the sum of $209.35, for the sale and delivery to appellant of certain office equipment and personal property. As stated, the judgment was in accordance with the prayer of the cross-complaint.

We are of the opinion that the trial court was in error in granting the prayer of the cross-complaint, and that the judgment from which this appeal was taken must be reversed.

Although there is substantial evidence in support of the findings in regard to the alleged fraudulent representations in connection with the sale of the candy business, and it may be concluded that respondent did not intentionally mislead appellant as to any of the conditions connected with the sale of such business, we are firmly convinced that respondent is not entitled to recover any sum which might be due on account of the sale of the three trucks. It is also the opinion of this court that before respondent may have judgment against appellant for any sum that might be due under the contract of sale of September 16, 1938, that it shall first be determined just what sums of money were due and payable to respondent by E. W. Reynolds and Wallace MacMillan, respectively, on the two accounts in question, which were listed in the inventory.

The language of the contract of sale which was executed on September 16, 1938, indicates quite clearly that a present and complete passing of title to everything included and specified as belonging to the candy business was intended to be effected as of that date. Included in the contract and specified were the three trucks in question. Consequently, the contract of sale having purportedly passed title in these trucks to appellant, without limitation or condition, it was the duty of respondent to immediately properly endorse the certificates of ownership, transferring legal title in the trucks to appellant and deliver the same to him. Respondent's failure in this regard constituted a violation of section 176 of the Vehicle Code, St.1935, p. 115, which provides as follows:

> "It is unlawful for any person to fail or neglect properly to endorse and deliver the certificate of ownership to a transferee who is lawfully entitled to a transfer of registration."

It should be noted that the foregoing section does not require any demand for endorsement and delivery on the part of the transferee. The language used is "fail or neglect."

[1] The respondent having wrongfully failed to comply with the provisions of section 176 of the Code, it is our opinion that the language of section 186 of the Vehicle Code, St.1935, p. 118, should be given its full force and effect, resulting in denying to respondent the right to recover any sums of money which might be due on the purchase price of the trucks. This

latter section of the Vehicle Code provides that:

"No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose until transfer of registration is made and the department has issued a new certificate of ownership and registration card with respect thereto as provided herein * * *."

[2] We are not deciding that non-compliance with section 186 of the code shall in every situation prevent a seller from recovering as against the buyer the purchase price due on the sale of a motor vehicle. Compliance with section 176 of the code on the part of the seller, that is, endorsement and delivery of the certificate of ownership to the transferee, even though the buyer fails to comply with section 186 by obtaining reissuance in his own name might be deemed sufficient compliance on the part of the seller so as to enable him to maintain an action for the purchase price of the vehicle as against the purchaser. The respondent, however, cannot place himself in that more favored position, as he has failed to take any steps toward compliance with the necessary provisions of the Vehicle Code.

The right of respondent to recover any money due on account of the sale to appellant of the three trucks involved in this action is in our opinion determined by the decision in Ludwig v. Steger, 99 Cal. App. 235, 278 P. 494, which was rendered by this court. In that case suit was brought upon a promissory note given in payment for the purchase price of an automobile. The evidence disclosed that the seller had failed to endorse or transfer the certificate of ownership (pink slip) to the purchaser, as was the situation in the present case. The seller testified in the Steger case, supra, 99 Cal.App. at page 236, 278 P. at page 495, that he had the "pink slip" at his home and that although he had forgotten to transfer it to the purchasers, they had said they would stop to get it but had neglected to do so. The seller of the automobile testified as follows:

"It has been an oversight * * * I guess, never thought about the pink certificate I had up there at the house until they brought the case in."

Section 45(e) of the Vehicle Act, St.1925, p. 402, which was in effect at the time of the action in the Steger case, and which section has been superseded by the present section 186 of the Vehicle Code, provided as follows:

"Until said division shall have issued said new certificate of registration and certificate of ownership * * * delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

Section 45½ of the Vehicle Act, St.1927, p. 1424, also in effect at the time of the action in that case, made it a misdemeanor for "Any person who refuses or neglects to deliver a certificate of ownership to a transferee entitled thereto under the provisions of this act * * *."

[3] This court, in applying the then existing provisions of the Vehicle Act in determination of the seller's right to recover the purchase price of the automobile, denied such right in the following language found at page 237 of the opinion in 99 Cal. App., 278 P. at page 495:

"An illegal act cannot become the basis of a valid consideration for a sale or transfer of property, even though the act is merely malum prohibitum. * * *

"Since the certificate of ownership of the automobile, the sale of which furnishes the only basis of consideration for the promissory note involved in the present action, was never signed or transferred by the vendor and the motor vehicle department has consequently never issued a new certificate of ownership, the title to the machine did not pass to the defendants, but still remains in the owner, Scott. Hence, the note was without consideration and void."

The language of section 186 of the Vehicle Code is even stronger against the right of a seller to recover the purchase price of a motor vehicle where there has been a failure of compliance thereunder, than was the language of section 45 (e) of the Vehicle Act, as the language used in section 186 is "No transfer of the title *or any interest* in or to a vehicle * * * shall pass" whereas the pertinent language of section 45(e) was "title thereto shall be deemed not to have passed." More important, however, than a comparison of the language of the present applicable sections of the Vehicle Code with those comparable sections which applied in determining the result in the Steger case, supra, is the fact that in the present case the respondent did not simply forget to endorse and deliver the certificates of ownership but intentionally and by his own admission placed them in a bank to be held in escrow as security for full payment of all money due under the contract of sale. This was a clear violation of section 176 of the Vehicle Code and the provisions of section 186 of this same code apply to prevent him from recovering any moneys on account of the purported sale of the three trucks.

In 37 A.L.R. at page 1466, numerous authorities are cited in support of the rule of law that failure to comply with the pertinent motor vehicle statutory provisions shall preclude an action for the purchase price of the car.

[4] In answer to the contention of respondent that appellant waived his right to an endorsement and delivery to him of the "pink slip" certificates, we believe it sufficient to quote from the language used by this court in the Steger case, wherein a similar defense was there raised. This court stated in that regard, at page 239 of the opinion in 99 Cal.App., 278 P. at page 496, as follows:

> "The respondents did not waive their defense or right to the certificate of ownership signed by the vendor. It was the duty of the owner to deliver this certificate to the purchasers. This was essential to a valid transfer of title."

Again we refer to respondent's action in placing the "pink slip" certificates in escrow as security for payment. This constituted more than a failure to properly endorse and deliver the certificates to the purchaser. It was affirmative action which placed the certificates out of the hands of the appellant, and respondent can hardly contend that appellant waived his right to their proper endorsement and delivery.

[5, 6] Although the inventory of respondent's assets, taken shortly before or at the time of the consummation of the sale of the candy business, lists the trucks at $3,000 value, there is a conflict in the evidence as to whether the $3,000 did not also represent the value of the "truck routes" as well as the actual value of the trucks. Additional evidence should be received by the trial court to determine this question. The burden is upon respondent to prove that the $3,000 figure placed opposite the word "trucks" in the inventory included value other than that represented by the trucks themselves. If the respondent is successful in proof of this matter, the appellant shall then be only entitled to a deduction from the purchase price of the candy business, measured by the market value of the respective three trucks as of the date of the execution of the contract of sale. If the evidence fails to support the contention of respondent in regard to the inclusion of value for the "truck routes," the appellant shall be entitled to a deduction from such purchase price of the candy business to the extent of $3,000, the inventory value of the three trucks. The three trucks are the property of respondent and he is entitled to their possession regardless of the conclusion in regard to the problem stated. The respondent is also entitled to recover as an offset the reasonable value of the use of the three trucks by appellant in the candy business.

[7, 8] In regard to the two accounts receivable, which were listed in the inventory as due and payable by E. W. Reynolds and Wallace MacMillan, respectively, it was the duty of respondent, when apprised of the fact that the amounts were contested by the debtors, to furnish appellant with satisfactory and conclusive proof of the exact amounts due and owing. The credit had been extended by respondent to the two debtors and he was in the best position to prove the amounts due. The respondent agreed with appellant that he would make an adjustment on these accounts for all sums not actually due thereunder. There was considerable discrepancy in the amount listed in the inventory as due and owing by Reynolds and the sum he admitted was due to respondent. Evidence should be received by the trial court for the purpose of determining the exact amounts due under these accounts receivable. If the figures placed in the inventory are incorrect the appellant is entitled to a further deduction from the purchase price of the business to the extent of the discrepancy in the amounts listed in the inventory and the actual sums due and owing by E. W. Reynolds and Wallace MacMillan, respectively.

Appellant makes no claim of error in the entry of judgment for the sum of $209.35, for the sale and delivery to him of certain office equipment. It is presumed that respondent made proof of a valid claim in this regard.

We believe that we have sufficiently answered all material issues raised by this appeal.

The judgment is reversed.

TUTTLE, J., and STEEL, J. pro tem., concurred.

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52 Cal.App.2d 432

JEFFERSON et al. v. TOM et al.

Civ. 12106.

District Court of Appeal, First District, Division 2, California.

June 2, 1942.

1. Estoppel 🔑70(2)

Where a person having a claim sees another doing an act inconsistent therewith, and stands by in such a manner as to induce the person doing the act, and who might otherwise have abstained from it, to believe that claimant assents to its doing, claimant cannot afterward be heard to complain of such act. Code Civ.Proc. § 1962, subd. 3.

2. Estoppel 🔑52

Generally before the doctrine of "equitable estoppel" is applicable, it must appear that the party to be estopped was apprised of the facts, that he intended that his conduct should be acted upon or so acted that the party asserting the estoppel had a right to believe it was so intended, that the party asserting the estoppel was ignorant of the true state of facts, and relied upon the conduct to his injury. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

3. Homestead 🔑145

Where wife had without husband's consent filed declaration of homestead on entire lot owned by husband, the south half of which husband thereafter sold, and made no claim to south half of lot in her administration of husband's estate, and assisted subsequent purchaser of south half of lot in surveying the lot and allowed purchaser to make improvements thereon without asserting any claim, wife was guilty of "laches" and was "estopped" from setting up any claim under the homestead declaration.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches" and "Estop".

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action by J. D. Jefferson and others against Helen D. Tom and others to quiet title to real property. From a judgment for the plaintiff, defendant Osie V. Trask, individually and as administratrix, etc., appeals.

Affirmed.

Erling S. Norby, of Marysville, for appellant.

Manwell & Manwell, of Marysville, for respondents.

STURTEVANT, Justice.

This is an appeal by the defendant from a judgment in favor of the plaintiffs in an action to quiet title. On the first page of her brief the defendant states two questions are involved, (1) the effect of the homestead declaration filed on the lot in dispute by the wife of the owner during his lifetime, said homestead never having been abandoned, and (2) is the wife now estopped to assert any right or interest in the lot in behalf of the estate of her deceased husband.

The plaintiffs' complaint was in the ordinary form. In her answer the defendant denied many of the allegations contained in the plaintiffs' complaint. She then alleged certain affirmative matter. She alleged that a part of the land in dispute and the improvements thereon were community property, that she had not conveyed her interest therein. She also alleged that on November 29, 1913, she filed a declaration of homestead on the land in controversy and adjoining land. The plaintiffs filed a "Reply to Answer." In that pleading they alleged an estoppel. On the issues so framed a trial was had before the trial court sitting without a jury. Later the trial court made findings and conclusions of law that were very full and complete. Among other things it found that the defendant Osie V. Trask had been guilty of laches and also that she was estopped from relying on her alleged homestead. The findings were dated the 22d day of November, 1940, and on the same day the court entered an interlocutory decree in accordance with said findings. That decree ordered judgment in favor of the defendant if within thirty days she paid the plaintiffs $2,500, the amount of their expenditures, otherwise judgment in favor of the plaintiffs should be entered. During the period of thirty days following the date of said findings the defendant made no tender to the plaintiffs of any sum whatever and thereafter, on December 24, 1940, the trial court entered a judgment in favor of the plaintiffs which is the judgment appealed from.

The controversy between the parties arose out of the following facts. In 1902 Charles E. Seaman purchased lot 3 of block 13, range G, as shown on the official map of the city of Marysville. At that time it had on it one building. In 1911 he married the defendant. To them were born three children. During the coverture other buildings were constructed on the property. The record shows that a house of eight rooms stood on the south half at the time the conveyances hereinafter mentioned became involved. The record shows that on the south half there were three cabins of two rooms each. On the north half stood the building which was occupied by Mr. and Mrs. Seaman and family as a residence. The record does not disclose when each building was constructed. On November 29, 1913, Mrs. Seaman, without the consent of her husband, declared a homestead on the property hereinabove described. It was dated the 29th day of November, 1913. Just when the record does not disclose, but Mr. and Mrs. Seaman became estranged. In February, 1936, she filed an action for divorce. That action was tried in May of that year. Speaking of the possession on the latter date Mrs. Seaman testified, "Yes, that was the way it was ordered through the court during the divorce proceedings. He treated the south half as his and collected the rents, and I did likewise with the north half. That continued from the time that the divorce action ended up to the time he died—until he sold it." As we understand the record P. J. Tom and Helen D. Tom, his wife (Chinese people) had been tenants of part of the property on the south half. On the 27th day of October, 1936, Charles E. Seaman deeded the south half to Helen D. Tom. Later, on August 29, 1938, Helen D. Tom and P. J. Tom conveyed the property to J. D. Jefferson and Alice Jefferson (colored people), the plaintiffs in the above-entitled action. The consideration was $1,000. On February 22, 1937, Charles E. Seaman died. Thereafter Osie V. Seaman applied for letters and thereafter letters of administration with the will annexed were duly issued to her. Later she caused an inventory and appraisement to be filed. It listed as one of the properties the north half of said lot but made no mention whatever of the south half. To said inventory was annexed the affidavit of Osie V. Seaman that it contained "* * * a true statement of all the estate of said deceased." On January 18, 1938, she filed a report and petition for distribution of the estate. In said report she again included the north half of said lot. In the verification of the petition she alleged that all the statements therein were true. At the same time she filed an account which listed the north half of said lot, but no interest whatever in the south half. In the verification to said account she alleged that it was a "* * * true and correct account of all property of the estate which has come into my hands as such administratrix with the will annexed; and I do not know of any error or omission in the said account to the prejudice of any person interested in said estate." By a decree entered on January 28, 1938, said account was approved and distribution ordered according to the prayer in the petition. On November 2, 1936, Mr. Norby testified, that as attorney for Mrs. Seaman he wrote P. J. Tom that Mrs. Seaman "* * * claims and I am certain that she can prove a community interest in this property. * * * Mrs. Seaman will not join in or consent to a sale of the south half of this property for the reason that a line drawn through the center of the lot would pass through buildings which are mainly on the north half of the lot." No other objection was made.

The record does not show the date, but some time prior to the commencement of this action Osie V. Seaman married Thomas R. Trask.

After a conveyance was made to the Jeffersons they proceeded to tear down or remove the buildings which were on the land in dispute, to level the lot, and to build a cottage which cost them $2,700 as testified to by J. D. Jefferson. Before he started to tear the buildings down he talked to Mrs. Trask. She said, "When you get ready for your papers I will sign it, I won't stand in your way for a minute." That testimony was corroborated by D. Williams. He had lived on the land in dispute and was present at said conversation. Mrs. Trask never said anything more until Jefferson had a talk with her and Mr. Trask. They told him he should get the corners set "so we can have our property and you yours." Mrs. Trask told the witness to get a surveyor and she would pay her half. Jefferson employed Hugh Stone. They went to the property to make the survey. Mrs. Trask came out and showed them the corners. The survey was made. Stone testified that as Mrs. Trask showed him the corners he made no charge. Later Jefferson tore down the buildings as above mentioned and commenced the construction of the new building. It progressed to a point where the plumbing had been installed, drainage pipe installed, some wall board put in place and some windows had been put in. In the meantime Mrs. Trask tore down the old fence and put up another about two inches on her side of the line.

The transaction between the Toms and Jeffersons was an exchange. The Jeffersons owned a property valued at $2,000. They agreed to convey it to the Toms and take in payment the property in dispute at a value of $1,000 and cash in the sum of $1,000. The transaction was handled through the Yuba Title and Guaranty Company. Mr. Phillips acted for the company. The Toms were present and so was Judge E. P. McDaniel, former judge of Yuba County, acting as attorney for the Toms. The Jeffersons were present but were not represented by counsel. Testifying two years later as to what occurred at that time, Mr. Phillips stated that he had prepared an insurance policy protecting the Toms and delivered it, together with a deed, to the Toms. Continuing he testified that he delivered a deed to the Jeffersons but stated to them that he could not issue to them title insurance. He did not state the reason.

When the building was nearly completed the Jeffersons were compelled to go to a bank for a loan. The bank asked for an inspection of the title insurance. The title company stated it could not issue insurance until the title had been examined. J. D. Jefferson went to Mr. Norby, Mrs. Trask's attorney, and asked that Mrs. Trask execute a deed to him. Mr. Norby stated he would make the request because there had been a division of the property by the owners; that, by the division Mrs. Trask (Mrs. Seaman) became owner of the north half and Mr. Seaman became owner of the south half. Later Mr. Norby informed Jefferson she refused to sign for him and told Jefferson to call on her and see what he could do. He did so and she stated that Mr. Trask objected. He claimed he had expended funds on the south half which should be repaid.

At this time in the proceedings a bill of over $200 was due and payable to the Diamond Match Company for materials furnished. It was threatening to file a lien. Jefferson, through his attorney Mr. Manwell, applied to the title company for insurance, and paid $25 for a report. When that report was received it showed the existence of the homestead. A fair interpretation of the whole story is that the homestead as a factor was never mentioned between the parties until that report was received—some time between May 17, 1939, the date of the application therefor, and June 5, 1939, the date when the action was commenced. The record is loose, disjointed, and full of direct conflicts. At every stage of the proceedings the trial was had with the utmost care on the part of the trial judge. By reason of the conclusions set forth in the findings we assume the trial court saw the controversy as we have delineated it. By its judgment it held that Mrs. Trask was guilty of laches and that she was estopped from setting up any claim under said homestead. Such holding was, we think, supported by the evidence.

[1, 2] In 31 C.J.S., Estoppel, § 98, p. 320, the author says: "Where a person having a claim sees another doing an act inconsistent therewith, and stands by in such a manner as to induce the person doing the act, and who might otherwise have abstained from it, to believe that he assents to its doing, he cannot afterward be heard to complain of it." In this state the rule is statutory. (Code Civ.Proc., § 1962, subd. 3.) In 10 Cal.Jur. 627, "Estoppel," section 14, speaking of the doctrine it is said: "In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury." Then in section 18 it is said: "It has been said that an estoppel in pais must possess an element of fraud, and that the party to be estopped must have intended to deceive, or have acted with such careless and culpable negligence as to amount to fraud." And, finally, in section 20 it is said: "It is an essential element

of an estoppel by conduct that the party asserting it must be ignorant of the true state of facts, and should have relied upon the representation or admission of the adverse party. If he relies upon negligence as the basis of the estoppel he must show that such negligence was the proximate cause of the deceit. He need, however, not be destitute of all possible means of knowledge of the facts, it being sufficient if he is destitute of convenient and ready means to that end." That the doctrine under certain circumstances is applicable to homestead rights has been held in many cases as shown by the text books. 13 R.C.L. p. 662; 29 C.J. 958. The leading case seems to be Grice v. Woodworth, 10 Idaho 459, 80 P. 912, 69 L.R.A. 584, 109 Am.St.Rep. 214; Hainz v. Kurth, 227 Wis. 260, 278 N.W. 413, is also directly in point. In Krueger v. Groth, 190 Wis. 387, 209 N.W. 772, at page 775, the Supreme Court of Wisconsin said: "Although the constitutional and legislative provisions for such exemption have been steadfastly upheld, however far reaching the results may seem in many instances to be found in the decisions, nevertheless the right in the wife to invoke the protection of the statutes concerning the establishment of or alienation of interests in the homestead are not so absolute and unqualified as to be beyond recognized and well-established equitable doctrine." After setting forth the several statutes of the State of Idaho relating to homesteads, in Grice v. Woodworth, 80 P. 912, at page 915, the Supreme Court of Idaho said: "While the provisions of the sections above quoted were made for the protection of married women, they were not intended to operate as a shield to relieve them against a fraudulent transaction, such as the one under consideration, and she is estopped by her own acts from interposing the provision of said sections as a valid defense to this action." See, also, Baillarge v. Clark, 145 Cal. 589, 79 P. 268, 104 Am.St.Rep. 75. In that case, at page 595, of 145 Cal. at page 270 of 79 P., the court quoted from an earlier case as follows: "These things created an equitable estoppel, because it is unconscionable for a party to permit another to so improve property obtained in such a bargain, and then claim the property and improvements, even were he to pay the costs of the improvements."

[3] So in the instant case we think the defendant Osie V. Trask was under the facts estopped. The letter which she caused to be sent to P. J. Tom on November 2, 1936, made no claim to a homestead. Moreover there is nothing to show that its contents were ever communicated to the Jeffersons. On the date last stated Charles E. Seaman was alive and if such claim had been made at that time it could have been refuted or the Jeffersons could have been advised and never entered into the transaction. When the Jeffersons purchased August 29, 1938, the estate of Seaman had been distributed and the defendant's claim, if any, should have been reflected in the decree of distribution. Assuming that the defendant had a color of title, she freely stated to Mr. Jefferson, "When you get ready for your papers I will sign it. I won't stand in your way for a minute." At the time of the divorce proceedings some kind of a division, temporary or otherwise, was made between Mr. and Mrs. Seaman. At the time of the Jefferson survey Mrs. Seaman showed the surveyor the corners. When were those corners established—at the time of the divorce proceedings? When Jefferson entered the premises and commenced to take down the building thereon he was, under the contention of Mrs. Trask, a trespasser. However, no objection whatever was made. Under the contention of Mrs. Trask he was building on her property, nevertheless she stood by and made no objection. Conceding that Mrs. Trask had filed a declaration of homestead manifestly she knew such to be the fact at all times. Mr. Jefferson throughout contended that he never knew of such a fact until May 17, 1939. However, as a reasonable man he had attempted to transact business through a reputable title company and was guilty of no negligence.

We find no error in the record. The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

52 Cal.App.2d 467

LAHER SPRING & TIRE CORPORATION et al. v. SUPERIOR COURT OF ALAMEDA COUNTY et al.

Civ. 12192.

District Court of Appeal, First District, Division 2, California.

June 4, 1942.

1. Mandamus ⚿187(6)

In mandamus proceeding to enforce stockholders' rights to inspect corporate record, appeal from order does not stay the proceeding.

2. Mandamus ⚿187(6)

In mandamus proceeding to enforce stockholders' right to inspect corporate records, party seeking writ of supersedeas on appeal from order must show that substantial questions will be presented on the appeal and that some special reason exists why inspection of records should be stayed pending appeal. Code Civ.Proc. § 949.

3. Corporations ⚿181(1)

If a shareholder believes that officers of corporation have illegally failed to pay accrued dividends and shareholder desires to associate with other shareholders in like condition to enforce their respective rights, an inspection of share register to ascertain names of other shareholders is "reasonably related to interest of shareholder" and shareholder is entitled to inspect corporate record for such purpose.

See Words and Phrases, Permanent Edition, for all other definitions of "Personally Related to Interest of Shareholder".

4. Mandamus ⚿187(6)

On appeal from order granting writ of mandate to enforce shareholder's right to inspect corporate record, showing that substantial questions would be presented on appeal was insufficient to authorize granting of writ of supersedeas. Code Civ.Proc. § 949.

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Proceeding by Laher Spring & Tire Corporation and others against the Superior Court of Alameda County and others for a writ of supersedeas.

Application for writ of supersedeas denied.

Melville C. McDonough, of Oakland, for petitioners.

Andrew J. Eyman, of San Francisco, for respondents.

NOURSE, Presiding Justice.

The petitioners seek a writ of supersedeas to suspend proceedings in the respondent court upon a writ of mandamus instituted to require these petitioners to permit the inspection of the books of the corporation. In the proceedings in the superior court the application for the order was made by a shareholder for leave to inspect the share register and duplicate share register. The corporation and its officers defended upon the ground that it did not appear that the inspection sought was reasonably related to the interest of the shareholder because it appeared that he desired to ascertain the identity of other shareholders and to confer with them relative to the institution of legal proceedings to compel payment of dividends. On this application the contentions are that this interest does not affirmatively appear and that the order appealed from in the nature of a writ of mandamus was not preceded by findings of fact covering that issue.

[1-4] Since the appeal from an order of this kind does not stay proceedings a writ of supersedeas is sought under section 949 of the Code of Civil Procedure, but in order to succeed it is incumbent upon the petitioner to show that substantial questions will be presented upon the appeal and that some special reason exists why the inspection of the records should be stayed pending the appeal. Private Investors v. Homestake Min. Co., 11 Cal.App.2d 488, 492, 54 P.2d 535. This the petitioners have failed to do. If the shareholder believes that the officers of the corporation have illegally failed to pay accrued dividends to the shareholders and he desires to associate with other shareholders in like condition in order to enforce their respective rights as shareholders it is too clear for controversy that an inspection of the share register to ascertain the names of such other shareholders is "reasonably related to his interest as a shareholder." We may assume that the trial court so concluded when it ordered that the writ of mandate should issue. If it did so it was a conclusion of law based upon facts which were admitted and not disputed. Hence, if findings of fact were necessary to support the order appealed from, the petitioners herein have failed to point out what controverted facts

were to be covered by findings. If these are the only grounds which the appellants propose to raise on their appeal from the order it is manifest that they are not sufficient to entitle them to the extraordinary remedy of supersedeas.

The application is denied and the preliminary writ is discharged.

STURTEVANT and SPENCE, JJ., concurred.

STROMERSON et ux. v. AVERILL.*

Civ. 6683.

District Court of Appeal, Third District, California.

June 1, 1942.

Hearing Granted July 30, 1942.

1. Pleading 🔑129(2)

In action to quiet title, wherein answer denied that plaintiffs were the "equitable owners, or owners at all, of said real property or any portion thereof", there was no "admission", by failure to deny, of allegation of complaint that realty involved in action was community property of plaintiffs.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

2. Frauds, statute of 🔑116(5)

The term "party sought to be charged", within statute providing that agreement for leasing for longer than one year or for sale of realty, if made by agent of party sought to be charged, is invalid unless agent's authority is in writing subscribed by party sought to be charged, is person charged in court with performance of the obligation. Civ.Code, § 1624, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Sought to be Charged".

3. Principal and agent 🔑75

Whenever agent improperly authorized in the first place performs acts in execution of agency which are ratified by principal, principal is entitled to enforce his demands against the agent for anything which agent has received on his account.

4. Frauds, statute of 🔑116(10)

Where agent, who was authorized to purchase land for principal but whose authority was not in writing, entered into written contract for purchase of land in his own name, and principal ratified contract, quieting of principal's title was not barred by statute of frauds. Civ.Code, § 1624, subd. 4; §§ 2309, 2310.

5. Evidence 🔑418

Proof dehors a written contract that one of named parties thereto signed it as agent of the real party in interest is not a violation of the "parol evidence rule", prohibiting the use of parol evidence to vary the terms of the written contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

6. Quieting title 🔑51

Where agent authorized to purchase land for principal entered into contract for purchase of land in his own name, and evidence authorized finding that agent used principal's money to make payments on contract and to farm land, but agent was contingently liable for balance of payments, decree quieting title in principal should do equity by requiring principal to relieve agent from liability under contract.

7. Quieting title 🔑51

Where land owned by agent and other lands which he bought in his own name with principal's money had been operated by agent as a unit with money secured by crop mortgages on all lands, a decree, quieting title in principal to land so purchased, should be modified to provide for an accounting to determine unpaid balance of crop mortgages and what portions of moneys so obtained were used on lands of agent and of principal, and, when so determined, agent should be relieved from all liability remaining on crop mortgages except for moneys used on his land.

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Appeal from Superior Court, Madera County; Ernest Klette, Judge Assigned.

Action to quiet title by H. C. Stromerson and wife against Roger Averill. From a judgment for defendant, plaintiffs appeal.

Modified and affirmed.

For prior opinion, see 121 P.2d 826.

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* Subsequent opinion 133 P.2d 617.

Conley, Conley & Conley, W. M. Conley, Philip Conley, and Matthew Conley, all of Fresno, for appellants.

Barcroft & Barcroft, of Madera, and David E. Peckinpah and L. N. Barber, both of Fresno, for respondent.

CURLER, Justice pro tem.

On rehearing the original opinion, as modified, is adopted as follows:

This is an action to quiet title brought by H. C. Stromerson and Leone Stromerson, his wife, against Roger Averill. In his amended answer Roger Averill asked that his title be quieted against H. C. Stromerson and wife.

Prior to the transactions involved in this case, H. C. Stromerson had been acquainted with Averill for many years, and had worked under him on several public construction jobs. While Stromerson and wife were living in Los Angeles, California, Averill sought to interest them in going to Madera County, California, for the purpose of farming certain land there. On the 1st day of November, 1933, the Stromersons entered into a contract with Miller & Lux, Inc., a corporation, for the purchase from said corporation of 160 acres of land in Madera County. On the 6th of November, 1933, the Stromersons moved to Madera County. Subsequently the Stromersons received a loan from the Federal Land Bank with which they paid up the balance due on the 160 acres of land and received a deed from Miller & Lux, Inc., to the land. On the 6th day of March, 1936, H. C. Stromerson entered into a contract with Miller & Lux, Inc., a corporation, wherein he agreed to buy from said corporation a tract of land adjoining the 160 acres already purchased. This latter tract of land contained 562.55 acres, and was located in section 19, township 11 south, range 16 east, Madera County, California. (Title to the 160 acres piece of land is not involved in this suit.) At the time the Stromersons moved to Madera County, Averill already had associated with him in his land enterprises, a man by the name of P. A. Davis, and a man by the name of J. F. Lincoln. There were some 475 acres of land in section 10 in said county standing in the name of P. A. Davis, and 650 acres in section 23, standing in the name of Roger Averill. Upon the Davis land there was a loan of approximately $36,500 from the Federal Land Bank, and upon the land standing in the name of Roger Averill he had borrowed approximately $36,000 from the Federal Land Bank. All of the land, including that standing in the name of Roger Averill, that standing in the name of P. A. Davis, and the land involved in this suit, was jointly farmed. The money for the payment of the land, and for the farming of the same, came from personal advances by Roger Averill, and from money advanced by the San Joaquin Cotton Oil Company, for crops raised, and to be raised on the land, and also from sales of crops to parties other than the Cotton Seed Oil Company.

There is a great deal of evidence bearing upon the transactions and relationships existing between H. C. Stromerson, Roger Averill, P. A. Davis and J. F. Lincoln.

In their pleadings, and throughout the trial, H. C. Stromerson and Leone Stromerson, his wife, maintained that the contract entered into by Miller & Lux, Inc., a corporation, as seller, and H. C. Stromerson, as purchaser, was for the sole benefit of the Stromersons. On the other hand, Roger Averill maintained that in the entire transaction H. C. Stromerson was acting as his agent.

The trial court found that the contract of purchase pertaining to the 562.55 acres by H. C. Stromerson, on the one part, and Miller & Lux, Inc., a corporation, on the other part, was in truth and in fact the contract of Roger Averill, and that he executed said contract by and through H. C. Stromerson, who was acting as his agent, and that Roger Averill had been in possession of the land ever since the date of the execution of the contract, and that H. C. Stromerson and Leone Stromerson, his wife, had neither in law nor in equity, any right, title or interest in or to the land, and that Roger Averill is in equity the owner of the same, and is entitled to receive a conveyance of said land from Miller & Lux, Inc., a corporation, upon full performance of the terms and conditions of said contract on the part of the purchaser. The trial court then gave judgment quieting the title of Roger Averill, and adjudging that H. C. Stromerson and Leone Stromerson, his wife, have no right, title or interest in the premises. From this judgment H. C. Stromerson and Leone Stromerson, his wife, appeal.

[1] One of the main contentions of the appellants is that their complaint contains the allegation "that the property in-

volved in this suit is the community property of H. C. Stromerson and Leone Stromerson, his wife," and that inasmuch as this allegation is undenied in the amended answer of Roger Averill, this fact is deemed as admitted and must be considered as found by the court. In the amended answer there is the following denial: "Denies that by reason of said contract of purchase and sale, or otherwise, the plaintiffs, or either of them, became, or ever since have been, or now are, or ever were, the equitable owners, or owners at all, of said real property, or any portion thereof, or the equitable owners, or any owners, of said contract." This appears to be a full denial of any ownership of plaintiffs, or either of them, in the contract or the property mentioned therein. The balance of appellants' contentions, with the exception that the court erred in ruling on admissibility of evidence and that the judgment fails to do equity, falls into one class, namely, that agency was not proven, and that if it was proven the evidence admitted violated the parol evidence rule or the statute of frauds. The following sections of the statute of frauds seem to be applicable in this case:

Section 1624, Civil Code—

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * *

"4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged."

Section 2309, Civil Code—"An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."

Section 2310, Civil Code—"A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

[2-4] Applying, first, section 1624 of the Civil Code, we find that the term "party sought to be charged" is defined in the case of Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451, 28 L.R.A.,N.S., 689, 134 Am.St.Rep. 124, as meaning the person charged in court with the performance of the obligation. If Miller & Lux, Inc., were being sued for performance of the contract, the section would not avail it, because it signed the contract, and if Stromerson was being sued by Miller & Lux, Inc., the same reasoning would apply to him. If Miller & Lux, Inc., were suing Averill, he could avail himself of this section, and also section 2309 of the Civil Code, unless it were held that he had ratified the contract. However, Averill, by appearing in the suit and setting up the claim that he was the real purchaser under the contract, and that he was the equitable owner of the land mentioned in the contract, in effect ratified the action of the agent in entering into the contract. This, however, is a suit between the principal and the agent. It has been repeatedly held that whenever an agent, improperly authorized in the first place, performs acts in the execution of the agency which are ratified by the principal, the principal is entitled to enforce his demands against the agent for anything which the agent has received on his account. McBride v. McCartney, 53 Cal.App. 707, 200 P. 756; Troendle v. Clinch, 125 Cal.App. 147, 13 P.2d 852. These cases were decided at a time when the provisions of sections 1624, 2309 and 2310 of the Civil Code read the same as they now do, and were cases in which the agent was attempting to hide behind the terms of the statute of frauds.

[5] Proof dehors a written contract that one of the named parties thereto signed it as the agent of the real party in interest is not a violation of the rule prohibiting the use of parol evidence to vary the terms of a written contract. Otten v. Spreckels, 24 Cal.App. 251, 141 P. 224; Hay v. McDonald, 21 Cal.App. 204, 131 P. 74.

[6] It is contended that the decree is fatally defective in its failure to require the defendant to do equity. So far as such a contention applies to payments on the contract, and to the cost of farming the land mentioned therein, we feel that it is unsound. The trial court decided that Stromerson was the agent and employee of Averill, and that he was paid a salary for his efforts. Although the evidence is conflicting as to where the money came from for the operation of the farm and

the payments under the conditional sales contract, there was adequate proof to justify the court in believing that it was Averill's money, and although there is no specific finding on this point, it would of necessity follow from the court's decision. However, it is true that the Stromersons are contingently liable for the balance of the payments under the contract with Miller & Lux, Inc., and it would be entirely inequitable in this action to turn the fruits of the contract and the security of the equitable interest in the land over to Averill without requiring him to protect the Stromersons against future liability under the contract.

[7] A rehearing was granted on appellant's contention that the court failed to do complete equity in its former opinion, because while he was in possession of the land heretofore determined to belong to Averill, he gave crop mortgages in the sum of $53,464.57, mortgaging the crops on his lands and also the crops on the lands belonging to respondent, during the years 1937 and 1938, and all subsequent and succeeding years as long as the indebtedness secured by the mortgage should remain unpaid, in favor of the San Joaquin Cotton Oil Company. The moneys from this mortgage were used both on the land of appellant and on the land of respondent, and at the present time the indebtedness is still partly unliquidated. It is appellants' contention that he is entitled to be protected on the outstanding liability, insofar as it has already been, or may hereafter be devoted to the production of crops on the land owned by respondent. With this contention we are inclined to agree; and it is therefore ordered that the original opinion be modified by providing that an accounting be had before the trial court for the purpose of determining what portion of the crop mortgages heretofore mentioned still remain unpaid, and what portions of the money secured from the crop mortgages were used on the lands of the appellants, and what portion on the lands of respondent; and that when this has been determined, the judgment of the trial court be modified to relieve appellants from all liability remaining on the crop mortgage, except for moneys used on appellants' land.

Appellants claim that numerous errors were committed by the trial court in rulings on admissibility of evidence. We find no errors in the rulings in the rejection or admission of evidence which would justify a reversal of the judgment.

The judgment of the trial court shall be modified to require respondent to relieve appellants from their liability under the contract within a reasonable time to be fixed by the court.

When all of the above has been done, the trial court shall adjudge that respondent's title in and to the contract and equitable ownership of the land thereunder be adjudged quieted.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

52 Cal.App.2d 447

HAMILTON v. CARPENTER et al.

Civ. 13474.

District Court of Appeal, Second District, Division 2, California.

June 2, 1942.

Rehearing Denied June 25, 1942.

1. Judicial sales 🔑11, 37

A failure to give proper notice of a judicial sale of real estate does not invalidate the sale nor constitute sufficient reason for setting such sale aside. Code Civ.Proc. § 692a.

2. Mortgages 🔑510(1)

If proper notice was not given to defendants of sale of real property pursuant to decree foreclosing a deed of trust, defendants' exclusive remedy was under statute providing penalty for selling without notice. Code Civ.Proc. §§ 692a, 693, 725a.

3. Mortgages 🔑512

Where two parcels of land covered by trust deed were offered for sale separately in foreclosure proceedings and no bid was made for either parcel, sale of the property en masse was valid.

4. Mortgages 🔑514

Where defendants had sought in every legal way to defeat proceeding for foreclosure of trust deed, creditor's attorney properly requested court commissioner to exercise the utmost caution in making judicial

sale and charge that attorney and commissioner acted in bad faith were without foundation.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Archibald J. Hamilton against Margaret B. Carpenter and others. From an order denying defendants' motion to set aside a sale of real property pursuant to decree foreclosing a deed of trust, defendants appeal.

Affirmed.

See, also, Cal.App. 126 P.2d 397.

Roy A. Linn, of Los Angeles, for appellants.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for respondent.

McCOMB, Justice.

From an order denying defendants' motion to set aside a sale of real property pursuant to a decree foreclosing a deed of trust, defendants appeal.

The essential facts are:

Defendants executed a deed of trust to secure a promissory note payable to plaintiff. This deed of trust was foreclosed as a mortgage pursuant to the requirements of section 725a of the Code of Civil Procedure. (See Hamilton v. Carpenter, 15 Cal.2d 130, 98 P.2d 1027.) Thereafter on December 3, 1940, the property described in the deed of trust consisting of two separate parcels of real estate was sold en masse to plaintiff after the commissioner appointed by the court had called for bids separately on each of the parcels and received none.

Defendants rely for reversal of the order on two propositions which will be stated and answered hereunder *seriatim.*

First: The sale was invalid because no notice of sale was (a) posted upon the property sold, (b) given either defendant pursuant to the terms of section 692a of the Code of Civil Procedure, or (c) given either defendant in accordance with the provisions of the deed of trust.

[1, 2] This proposition is untenable for the reason that the law is established in this state that a failure to give proper notice of a judicial sale of real estate does not invalidate the sale or constitute sufficient reason for setting such sale aside. If proper notice is not given, defendants' exclusive remedy is that provided in section 693 of the Code of Civil Procedure, which section is practically identical with section 222 of the California Practice Act, and which was the basis of the decision of our Supreme Court in Smith v. Randall, 6 Cal. 47, 50, 65 Am.Dec. 475. (See, also, in support of the foregoing rule Shores v. Scott River Water Co., 17 Cal. 626, 628; Frink v. Roe, 70 Cal. 296, 302, 11 P. 820; Batini v. Ivancich, 105 Cal.App. 391, 393, 287 P. 523.)

[3] *Second: The sale was invalid for the reason that the two separate parcels of land described in the trust deed were sold en masse.*

The foregoing proposition is likewise untenable and is governed by the rule that whenever two or more parcels of land are offered for sale separately in a foreclosure proceedings and no bid is made for either parcel then the property may be offered and sold en masse. (Connick v. Hill, 127 Cal. 162, 164, 59 P. 832.)

Browne v. Ferrea, 51 Cal. 552, cited by defendants is not in point because in that case the parcels were not offered for sale separately before they were sold en masse.

[4] Defendants' charges that plaintiff's counsel and the commissioner appointed by the court to conduct the foreclosure sale acted in bad faith are wholly without foundation. Plaintiff's counsel in asking the commissioner to use the utmost care in conducting the foreclosure sale was only taking proper steps to protect his client's interest, in view of the fact that defendants had at each stage of the proceedings sought in every legal way to defeat the foreclosure proceedings. For example, after the Supreme Court in Hamilton v. Carpenter, supra, had affirmed the foreclosure proceedings, defendants petitioned the United States Supreme Court for a writ of certiorari, which was denied. (Carpenter v. Hamilton, 311 U.S. 656, 61 S.Ct. 10, 85 L.Ed. 420.) Subsequent thereto defendants applied to the Supreme Court of California for a writ of review of its previous decision, which petition was denied on November 25, 1940. Thereafter defendants filed a petition for a writ of certiorari in the Supreme Court of the United States to review this last order, which was also denied. (Carpenter v. Superior Court, 312 U.S. 705, 61 S.Ct. 825, 85 L.Ed. 1138.) It is therefore apparent that plaintiff's at-

torney properly requested the court commissioner to exercise the utmost caution in making the judicial sale which is the subject of the present proceeding.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

52 Cal.App.2d 449

HAMILTON v. CARPENTER et al.

Civ. 13474.

District Court of Appeal, Second District, Division 2, California.

June 2, 1942.

Rehearing Denied June 25, 1942.

Hearing Denied July 30, 1942.

1. Appeal and error ⚷82(5)

A ruling upon admissibility of evidence which is to be used in determining motion to set aside sale of realty pursuant to decree of foreclosure of trust deed is not an "appealable order" under statute permitting appeal from "special orders made after final judgment". Code Civ.Proc. § 963, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order" and "Special Order Made After Final Judgment".

2. Appeal and error ⚷82(1)

A ruling either admitting or rejecting evidence to be used in connection with a special proceeding after a final judgment is not a "special order made after final judgment" within statute permitting appeal from such an order. Code Civ.Proc. § 963, subd. 2.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit to foreclose a trust deed by Archibald J. Hamilton against Margaret B. Carpenter and others. From an order denying a motion to strike an affidavit filed by plaintiff in opposition to defendants' motion to set aside a sale, defendants appeal.

Appeal dismissed.

See, also, Cal.App., 126 P.2d 395.

Roy A. Linn, of Los Angeles, for appellants.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for respondent.

McCOMB, Justice.

Defendants attempt to appeal from an order denying a motion to strike an affidavit filed by plaintiff in opposition to defendants' motion to set aside a sale of real property pursuant to a decree foreclosing a deed of trust.

[1, 2] This is the sole question for our determination:

Is a ruling upon the admissibility of evidence which is to be used in determining a motion to set aside a sale of real property pursuant to a decree of foreclosure of a deed of trust an appealable order under the terms of section 963 subdivision 2, of the Code of Civil Procedure?

This question must be answered in the negative. The law is established in California that a ruling either admitting or rejecting evidence to be used in connection with a special proceeding after a final judgment is not a "special order made after final judgment" within the meaning of section 963, subdivision 2, of the Code of Civil Procedure. (Watson v. Pryor, 49 Cal.App. 554, 557, 193 P. 797.)

Therefore, since in the present case the order from which defendants attempt to appeal was merely a ruling upon the admissibility of evidence, such ruling was a nonappealable order and the purported appeal should be and it is hereby dismissed.

MOORE, P. J., and W. J. WOOD, J., concurred.

52 Cal.App.2d 398

AVERILL v. LINCOLN et al.

Civ. 6521.

District Court of Appeal, Third District, California.

June 1, 1942.

1. Appeal and error 🔑653(1)

The appellate courts will grant an application to correct the record, where possible, so that the case may be determined on the merits.

2. Appeal and error 🔑653(1)

Where certificates of trial judge and clerk to transcript on appeal were defective, motion for an extension of the record so that proper certificates by both trial judge and clerk, which had been transmitted to appellate court for inclusion in record, could be attached to the record, would be granted.

3. Venue 🔑66

A defendant's affidavit of merits, filed in connection with change of venue motion, and answered by counsel, stating that defendant had "fully and fairly" stated the facts of case to her attorney, was sufficient, as against contention that affidavit should have contained language that defendant had stated "all" of the facts to her attorney, and that attorney's advice was after statement of facts to him.

4. Venue 🔑66

A defendant's affidavit of merits, filed in connection with change of venue motion, stating that defendant was an attorney and was familiar with transactions upon which action was brought and intended to represent himself in defense of action and that he had a good, full, meritorious defense to alleged cause of action on the merits, sufficiently stated that the defense was on the merits.

5. Venue 🔑46

An action against defendants residing in Los Angeles county, to remove one defendant as trustee and officer of Massachusetts trusts and to divest such defendant of her ownership of beneficial shares in the trusts, and for cancellation of note and chattel mortgage executed to remaining defendant, and for damages and costs of suit, was "transitory" and not "local", and venue would be changed from Madera county where land which was subject of trust was located, to Los Angeles county, since primary object of suit was dissolution of copartnership.

See Words and Phrases, Permanent Edition, for all other definitions of "Local Action" and "Transitory Action".

6. Joint-stock companies and business trusts 🔑1

A "Massachusetts trust" is a copartnership with the partnership property vested in the trustee.

See Words and Phrases, Permanent Edition, for all other definitions of "Massachusetts Trust".

7. Joint-stock companies and business trusts 🔑19

The superior court of Madera county, by appointing trustees holding title to partnership property which was subject matter of trust, did not thereby assume jurisdiction over subject matter of action for dissolution of the copartnership, so as to be entitled to retain such jurisdiction as against a motion for change of venue to another county.

◆

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by Roger Averill against Walter Gould Lincoln and others. From an order denying the defendants' motion for a change of venue, the defendants appeal.

Order reversed with directions.

Walter Gould Lincoln, of Los Angeles, in pro. per., and for appellants.

David P. Barcroft, of Madera, and David E. Peckinpah and L. N. Barber, both of Fresno, and Neice & Crane, of Los Angeles, for respondent.

PER CURIAM.

This is an appeal from a decision of the Superior Court of the State of California, in and for the County of Madera, denying defendants' motion for a change of venue from that county to the county of Los Angeles, California.

[1, 2] At the oral argument of this appeal it developed that the certificates of the trial judge and clerk to the transcript on appeal were defective. Motion has been made for an extension of the record so that proper certificates could be attached to the record, and proper certificates by both the trial judge and the clerk have been transmitted to this court for inclusion in the

record. Where an application to correct the record is made, it is the attitude of appellate courts that the same should be granted, where possible, so that the case may be determined on the merits. On the authority of the case of Frankish v. Federal Mortgage Co., 28 Cal.App.2d 499, 82 P. 2d 962, the motion for extension of the record is granted.

Plaintiff's complaint filed in the Madera County action alleges that plaintiff owned and controlled a large amount of farm and ranch properties in Madera County, from the operation of which he derived substantial profits; that he also owned a large quantity of farming tools and equipment used for the farming of the lands; that upon the advice of his attorney Walter Gould Lincoln, who was his sole legal adviser and confidential agent, the lands and personal property used in farming the same were formed into four Massachusetts trusts; that the three trusts which held the real estate were known as "Davis Ranch Company," "Lincoln Ranch Company," and "Averill Ranch Company," respectively, and that the trust which held the personal property and tools was known as "Roger Averill and Associates"; that the beneficial interest in each trust was divided into one hundred units, ten of the units in each trust being owned by Jesse F. Lincoln, ten by Paris A. Davis, and eighty by plaintiff Roger Averill; that Roger Averill, desiring to secure Walter Gould Lincoln for any attorney fee that might be coming to him for services, offered to issue Walter Gould Lincoln an authorization for ten units of each trust, said authorization not to be used until the death of Averill, and only then in case Lincoln had any money coming to him for legal services; that upon the insistence of Walter Gould Lincoln, the authorization was issued in the name of M. W. Beale, Lincoln's attorney, in whose name, he stated, all of his personal property was held; that contrary to instructions, Walter Gould Lincoln and M. W. Beale had ten units in each trust issued in the name of M. W. Beale; that M. W. Beale is a trustee, and secretary and treasurer of each of the said trusts, and also owns ten beneficial shares in each of the same; that each of the trusts is qualified under the laws of the State of California, to do business in this state; and that declarations of all of the trusts were recorded in Madera County; that in the month of December, 1938, Walter Gould Lincoln filed petitions in the Superior Court of Madera County for orders confirming and appointing the then trustees of the three trusts which held the real estate, and that orders were received from said court confirming the trustees of said trusts; that advice given by Walter Gould Lincoln as to the advantages of putting the properties into trusts was knowingly false, and was given with the intent of complicating the affairs of Roger Averill, and with the object and intent of securing for defendants Walter Gould Lincoln and M. W. Beale the direct or indirect ownership of a substantial part of the real and personal property and ranching business, and the right and power to dictate to plaintiff the management of the properties; that in this scheme, defendants wrongfully and maliciously connived, planned, conspired and confederated together; that plaintiff now finds that as a result of placing his properties in said four Massachusetts trusts, he no longer has any control over the management of his property, the same being vested in the trustees of each trust, and further finds that M. W. Beale, as such trustee, refuses to cooperate in signing papers necessary to borrow capital required to carry on the ranching activities on the various properties; and that as a result of the conspiracy entered into by the defendants, and their acts, he has been damaged in the sum of $15,000 for loss of crops, and has been otherwise damaged in the sum of $75,000. The complaint further states that upon the advice of defendant Walter Gould Lincoln, and without any consideration, he executed to the said defendant a promissory note and chattel mortgage in the sum of $9,000, the mortgage being given on a quantity of hay owned by plaintiff; that the hay has been released from the mortgage, but that the note and mortgage is still outstanding, and defendant has commenced a suit in Los Angeles County, which was later transferred to Madera County, for the collection of the same, and that said suit is now pending.

In the prayer of the complaint, plaintiff asks that defendant M. W. Beale be removed as trustee, and secretary and treasurer of each of the said four trusts, and that the ten units and shares of beneficial interest in each of said trusts, standing in her name be canceled and declared the property of plaintiff; and that it be adjudged that neither of defendants has any right, title, or interest in or to said trusts or any of the assets thereof, or of the beneficial interests therein. Plaintiff further asks that the promissory note and chattel mortgage in the sum of $9,000, executed to defendant Walter Gould Lincoln without consideration, be canceled and surrendered to plaintiff. Plaintiff further seeks damages in the sum of $9,000, and costs of suit.

Defendants made a motion for a change of venue, asking that the place of trial be transferred from Madera County to the County of Los Angeles, upon the ground that they were both residents of that county. This motion for change of venue was denied, and defendants have appealed from the order. Respondent contends that the affidavits of merit filed by each of the defendants in connection with their motion for a change of venue was defective.

[3] The affidavit of merits of defendant M. W. Beale, is clearly sufficient. The objection that the affidavit fails to set out that she has stated "all of the facts to her attorney," is without merit, in that the affidavit contains language that "she has fully and fairly stated the facts of the case to her attorney." It would be impossible to "fully and fairly" state the facts without stating all of the facts. The objection that there is no allegation that the advice given by the attorney was after the statement of facts to him, is hyper-technical. The affidavit of merits was filed after the advice of counsel, and it is not to be presumed that he advised before a statement of the facts had been given to him.

[4] The objection to the affidavit of merits of defendant Lincoln is also without merit. The affidavit contains language that he is an attorney at law, and is familiar with the transactions upon which this action is brought, and intends to represent himself in the defense of the action; that he has a good, full, meritorious defense to the alleged cause of action upon the merits. Although the affidavit contains other language which might be questionable, the language above mentioned is clearly sufficient. The object of the affidavit is that the defense is on the merits and not a technical one. Carter v. Broder, 50 Cal.App. 63, 69, 194 P. 527.

[5, 6] Respondent's next contention is that this is a local action. The prayer of the complaint reveals that the objects of the suit are many, i. e., to divest appellant M. W. Beale of her ownership of ten beneficial shares in each of the four trusts; to remove her as a trustee and officer of each of the trusts; to have a promissory note and chattel mortgage, executed to appellant Walter Gould Lincoln, canceled; for damages and costs of suit. In the case of Walter Gould Lincoln et al., Petitioners, v. Superior Court of Madera County et al., respondents, reported in 51 Cal.App.2d 61, 124 P.2d 179, it is held that the Massachusetts trusts involved in this case, are a copartnership with the partnership property vested in trustees. From the above, it must appear that the primary object of this suit is the dissolution of a copartnership. As an incident of the dissolution, the property which was held for its benefit will be vested by the court in the persons entitled thereto, and the trustees of the trusts will be discharged. If this is correct, the suit now under consideration is a transitory one and not local. The prayer for damages is incidental to the main object of the suit. However, that part of the suit which seeks the cancelation of the note and chattel mortgage, is directed solely against appellant Walter Gould Lincoln. Standing by itself, a suit for such a purpose would be of a transitory nature, and if incorporated in the common design of appellants to deprive respondent of his property, it would still partake of a transitory character, because the real object of the entire suit is to dissolve the partnership which was entered into due to the fraud of appellants, and to free respondent of all of the consequences of that partnership.

[7] Respondent next contends that because the Superior Court of Madera County appointed the trustees who held the title to the partnership property, that it, by such action, assumed jurisdiction over the subject matter of this action and is entitled to retain such jurisdiction. With this we cannot agree. Trustees who hold title to partnership property, hold such title as an incident of the partnership, and an accounting between the partners and a dissolution of the partnership would also terminate the trust.

The order of the trial court denying the motion for a change of venue is reversed, with directions to the court to transfer the cause to Los Angeles County for trial.

52 Cal.App.2d 460

RYAN et al. v. SAN DIEGO ELECTRIC RY. CO.

Civ. 2806.

District Court of Appeal, Fourth District, California.

June 3, 1942.

Hearing Denied July 30, 1942.

1. Trial 🔑395(1)

A finding that deceased pedestrian in crossing street had not failed to use ordinary care for his own safety and that he had used ordinary care, and that sole cause of collision with street car was defendant's negligent conduct, sufficiently covered defendant's alleged affirmative defense of contributory negligence.

2. Trial 🔑395(5)

In action for death of pedestrian killed by street car while crossing roadway, trial court was not required to find upon the evidentiary matters whether pedestrian was crossing the street in a place other than in the crosswalk in violation of ordinance, where such ordinance was unconstitutional, or whether the street car was traveling at a particular speed.

3. Municipal corporations 🔑703(1)

An ordinance making it unlawful for pedestrian to cross roadway at place other than crosswalk was unconstitutional as in conflict with Vehicle Code providing merely that a pedestrian must yield the right of way if he crosses roadway outside of crosswalk. Vehicle Code, § 450 et seq., and §§ 458, 562, St.1935, p. 163 et seq., and pp. 164, 188.

4. Appeal and error 🔑1008(1)

In action for death of pedestrian killed by street car while crossing roadway, whether deceased was contributorily negligent was a question of fact for trial judge.

5. Street railroads 🔑112(3)

In action for death of pedestrian struck by street car while crossing roadway, presumption was that pedestrian was in the exercise of due care.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Alma Ryan and another against San Diego Electric Railway Company for death of pedestrian killed while crossing defendant's track. From a judgment for plaintiffs, the defendant appeals.

Judgment affirmed.

Morrison, Hohfeld, Foerster, Shuman & Clark and Forrest A. Cobb, all of San Francisco, and V. F. Bennett, of San Diego, for appellant.

H. Albert George, City Atty., of Oakland, Fred C. Hutchinson, City Atty., of Berkeley, Richard C. Waltz, City Atty., of Beverley Hills, M. Tellefson, City Atty., of Culver City, C. M. Ozias, City Atty., of Fresno, Aubrey N. Irwin, City Atty., of Glendale, Ray H. Overacker, City Atty., of Huntington Beach, Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, Robert B. Fowler, City Atty., of Modesto, F. B. Fernhoff, City Atty., of Oakland, Harold P. Huls, City Atty., of Pasadena, Miguel Estudillo, City Atty., of Riverside, Hugh B. Bradford, City Atty., of Sacramento, Jacob Weinberger, City Atty., of San Diego, J. H. McKinney and Morey S. Levenson, Deputy City Attys., both of San Diego, John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, Archer Bowden, City Atty., of San Jose, and Henry G. Baron, City Atty., of Taft, as Amici Curiae in behalf of appellant.

Hervey & Holt, of San Diego, and Henry F. Walker, of Los Angeles, for respondents.

GRIFFIN, Justice.

This is an action for damages by respondent Minnie May Ryan, the mother, and respondent Alma Ryan, the surviving widow of Edward Neal Ryan, tried without a jury, for the wrongful death of their son and husband respectively who, on February 13, 1939, was struck by appellant's street car while walking across a street.

No point is raised on this appeal concerning the claimed negligent conduct of appellant nor the amount of damages awarded. Appellant company, by its answer, denied the alleged negligence, and as separate affirmative defenses alleged contributory negligence and contended mainly under this subhead, that the deceased was guilty of contributory negligence as a matter of law in that he attempted to cross the street at other than a crosswalk in violation of a city ordinance which was pleaded and which, if valid and effective, made it a violation of law for a pedestrian to cross a roadway other than at a crosswalk.

It is first contended that the findings of the court failed to dispose of all of the issues raised by appellant's affirmative defenses and that the evidence establishes as a matter of law contributory negligence on the part of the decedent. Under the latter contention appellant asserts (1) that decedent was crossing the street outside of the crosswalk and in so doing was violating a valid city ordinance, and (2) the fact that the decedent was struck by appellant's street car, under the circumstances related and on a lighted street, establishes its defense as a matter of law.

The facts show that the decedent lived just north of Fir Street on the east side of Fifth Avenue in San Diego; that on the night of his death he left his home on a business errand. No witness testified that he saw the deceased from the time he left his home until the time he was struck by appellant's street car which was proceeding in a northerly direction on Fifth Avenue near Elm Street. It was stipulated that Fifth Avenue at and between the intersections of Elm and Fir Streets was well lighted and that visibility was good.

The evidence discloses that as appellant's street car approached Elm Street a woman passenger walked to the front of it and stood there momentarily. The motorman, believing she desired to alight at that corner, slackened the speed of the car just south of Elm Street, but upon being informed by her that she desired to get off at Fir Street he accelerated its speed and continued through the intersection. As the street car crossed Elm Street an automobile was approaching from the north on the southbound rails, and the lights from that car were shining in the motorman's eyes. As he was watching that car the impact occurred. The testimony as to the position of the street car in the street when the collision occurred was conflicting. The motorman testified that he had passed the north crosswalk several feet when the impact occurred. A witness who was standing in a store on the northeast corner of the intersection testified that he glanced up from his newspaper, looked at the street car when its front end was at a point nearly across the intersection; that when the front of the street car was somewhere between that point and the north property line of Elm Street extended he glanced back at his newspaper and at that time heard the sound of the impact.

Evidence as to the speed of the street car at and immediately preceding the impact also was conflicting. The motorman stated that there was no speedometer on the street car and "it is really hard to say. I would say about 22 miles an hour. It was a moderate rate of speed." One witness estimated it was traveling between 20 and 22 miles per hour, and another that "it was going approximately 40 to 45 miles an hour."

The first witness to see decedent after he left his home was a pedestrian who was walking north on Fifth Avenue. This witness heard the crash and saw decedent's body "coming" or "hurtling through the air" and said that decedent fell to the pavement near the east curb. The distance thereof from the north crosswalk at Elm Street was given by one witness as about 59 feet. The decedent's hat was found against the east curb about 15 feet north of the intersection. The impact dented a sign and metal holder on the front end of the street car about 3 to 4 feet above the pavement level.

[1] The trial court found that the language of the ordinance was as alleged in appellant's answer and "that it is not true that, in crossing Fifth Avenue between the intersections of Elm and Fir Streets * * * in violation of the provisions of * * * this ordinance or at all, Edward Neal Ryan * * * negligently failed or neglected to use ordinary care for his own safety or concern or was guilty of any * * * negligent conduct which was the sole, only, proximate, concurring or contributing cause of any or of * * * all of the damage sustained or received by plaintiffs" but found "that it is true that said" decedent "exercised ordinary care at all of said times for his own safety and concerns and it is true that the sole cause of said collision or the injuries to and death of said" decedent "and of the damages to plaintiffs occasioned thereby, was the aforesaid negligent conduct of the defendant." The court also found that the ordinance "was at said time in full force and effect except as rendered inoperative, ineffective or invalid by the provisions of division IX of the Vehicle Code of the State of California [St.1935, p. 163 et seq.] and particularly section 458 of said Vehicle Code."

The trial court refused to find, as requested by appellant, that decedent was struck while crossing Fifth Avenue between the intersections of Elm and Fir Streets approximately 50 to 60 feet north of the north property line of Elm Street; and that the street car was not being negligently operated at a high and excessive rate of speed at the time and place of the accident.

Appellant concedes that if the ordinance is ineffective and invalid "it was then, of course, not necessary to find on the issue of whether the decedent was inside or outside the crosswalk."

[2] Under the authorities the findings above mentioned are sufficient to cover appellant's alleged affirmative defense of contributory negligence. Todd v. Orcutt, 42 Cal.App. 687, 183 P. 963; Bowers v. Union Trust Co., 117 Cal.App. 259, 3 P.2d 614; Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A.L.R. 291; Arrelano v. Jorgensen, 52 Cal.App. 622, 199 P. 855; Backus v. Sessions, 17 Cal.2d 380, 392, 110 P.2d 51. Although not clearly stated, appellant's secondary defense, i. e., that the deceased violated the city ordinance, was adequately covered by the court's finding above quoted. Appellant in reality complains that the court did not find upon an evidentiary matter, i. e., whether the decedent was crossing the street in a place other than in the crosswalk in violation of the said ordinance and whether the street car was traveling at a particular speed. This was unnecessary under the pleadings and the concession above made. Carlson v. Stanbitz, 7 Cal.App.2d 455, 457, 45 P.2d 820; Williams v. McDowell, 32 Cal.App.2d 49, 52, 89 P.2d 155.

[3] Appellant, as well as several amici curiae, have presented briefs and have cited many cases on the question of the validity of the ordinance and contend that the ordinance above mentioned is valid in that "since section 562 of the Motor Vehicle law does not authorize nor give the right to pedestrians to cross a roadway between intersections and, therefore, does not conflict with that portion of the ordinance which Prohibits crossing the street outside of the crosswalks in the central traffic district and in a business district, the only reasonable deduction to be drawn is that the ordinance is valid." We need not discuss this question further. Since this appeal was perfected and since the briefs have been filed our own Supreme Court has disposed of this question in Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, decided May 1, 1942 (rehearing denied May 28, 1942). This was an action wherein the widow and the son of a deceased brought an action to recover damages for his wrongful death. The deceased was struck after dark by an automobile operated by the defendant Benson while Pipoly was crossing Central Avenue near the intersection. Defendants denied the material allegations of the complaint and also as an affirmative defense alleged that the death of deceased was caused by his own contributory negligence. The jury found for defendants. The main ground which plaintiffs urged upon their appeal was that the instructions of the trial court respecting deceased's statutory obligations as a pedestrian were so conflicting as to constitute prejudicial error. The jury was instructed that under the Vehicle Code it was the duty of a pedestrian to yield the right of way to all vehicles on the roadway if crossing at any point other than within a marked crosswalk, under section 562(a) of the Vehicle Code. The court, however, also instructed the jury in the language of the Municipal Code of Los Angeles, section 80.38, that "no pedestrian shall cross a roadway other than by a crosswalk in a central traffic district or in any business district." The jury was told that if they found the deceased had violated the ordinance he was presumptively guilty of negligence since it was stipulated the accident occurred within a business district as defined by the ordinance. Plaintiffs argued that the ordinance was unconstitutional and in conflict with the provisions of the Vehicle Code because it prohibited a pedestrian from crossing a roadway outside of a crosswalk while the statute merely imposed upon the pedestrian the obligation to yield the right of way if he crossed outside of the crosswalk. It was therefore argued that the trial court based its instructions to the jury upon the ordinance and also the statute and that the conflicting instructions required a reversal of the judgment. The decisive issue presented by that appeal, therefore, was whether the Los Angeles ordinance regulating the conduct of pedestrians at or near crosswalks was in conflict with the provisions of the Vehicle Code and was for that reason invalid. It was there held, after citing many cases, that the ordinance involved was unconstitutional since it invaded a field of traffic regulations which the Legislature intended to occupy fully. That section of

the city ordinance was held to be unconstitutional. We perceive no legal distinction between the issues there presented and those here involved. As the city ordinance in the instant action was invalid, the decedent cannot be held to have been guilty of contributory negligence as a matter of law in violating it. The decision in the above entitled case absorbs and disposes of the main point here raised.

[4, 5] Any other evidence presented respecting the question whether the decedent was otherwise guilty of contributory negligence was a question of fact for the trial judge. Respondents were entitled to the benefit of the presumption of due care on the part of decedent. Wiswell v. Shinners, 47 Cal.App.2d 156, 159, 160, 117 P.2d 677; Ross v. San Francisco-Oakland T. Railways Co., 47 Cal.App. 753, 760, 764, 191 P. 703; Hoppe v. Bradshaw, 42 Cal.App.2d 334, 108 P.2d 947; Duehren v. Stewart, 39 Cal.App.2d 201, 102 P.2d 784; Umemoto v. McDonald, 6 Cal.2d 587, 590, 58 P.2d 1274.

We see no merit to the remaining contentions presented.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

ROSECRANS et al. v. PACIFIC ELECTRIC RY. CO. et al.*

Civ. 13670.

District Court of Appeal, Second District, Division 2, California.

July 9, 1942.

Hearing Granted Sept. 3, 1942.

1. Deeds 🔑155

Conditions subsequent are not favored in law and no provision in a deed relied upon to create a condition subsequent will be so interpreted if the language used will bear any other reasonable construction.

2. Railroads 🔑72(1)

Where a deed for right of way purposes provided that land was to revert to grantors upon grantee's failure to "establish and maintain * * * a daily service of not less than 18 local passenger trains * * *", discontinuance of passenger train service after a period of 33 years did not entitle grantors to reconveyance, since its obligation to "establish and maintain" passenger train service did not require maintenance of permanent or perpetual service.

See Words and Phrases, Permanent Edition, for all other definitions of "Establish and Maintain".

3. Railroads 🔑72(1)

Under a deed for right of way purposes providing that land should revert to grantors upon grantee's failure to establish and maintain "on each and every day" not less than 18 local passenger cars, the words "each" and "every" did not indicate that railroad was obligated to perpetually maintain passenger service, since such provision related to the frequency of service rather than to its duration.

See Words and Phrases, Permanent Edition, for all other definitions of "Each" and "Every".

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by William S. Rosecrans and others against Pacific Electric Railway Company to quiet title to certain lands and right of ways which had been conveyed for railroad purposes and to compel defendants to reconvey the lands and right of ways to plaintiff. From a judgment for defendant after trial court sustained a demurrer to the complaint without leave to amend, plaintiffs appeal.

Affirmed.

Paul Overton and J. G. Leovy, both of Los Angeles, for appellants.

Frank Karr, C. W. Cornell, and Randolph Karr, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiffs seek to quiet title to certain lands and right of way which had been conveyed for railroad purposes, to compel defendants to reconvey the lands and right of way to plaintiffs and to remove their rails and appliances therefrom. Defendants filed a general demurrer and also a special demurrer in which it is charged that it cannot be ascertained from the amended complaint whether the defendant railway company has continued to operate freight trains over the right of way. The action is founded upon an alleged breach of a condition subsequent in the conveyance. The trial court sustained the demurrer without leave to amend and plaintiffs have appealed from the ensuing judgment.

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* Subsequent opinion 134 P.2d 245.

An instrument of conveyance was executed on September 17, 1907, by the predecessors in interest of plaintiffs conveying the property in dispute to the predecessors in interest of defendants. The instrument contained the following provisions: "The aforesaid right-of-way is granted upon the express condition that second party or its assigns shall establish and maintain over the railway * * * a daily service of not less than eighteen local passenger cars or passenger trains each way; and that second party or assigns shall on each and every day run not less than eighteen local passenger cars or passenger trains each way over said railway. * * * Each of the conditions * * * is hereby declared to be a condition and not a personal covenant * * * and the breach by second party or assigns of any of said conditions will render the conveyance null and void, and upon such breach the right-of-way hereby granted shall revert to first party, his heirs or assigns. * * * Each of the aforesaid conditions is made for the benefit of first party, his heirs and assigns, and shall bind second party, his heirs and assigns and the right-of-way hereby granted."

It is alleged in the amended complaint that the defendant railway company has since January 1, 1941, failed to operate and maintain a daily service of not less than eighteen local passenger cars or passenger trains each way "and is not now operating or maintaining any passenger cars or passenger trains whatever over said railroad." It is now argued that the failure of the railway company to continue the operation of passenger cars over the right of way should be held to be a breach of a condition subsequent and that plaintiffs have a right to a reconveyance.

[1] The question before us must be considered in the light of the rule that conditions subsequent are not favored in law and that no provision in a deed relied upon to create a condition subsequent will be so interpreted if the language used in the deed will bear any other reasonable construction. Conner v. Lowery, 94 Cal.App. 323, 326, 271 P. 118.

[2] The determination of the question involves the construction of the words "shall establish and maintain," as they appear in the instrument of conveyance. The question whether a provision that a railway company shall maintain service requires the maintenance of perpetual service has been passed upon by the reviewing courts in a number of the states, but the decisions are not uniform. The majority follow the rule that the rendition of service is not required to be perpetual in order to prevent a forfeiture. In a notation in 7 A.L.R. 817, 818, it is said: "The majority of jurisdictions seem to hold that, in the absence of a specified term of years or of express and suitable words showing an intention that performance shall be perpetual, a covenant or condition subsequent for the maintenance of a railroad or its appurtenances is sufficiently complied with by a performance covering a term of years, varying in the cases which have so held from five to sixty years." (In Texas & Pac. Ry. Co. v. Marshall, 136 U.S. 393, 10 S.Ct. 846, 847, 34 L.Ed. 385), cited by the author, defendant railway company contracted with the city of Marshall, for a valuable consideration, that it would "permanently establish its eastern terminus and Texas office at the city of Marshall, and will also establish and construct at said city the main machine-shops and car-works." The railway company established its offices and built its shops as called for by the contract, maintained them for a period of eight years, then moved to another city. The Supreme Court held that the agreement "did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall; that it would forever keep up the depot at that place; that it would for all time continue to have its machine-shops and car-shops there, and that, whatever might be the changes of time and circumstances, of railroad rivalry and assistance, these things alone should remain forever unchangeable. * * * The word 'permanent' does not mean forever, or lasting forever, or existing forever."

The decisions of the California courts are in line with the majority rule. In Hasman v. Elk Grove Union High School, 76 Cal.App. 629, 245 P. 464, 465, the deed provided that the property conveyed should "be used for the purpose of maintaining thereon a high school; otherwise, the above described property shall revert to and become the property of the party of the first part, his heirs, or assigns." A high school was maintained on the property conveyed for approximately twenty-nine years. The successors in interest of the grantor sought to enforce a condition subsequent under the claim that the defendant was no longer maintaining the high school on the property. The reviewing court affirmed a judgment in favor of the defendant, holding that "to maintain a school does not necessarily mean to keep it up perpetually." The court based its decision on a number of cases, notably Texas & Pac. Ry. Co. v. Marshall, supra.

A case bearing a striking similarity to the case now before us is O. T. Johnson Corp. v. Pacific E. R. Co., 19 Cal.App.2d 306, 65 P.2d 368. In that case the plaintiff had entered into an agreement with the defendant railroad company in which it was provided that the plaintiff should convey a right of way and defendant railway company should complete its road. The agreement further provided: "That upon the completion of said railroad and the commencement of operation of passenger cars thereon and thereover, regular local passenger cars or trains shall be operated each way (East and West making direct connections to and from Los Angeles) over said line through the said property of the parties of the first part at intervals of not greater than one hour between the hours of six o'clock a. m. and eight o'clock p. m. of each day making not less than fifteen local trains to be operated each way every twenty-four hours." It was further provided that if the land conveyed should thereafter be used for other than railroad purposes or "if any of the foregoing conditions shall be violated" the title to the land should revert to the grantors. The railway company operated passenger cars over the right of way for the period of eighteen years and thereafter operated freight cars only. The plaintiff then demanded a reconveyance and upon refusal of the defendant to make a reconveyance the plaintiff sought compensation for taking the reversionary interest in the land. As in the present case, the demurrer was sustained without leave to amend and on appeal the judgment was affirmed, the reviewing court holding that the defendant was not obligated to maintain passenger service perpetually. In support of its decision the court referred to Texas & Pac. Ry. Co. v. Marshall, supra, and Hasman v. Elk Grove Union High School, supra.

[3] Plaintiffs call attention to the language in the deed in which it is provided that "on each and every day" not less than eighteen local passenger cars should be operated and argue that the definitions of the words "each" and "every," as found in the dictionary, indicate that defendants are obligated to continue maintaining the passenger service. We find nothing in the language used in the deed to justify this contention. As was held in the Johnson case, where provision was made for the operation of cars at intervals of not greater than one hour of each day, the provision "relates to the frequency of service rather than to its duration."

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

52 Cal.App.2d 428

PEOPLE v. BROWN.

Cr. 2228.

District Court of Appeal, First District, Division 1, California.

June 2, 1942.

1. Statutes 🔑231

The section of Penal Code providing that information may be substantially in the form as set forth in such section, including designation of felony or misdemeanor, should be read in connection with the section setting forth requisite contents of information, which do not include a designation of offense as a felony or misdemeanor, and the section relating to sufficiency of an information. Pen.Code, §§ 950, 951, 959.

2. Criminal law 🔑27

Whether a crime is a "misdemeanor" or a "felony" is to be determined both by statute and judicial decision, by the punishment, and where a crime is punishable either by incarceration in state prison or county jail, sentence actually given determines nature of offense. Pen.Code, § 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Felony" and "Misdemeanor".

3. Larceny ⚷28(1)

In charging theft, it is sufficient to allege that defendant unlawfully took property of another. Pen.Code, § 952.

4. Indictment and Information ⚷63, 91(2), 110(18)

An information charging petty theft and two prior convictions substantially in form set forth in statute, except for failure to use word "feloniously" in charging part of information, but not including a designation of the offense as a felony or misdemeanor, was sufficient, as against contention that information failed to state a criminal offense, inasmuch as charge of petty theft was a mere "conclusion". Pen.Code, §§ 16, 17, 666–668, 950–952, 959.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

5. False pretenses ⚷20

Larceny and obtaining money by false pretenses constitute "theft" as that offense is defined in Penal Code. Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Theft".

6. Criminal law ⚷1158(1)

In prosecution for petty theft, where evidence tended to establish theft by fraudulent representations, whether money obtained by defendant was a loan as contended by defendant was a question of fact for trial court. Pen.Code, § 484.

7. False pretenses ⚷49(1)

Evidence supported conviction of petty theft, based on obtaining money by false pretenses. Pen.Code, § 484.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

James Edward Brown was convicted of petty theft, as charged in two counts, and of two prior convictions, and he appeals.

Affirmed.

Jay Maurice, of Oakland, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

WARD, Justice.

Defendant appeals from judgment convicting him of petty theft, as charged in two counts, and of two prior convictions, from the order denying his motion for a new trial on each count and from all orders made before and after judgment.

A demurrer to an original information was overruled. An amended information, differing from the original only in that it alleged a second prior conviction, the first for petty theft and the second, under the provisions of Penal Code section 107, for escape as a prisoner, was filed. Defendant entered a plea of not guilty to each of said counts, and standing mute when arraigned, the court entered a plea of not guilty on the two prior convictions. Motions in arrest of judgment and for a new trial were denied.

The appellant makes two contentions in support of the appeal, namely, (1) that the information fails to state a criminal offense inasmuch as the charge of petty larceny is a mere conclusion, and (2) that the evidence is insufficient to support the judgment.

[1] The counts in the information do not designate the crime charged, petty theft, as a felony or a misdemeanor. Penal Code, section 951, providing that an information may be substantially in the form as set forth in the section, including the designation of felony or misdemeanor, should be read in conjunction with section 950, setting forth the requisite contents of an information, which do not include a designation of the offense as a felony or misdemeanor, and section 959 as to the sufficiency of an information. Whenever possible the division into which the offense falls should be alleged, Pen.Code, § 16, but when a crime may be punished by imprisonment in the state prison or by fine or imprisonment in the county jail, it is after judgment deemed a misdemeanor, unless a sentence of imprisonment in the state prison has been pronounced. Pen.Code, § 17.

Section 666, Penal Code, provides in part: "Every person who, having been convicted of petit larceny or petit theft and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows; * * * If the subsequent conviction is for petit theft, then the person convicted of such subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the State prison not exceeding five years." Pen.Code, §§ 667, 668.

[2, 3] "It is established in this state, both by statute and judicial decision, that whether a crime is a misdemeanor or a felony is to be determined by the punishment; and where a crime is punishable either by incarceration in the state prison or the county jail, the sentence actually given determines the nature of the offense." In re Rosencrantz, 211 Cal. 749, 751, 297 P. 15, 16. In charging theft, it is sufficient to allege that the defendant unlawfully took the property of another. Pen.Code, § 952; People v. Mason, 12 Cal.App.2d 84, 55 P.2d 249; People v. Myers, 206 Cal. 480, 275 P. 219.

[4] It does not appear, as appellant contends, that a departure from the terms of Penal Code, section 951 in respect to the division of the offense or in the failure to use the word "feloniously" in the charging part of the information, prejudiced the defendant herein. The information substantially followed the language of the section. The court on each count found the prior convictions to be true.

On one of the counts the evidence shows that defendant visited a gas station and asked the attendant who worked there on Sundays only whether he knew a Dr. Stevens, for whom defendant said he acted as chauffeur and who was a regular patron of the station. He informed the attendant that he had won $52 from a lady in a poker game the night before, and he was obliged to show her that he could have paid had he lost. After further conversation, the attendant advanced $45 to the defendant who signed the name "Willie Brooks" to a Standard service "Credit Courtesy Card Delivery Receipt," showing the "product" delivered as "Cash," and the amount as $45. They then walked to a nearby corner, where defendant requested the attendant to wait while he went to the house where he said he had been the night before. He received no response to his knock at the door and he then went around to the back. This was the last the attendant saw of him until defendant's arrest. The evidence on the other count disclosed a similar technique. For the purpose of showing a common plan and scheme to commit theft, evidence of a third similar transaction was introduced.

Appellant admitted obtaining the money but testified that it constituted a loan. An inspector of police testified that appellant made the following statement: "This is the way I operate: I go to a service station in a dwelling district * * * and I tell them I am a chauffeur for Doctor So and So, who lives up on the hill. The service station attendant thinks maybe I am. Then I bring out a deck of cards and show how fast I am. I pull off a few at the top and a few off the bottom of the deck in a second or so and get him interested. Then I tell him there is a poker game not far away, if I had a few dollars I could make him some money. Maybe I will come back in a little while. He loans me a few dollars. I stay awhile and I phone him and tell him things are going pretty good, I need a few more dollars. I go back and borrow some money from him and get him to make an I. O. U. I manage to get it before I leave because that is my best defense, if I can prove he gave me that I. O. U." Another inspector testified that at the time of his arrest "Brown said 'Don't bring in any more of those fellows, I clipped them all.' I said 'Brown, this is serious. You got out of the County Jail two days ago and you spend two days clipping these gas stations the way you have.' He said 'Listen, I will never be broke as long as there are suckers like those around.' "

Appellant urges that the evidence as above related is insufficient to sustain the judgment. This contention is based upon the theory that if any crime was committed it was that of obtaining money by false pretenses. He claims that the money obtained was a loan.

[5-7] Larceny and obtaining money by false pretenses constitute theft as that offense is defined in section 484, Penal Code. People v. Carter, 131 Cal.App. 177, 21 P.2d 129; People v. Plum, 88 Cal.App. 575, 263 P. 862, 265 P. 322; People v. Myers, supra; People v. Breyer, 139 Cal.App. 547, 34 P.2d 1065, 1067. The evidence establishes theft by fraudulent representation. Whether the money obtained was a loan was a question of fact to be determined by the trial court. The statements of the police officers,—which are corroborated by other circumstances,—that "I clipped them all" and "I will never be broke as long as there are suckers like those around" are certainly sufficient to determine beyond a reasonable doubt that the money obtained did not in fact represent loans.

The judgments and order denying the motion for a new trial are affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

52 Cal.App.2d 308

BRIGGS et al. v. STROUD.

Civ. 12026.

District Court of Appeal, First District, Division 1, California.

May 28, 1942.

1. Bastards 🔑3

The presumption that a married man is the father of his wife's child may be rebutted.

2. Bastards 🔑33

An action may be maintained by an expectant mother or guardian for the support of an illegitimate child in view of codal provision that for purposes of prosecution for failure to provide, such child shall be deemed an existing person. Civ.Code, § 196a; Pen.Code, § 270.

3. Bastards 🔑49

In action by expectant mother for support of child, where complaint was merely uncertain whether child was legitimate or illegitimate because of allegation that mother "is" an unmarried woman, sustaining of demurrer to complaint without leave to amend was error. Civ.Code, §§ 196a, 231; Pen.Code, § 270.

4. Bastards 🔑19

Society in general has an interest in proceeding by expectant mother for support of her child, since it is important that the parentage of the child be determined so that its father rather than society be required to support it. Civ.Code, §§ 196a, 231; Pen. Code, § 270.

5. Bastards 🔑51

In proceeding by expectant mother for support of her child, great liberality should be allowed in permitting an amendment to show the true facts so that parentage of child and responsibility for its support may be determined. Civ.Code, §§ 196a, 231; Pen. Code, § 270.

6. Bastards 🔑49

In proceeding by expectant mother for support of child, the court had jurisdiction at any time prior to judgment to reconsider its ruling sustaining demurrer to complaint without leave to amend. Civ.Code, §§ 196a, 231; Pen.Code, § 270.

7. Bastards 🔑51

Where because complaint merely alleged that expectant mother seeking hospital expenses and support for child "is" an unmarried woman, court erroneously sustained demurrer to complaint without leave to amend, refusal to permit supplemental complaint by mother individually and as guardian for child after its birth, showing that defendant was father of child conceived during mother's marriage to another who had not had access to mother since deserting her some years before, was error. Civ.Code, §§ 196a, 231; Pen.Code, § 270.

8. Seduction 🔑9

Only a chaste unmarried female can be seduced. Code Civ.Proc. § 374; Pen.Code, § 286.

9. Seduction 🔑16

Where complaint for seduction failed to show that plaintiff was chaste at time of alleged seduction, complaint was demurrable. Code Civ.Proc. § 374; Pen.Code, § 286.

10. Seduction 🔑16

Where supplemental complaint in action for seduction alleged that plaintiff though married to another had lived with defendant as husband and wife since December, 1938, that plaintiff was divorced on June 13, 1939, and seduced on June 17, 1939, and about a month thereafter, refusal to permit filing of supplemental complaint was not error, since it showed that plaintiff was not "chaste" at time of alleged seduction. Code Civ.Proc. § 374; Pen.Code, § 286; Civ.Code, § 43.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Chaste".

11. Seduction 🔑1

"Seduction" imports the idea of illicit intercourse accompanied by the use of arts, persuasions, or wiles to overcome the resistance of a female who is not disposed of her own volition to step aside from the paths of virtue. Code Civ.Proc. § 374; Pen. Code, § 286; Civ.Code, § 43.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Seduction".

12. Seduction 🔑16

In action for seduction, mere allegation that plaintiff "is" an unmarried woman means only that plaintiff was unmarried at the time the action was filed.

See Words and Phrases, Permanent Edition, for all other definitions of "Is".

13. Breach of marriage promise ⚿18

In action for breach of promise to marry, plaintiff must allege her lack of marital status at the time of the alleged promise, since under the law there can be no cause of action for breach of a promise to marry a woman who is already married.

14. Pleading ⚿193(5), 225(1)

In action for breach of promise to marry, where it was doubtful whether plaintiff was suing on promises allegedly made in December, 1938, after which she lived with defendant as husband and wife, or promises allegedly made in June, 1939, and there was no allegation that plaintiff had accepted the latter promises, and plaintiff took position that she was not required to disclose her marital status at the times of the alleged promises of marriage, but only at the time of suit, and there was merely an allegation that plaintiff "is" an unmarried woman, and plaintiff had been given two opportunities to make proper allegation, court was justified in sustaining demurrer to complaint without leave to amend. Civ.Code, § 43.5.

15. Breach of marriage promise ⚿5

Promises to marry must be mutual.

16. Pleading ⚿225(1)

Where plaintiff in action for breach of promise to marry had been given three opportunities to file a good complaint and on two occasions had declined to make an amendment in conformity with ruling of court, refusal to permit the filing of a proposed amendment was not an abuse of discretion. Civ.Code, § 43.5.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Meredith B. Briggs and another for support of infant, for seduction and for breach of promise to marry, against Clarence Grigsby Stroud. From a judgment after sustaining of demurrer to amended complaint, Meredith B. Davis appeals and from an order denying motion for leave to file a supplemental complaint, Clarence Stroud Davis appeals.

Order in accordance with opinion.

John Oliver, of Los Angeles, for appellants.

Clarence Grigsby Stroud in pro. per.

BRADY, Justice pro tem.

Appeal by plaintiff Meredith B. Davis from a judgment for defendant entered after demurrer sustained to the amended complaint, and appeal by Clarence Stroud Davis, an infant, from the order of the court denying his motion for the filing of a supplemental complaint. No brief was filed on this appeal upon behalf of respondent.

The history of the pleadings was as follows: A complaint was filed containing three counts. The first count was for support of the then unborn minor and confinement expenses for the plaintiff mother. It did not allege whether or not the plaintiff mother was unmarried at the time of conception, or at any time mentioned in the complaint. The second cause of action was for seduction. The only reference to plaintiff's status contained therein was "Plaintiff is unmarried, over the age of 21, and is chaste and virtuous." The third cause of action was for alleged breach of promise to marry, and contains no allegation as to plaintiff's marital status. The court sustained demurrers to all three causes of action; to the first, because there was no allegation as to whether the plaintiff was married or unmarried at any time set forth in the cause of action; to the second, because it interpreted the allegation "the Plaintiff is unmarried" as applying only to the time of the filing of the complaint, and because there was no allegation therein as to her status at the times of the alleged seduction, and as to the third, because it nowhere appeared that the plaintiff was unmarried and free to enter into an agreement of marriage with the defendant. According to the memorandum ruling of the judge upon the demurrers to the amended complaint the court stated at the time of sustaining the demurrers to the original complaint, that in amending plaintiff must meet the question of whether or not the plaintiff was an unmarried woman at all the times mentioned in each of the three causes of action.

Thereafter plaintiff filed her amended complaint, again containing three causes of action. The first cause of action again was for the support of the still unborn child and confinement expenses for plaintiff mother. To meet the court's objection to the first complaint, the plaintiff merely alleged on the subject of her marital or non-marital status, "Plaintiff is an unmarried woman." The court sustained a demurrer to this cause of action upon the ground that the fact that plaintiff was unmarried at the time of the filing of the suit gave no information as to the question of whether or not she was married to either the defendant or some one other than the defendant at the time of conception, and therefore, might be bound by the presumption that a child born during wedlock is presumed to be the child of the husband. The second cause of action, was like that in the original complaint, one for seduction. To meet the original objection, paragraph one of the first cause of action which stated "Plaintiff is an unmarried woman" was incorporated by reference into this second cause of action, and then it is alleged "Plaintiff is at all times referred to in this said cause of action, unmarried, over the age of 21, and is chaste and virtuous." Again ruling that this statement referred to the time of filing the complaint rather than to the time of the alleged seduction, the court sustained a demurrer to this cause of action. The third cause of action, like that in the first complaint, was for breach of promise to marry. Here, upon the question involved, the only allegation was the incorporation by reference from the first cause of action of the allegation "Plaintiff is an unmarried woman." Upon demurrer the court held that this did not disclose her status at the time of the alleged promise or promises to marry, and sustained the demurrer upon that ground. At the argument of the demurrer to the second amended complaint, the court, according to its memorandum ruling, was informed by counsel for the plaintiff that he was not required in his pleadings to meet this question of plaintiff's marital status other than as he had set it forth in the amended complaint. Apparently, because of that position taken by counsel the court in sustaining the demurrers to the amended complaint, sustained them without leave to amend.

Later, leave was granted to reargue the case and the order sustaining the demurrers without leave to amend was set aside so as not to prejudice plaintiff's right of appeal. On reargument, plaintiff, with permission, struck from the second cause of action the incorporation therein of paragraphs III and IV of the first cause of action. Apparently, this was done to escape the confusion caused by the allegation that the seduction for which plaintiff asked damages occurred on or about June 17, 1939, whereas it appeared from the expunged paragraphs that plaintiff and defendant had been cohabiting together since December 1938 and that plaintiff had become pregnant through intercourse with defendant in the month of March, 1939. Upon the reargument, the court sustained the demurrers to the first and third causes of action without leave to amend, and to the second cause (seduction) with leave to amend, stating, "The second cause of action alleges that the plaintiff was unmarried at the time referred to in that cause of action. It is not clear whether the plaintiff intends by such allegation to allege that she was unmarried in December, 1938, and at the time the unborn child was conceived. If that is the fact and if she can thus allege, I think she should have an opportunity to amend the second cause of action in that aspect."

Thereafter, the child having been born in the meantime, the plaintiff mother, and as guardian ad litem of the child, moved the court for permission to file a "Proposed Supplemental Complaint by minor child for support and proposed amended second complaint by mother for support of Child under section 196a of the Civil Code." This pleading, for brevity, will be referred to as the "Supplemental Complaint." The first alleged cause of action is one for support for the child and hospitalization expenses for the mother. It alleges that plaintiff mother "is an unmarried woman." It then sets forth that from August 11, 1934, to June 12, 1939, she was married to one Richard James Graham; that she lived with him as his wife from August 11, 1934, to September 12, 1934; that they then separated and that at no time thereafter did she cohabit, come in contact with, nor even see him; that on the 13th day of June, 1939, she obtained a divorce from him because of his wilful desertion of her on September 12, 1934. She then alleges that the defendant is the father of the plaintiff child and sets forth facts showing the life of plaintiff mother and the defendant together, living as husband and wife, and other matters to prove that defendant is the father of the child. The second cause of action is likewise for support for the child, incorporates all of the allegations of the first cause of action and adds others of no great importance. The third cause of action is for seduction as of June 17, 1939, and thereafter, incorporates all of the allegations of the first cause of action, and alleges that at all times referred to in this cause of action she is unmarried "except as alleged." The fourth cause of action is for breach of promise of marriage, incorporates all of the allegations of the first cause of action and alleges that subsequent to the date of the divorce decree the defendant repeatedly promised to marry her.

The court denied the motion for leave to file the supplemental complaint. The question here is the validity of the court's order sustaining the demurrers to the amended complaint and its order denying permission to file the supplemental complaint. For clarity and convenience, the causes of action will be considered separately.

[1] The first cause, that to determine the paternity of the child and for its support:—In the amended complaint, nothing was said as to the mother's marital status at time of conception, it merely being alleged that the mother "is an unmarried woman." It apparently was the theory of the defendant that in an action to establish paternity, there must be alleged facts which show that at the time of conception either the mother was married to the defendant, was unmarried, or if married to another that the situation negatives the presumption that the child is that of her husband. That this presumption can be overcome is the rule in California has been established by a number of cases, the latest being Dazey v. Dazey, 50 Cal.App.2d 15, 122 P.2d 308. Apparently, the defendant relied upon some language in Gambetta v. Gambetta, 30 Cal.App. 261, 157 P. 1141, where the court discusses the difference between the remedies provided for obtaining support from the father of a legitimate child and from the father of an illegitimate child. But the case does not bear the construction apparently placed upon it by defendant. In fact, it rather supports the theory of the plaintiff that the amended complaint, if not even the original complaint in the case at bar, is sufficient, for the court said at page 264 of 30 Cal.App., at page 1142 of 157 P.: "While, perhaps, the complaint, measured by the strictest rules of pleading, might be regarded as ambiguous and uncertain in the respect pointed out, still we think it can hardly be said to wholly fail to state sufficient facts. It is certain that it sets forth facts enough to enable the defendant to sufficiently understand the issues tendered by the pleading and to meet it by proper and full denials. Under the allegations of the complaint the defendant is the father of the plaintiff, and whether legitimate or illegitimate, defendant is liable for his support."

[2-5] Section 196a of the Civil Code expressly provides that the father of an illegitimate child is liable for his support and that an action for it may be brought by either the mother or guardian. Apparently no point was made in the lower court of the fact that the child was not in being at the time of suit, nor could such point be made in view of the provisions of section 270 of the Penal Code, which provides that such a child, for purposes of prosecution for failure to provide is to be deemed an existing person. Kyne v. Kyne, 38 Cal.App.2d 122, 100 P.2d 806, flatly holds that suit to establish paternity may be brought on behalf of an unborn child. While the amended complaint might be uncertain upon the question of whether the child was an illegitimate or a legitimate child of the defendant, still there was a basic right to bring an action under either theory. Section 231 of the Civil Code provides than an action may be brought for the purpose of having declared the existence or non-existence between the parties of the relation of parent and child, by birth or adoption. If the plaintiff and defendant were married to each other at the time of conception, a cause of action would exist under section 231 of the Civil Code, if they were unmarried, then one would exist under section 196a of the Civil Code. If plaintiff were married to another and set up facts which showed non-access by her husband, there would likewise be a cause of action under section 196a. Therefore, at most, the complaint was uncertain as to which of the three theories plaintiff was claiming under, and thus, in any event, an opportunity should have been allowed to plaintiff to amend to set up the true facts. This question is cleared up in the supplemental complaint, which clearly alleges that the child is that of the defendant, and although conceived during the period of the plaintiff's marriage with another man, sets forth allegations rebutting the presumption of parenthood by the husband. Thus, any uncertainty in the amended complaint could have been cleared up by the amendment, but the court sustained this count of the complaint without leave to amend. Society in general has an interest in a proceeding of this kind for it is extremely important that the true parentage

of this child be determined so that the father, rather than society, be required to support it. Great liberality should be allowed in permitting by amendment the true facts to be set up so that this extremely important question might be determined by the courts. That there should be such liberality is indicated in the decision in Sweet v. Hamilothoris, 84 Cal.App. 775, 258 P. 652, where the court, commenting upon an amendment to the original complaint allowed by the lower court to clear up the question of whether or not the mother was married to a person other than the defendant at the time of conception, stated that amendments in such cases should be liberally allowed.

[6, 7] The court had jurisdiction at any time prior to judgment to reconsider its ruling sustaining the demurrer without leave to amend (21 Cal.Jur. 124; 9 Cal. Jur.Supp. 221). In view of the public interest in a proceeding of this kind, and the fact that great liberality of amendments in actions over the question of paternity of a child and its support should be allowed, the court having improperly sustained the demurrer without leave to amend should have allowed the plaintiffs to file the first and second causes of action of the supplemental complaint. At the time of the application to file the supplemental complaint the child, which was not in being at the beginning of the action, had been born. The situation having thus changed, constituted an additional reason why the said pleading should have been allowed. It was an abuse of discretion not to permit an amendment or a supplemental pleading which would have brought properly before the court the true situation, in which society, as well as the child, have so vital an interest.

[8] Second cause of action—seduction—in the amended complaint plaintiff states June 17, 1939, as the date of the actionable seduction, that is, as such complaint stood after the court, on reopening the matter for further argument, had permitted plaintiff to strike out the references to paragraphs III and IV of the first cause of action which alleged acts of intercourse and cohabitation beginning as early as December, 1938. Of course, with those allegations in the complaint, the allegation that on the date of the alleged actionable seduction, June 17, 1939, she was chaste and virtuous meant nothing. With them out, there was still incorporated by reference allegation V of the first cause of action, which set forth that defendant is the father of her child to be born on or about the month of December, 1939. Comparing June 17th as the date of seduction with the fact that a child is to be born six months later makes it quite uncertain how plaintiff can meet the first requirement of an action for seduction, namely, that she was chaste and virtuous at the time of the alleged seduction. The court also felt that there was ambiguity in the allegations as to her marital status and for that reason, in sustaining the demurrer, suggested that that matter be cleared up and granted time to amend. Only an unmarried female can be seduced. § 374, Code Civ.Proc.; § 286, Pen.Code; 57 C.J. 14. Likewise, she must be chaste. (57 C.J. 14.)

[9-11] As the amended complaint failed to clearly show that she was chaste at the time of the alleged seduction, the court was justified in sustaining the demurrer and would have been justified under the circumstances as disclosed at the argument to have denied plaintiff the right to amend. However, it granted an opportunity to amend. This plaintiff did not do directly, but indirectly through her application for leave to file the supplemental complaint. But in the proposed supplemental complaint, plaintiff did not meet the situation. She alleged, in addition to incorporating all of the allegations of her first cause of action, "that plaintiff is at all times referred to in this said cause of action unmarried, except as alleged * * * and is chaste and virtuous." By the allegations incorporated by reference she alleges at considerable length her marriage, her divorce, the fact that she and the defendant had lived together as man and wife since December, 1938, and then attempts to charge seduction as of June 17, 1939, and approximately a month thereafter. Therefore, on the face of her proposed complaint it appears that she was not chaste and virtuous on the date of the alleged seduction, and there is no cause of action for seduction. Obviously, the court was justified in refusing to permit her to file a pleading which not only does not state a cause of action but actually negatives one. Particularly is this so, in view of the attitude of the law towards this type of action. This suit was filed but a few days before section 43.5 of the Civil Code, recently enacted, went into effect. That section abolished entirely causes of action for seduction, breach of promise of mar-

riage, alienation of affection, and criminal conversation. Appellant refers to Carter v. Murphy, 10 Cal.2d 547, 75 P.2d 1072, apparently as authority for the contention that the acts of unchastity of the plaintiff with the defendant occurring prior to June 17, 1939, which date plaintiff now chooses as the date of the actionable act of seduction, do not negative her right to bring such an action, because such prior acts occurred with the defendant and not with some other person. But the Carter case does not so hold. In that case the complaint alleged that the first act of intercourse occurred in September. At the trial plaintiff testified that the first act was committed in August. The defendant then contended that plaintiff was not chaste in September and that the cause of action thereby failed. Plaintiff asked leave to amend her complaint to set up the August date instead of September. The court held that that was not necessary for whether she was first violated in August or September made no difference as in either event, under the special circumstances of that case, the defendant was the original violator of her chastity. In the case at bar, assuming that a person having intercourse with someone else's wife may be considered the violator of her chastity, still, plaintiff is barred by law from claiming seduction for acts occurring during her marriage, and after the marriage bar is removed, and she continues to permit sexual intercourse, it can hardly be considered that because it is with the same man, plaintiff can claim herself to be chaste. Seduction imports the idea of illicit intercourse accomplished by the use of arts, persuasions, or wiles to overcome the resistance of a female who is not disposed of her own volition to step aside from the paths of virtue. Carter v. Murphy, 10 Cal.2d 547, 75 P.2d 1072, at page 1080. It cannot reasonably be said that a married woman who violates her marriage vows by sexual relations with a man not her husband and then after the marriage is dissolved continues such relationship is not disposed of her own volition to step aside from the paths of virtue.

The third cause of action—breach of promise of marriage—is in about the same category as the second cause. Here the plaintiff alleged that in December, 1938, she succumbed to the blandishments of defendant and his promises to marry her, and from there on until July 20, 1939, cohabited with him as man and wife. She then, by incorporation, repeats the paragraph in the second cause of action alleging acts of sexual intercourse on June 17, 1939, and for a month thereafter as being consented to by her because of defendant's repeated promises of marriage. Apparently it is intended to base this cause of action upon acts and promises of June 17, 1939, and thereafter, as of course, she could not legally base them upon acts or promises made her during her married life.

[12-15] There are several things wrong with this alleged cause of action, first, she states, that she "is an unmarried woman," which would only apply as to her status at the time of filing suit. As under the law, there could be no cause of action for breach of a promise to marry a woman who is already married (11 C.J.S., Breach of Marriage Promise, § 2, p. 772), she should have alleged her lack of marital status at the times of the alleged promises. Secondly, there is considerable uncertainty in the way this cause of action is drawn as to whether plaintiff is suing on the promises which she alleges the defendant made in December, 1938, and which she alleges she agreed to, or the promises made in June, 1939, concerning the acceptance of which she is silent. As to these latter promises she does not meet the requirements of the cases which hold that the promise to marry must be mutual. 8 Am.Jur. 74; 11 C.J.S., Breach of Marriage Promise, § 23, p. 785. On both these grounds the court was justified in sustaining the demurrer, and without leave to amend, because of the expressed attitude of plaintiff's counsel, as disclosed in the court's opinion, that plaintiff was not required to disclose her marital status at the times of the alleged promise of marriage, but only at the time of suit, and because plaintiff having had two opportunities to set up a cause of action, and having failed, the court, in view of the attitude of the law as expressed by the enactment of section 43.5 of the Civil Code, was justified in refusing to allow another opportunity.

[16] Plaintiff after having filed the original defective complaint was afforded an opportunity to cure the defects and failed to do so, not through inadvertence, but because plaintiff's counsel disagreed with the trial court in its interpretation of the law. In this respect the record shows that at the time the demurrer to the original complaint was sustained leave was granted to amend. An amended complaint was filed, but admittedly it did not con-

form to the requirements specified by the trial court in granting leave to amend; and it appears from the written opinion which was later filed by the trial court that the failure to meet such requirements was not the result of inadvertence, but was due entirely to the position taken by plaintiff's counsel that the court was wrong in its construction of the law; whereupon the trial court sustained the demurrer to the amended complaint without leave to amend. Thereafter plaintiff was given a second opportunity to comply with the trial court's view, but again she failed to do so. After the demurrer to the amended complaint had been argued and sustained without leave to amend the trial court granted plaintiff's motion for leave to reargue the demurrer, and to that end it set aside its previous order sustaining the demurrer; and although on reargument plaintiff amended her second cause of action (for seduction) she made no attempt to cure the defects previously pointed out by the court in the cause of action for breach of promise to marry; consequently for the second time the trial court sustained the demurrer thereto without leave to amend. That order so made was entered on December 18, 1939, pursuant to the written opinion above mentioned. Meanwhile and on December 11, 1939, the child was born; and on December 21, 1939, notice of motion was given for leave to file the supplemental and second amended complaint. The child through its guardian ad litem was made party plaintiff to the action and joined in the motion; and attached to the motion was a copy of the pleading they proposed to file. It set forth four causes of action. The first and second were clearly of a supplemental character. The first was in favor of Meredith B. Davis and was substantially the same as the first cause of action previously pleaded by her except that it set forth the supplemental facts relating to the birth of the child and the medical and hospital expenses incurred at the time of its birth. The second was in favor of the child to establish its paternity and to compel defendant to support it during minority. But the third and fourth causes of action were purely amendatory in their nature. They were in favor of Meredith B. Davis and merely restated in somewhat different form the causes of action for seduction and breach of promise to marry. The motion for leave to file the proposed third complaint came on for hearing before a different judge and the motion was denied. In view of the foregoing state of the record as it was then presented to the second judge, it would be wholly unreasonable to hold that he abused his discretionary power in denying leave further to amend, even though the proposed third complaint may have stated a good cause of action, for plaintiff already had been given three opportunities to file a good complaint for breach of promise to marry and had failed, in fact on two occasions had declined, so to do.

Nor can it be fairly said that there is anything inconsistent or anomalous in drawing a distinction between the first two causes of action set forth in the proposed third complaint and the cause of action for breach of promise to marry. As stated, the first two causes of action covered facts purely of a supplemental character, namely, the circumstances attending the birth of the child, which of course could not have been set forth in the former complaints because the event had not yet happened. Those two causes of action were therefore governed by a different code section, to-wit: Code of Civil Procedure, section 464. Moreover, they were causes of action having for their purpose the establishment of the paternity of an illegitimate child, and the responsibility for its maintenance and support; and as hereinbefore stated the public is inherently interested in actions of that class, in furtherance of which courts have shown much liberality in permitting amendments in order to accomplish the purposes for which the actions are brought. But certainly a personal action for the recovery of damages for breach of promise to marry does not fall in that class. Quite to the contrary, such actions continued to grow in such disfavor in this state that in 1939, California, like many other states, enacted a law abolishing the right to bring them. It is interesting to note that such law was enacted by the legislature just prior to the commencement of this action, and that it became effective more than three months prior to the application for leave to file the third complaint. However, by virtue of the saving clause in the law, plaintiff's cause of action did not abate.

The lower court is ordered to permit the filing of the first and second causes of action of the supplemental complaint. In all other respects the judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

HOYT et al. v. BOARD OF CIVIL SERVICE COMMISSIONERS OF CITY OF LOS ANGELES et al. *

Civ. 12029.

District Court of Appeal, First District, Division 1, California.

June 3, 1942.

Hearing Granted July 30, 1942.

1. Statutes 🔑219

Practical construction of a statute can only be resorted to in order to clear up uncertainties and ambiguities.

2. Statutes 🔑219

The construction of a statute by an administrative board cannot change its clear language or its plain meaning.

3. Statutes 🔑219

If meaning of statute is doubtful, the construction put upon it in actual administration by the officers entrusted with that administration should be given weight by the courts in determining its meaning, but if its meaning is not doubtful and the regulations are in conflict with that meaning, they are void.

4. Statutes 🔑206

In construing a statute, if possible, effect must be given to each sentence, phrase and word thereof.

5. Statutes 🔑202, 206

Such a construction should be given to a statute as will actively employ, give force to and preserve every part thereof, and unless exigencies of situation as presented from a consideration of the statute as a whole imperatively demand that some word, phrase or sentence thereof be discarded or rendered useless, or deprived of meaning, no such parts should ever be considered unnecessary or as surplusage. Code Civ.Proc. § 1858.

6. Municipal corporations 🔑218(11)

Where civil service section of city charter provided for reserve list to include employees suspended after January 1, 1928, employees suspended prior to that date and who made written request to have names placed on list, and employees suspended after section took effect on May 15, 1933, and provided that names in first two groups should remain on reserve list until regularly restored to position, name of employee suspended after January 1, 1928, but before May 15, 1933, could not be stricken from the reserve list.

7. Municipal corporations 🔑218(11)

Where city charter provided that names of suspended employees should remain on reserve list until again certified for appointment, Board of Civil Service Commissioners did not have power to change the law.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for declaratory relief by Samuel H. Hoyt and others against the Board of Civil Service Commissioners of the City of Los Angeles, etc., and others. Judgment for defendants and plaintiffs appeal.

Reversed.

Arthur Lasher, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and George William Adams, and Louis A. Babior, Deputy City Attys., all of Los Angeles, for respondents.

KNIGHT, Justice.

This action for declaratory relief involves a controversy which has arisen between plaintiffs and the Board of Civil Service Commissioners of the City of Los Angeles, over the construction that shall be placed on section 125(b) of the Los Angeles city charter. Judgment was given for defendants, and plaintiffs appeal.

The first question presented relates to plaintiffs' rights to remain on a reserve list for more than five years after being suspended from employment with the city by reason of causes other than personal delinquency. The cause was tried on a stipulation of facts, and the following are the events which led up to the bringing of the action, as they appear from the stipulation and the pleadings: Prior to 1926, plaintiffs, after having passed competitive examinations, were duly and regularly appointed to position in the office of the city engineer, served their probationary periods, and their appointments became complete. In February and March of 1932 they were suspended from employment by reason of lack of work, lack of funds, and abolishment of positions. In 1933 the electorate of the city added a new section to the charter, section 125. It became effective May 15, 1933, and subdivision (b) thereof is as follows: "Sec. 125. In addition to all other matters, the board [of civil service commissioners] shall by its rules provide for: (a) * * * (b). The establishment in each class in each office, department or bureau of the City or major division established in and by a department having control of definite revenues and funds of a reserve list which shall consist of the names of those persons who have been theretofore regularly appointed to, and have served beyond the probationary period in or have been regularly promoted to a position in such class and have been suspended from their positions since January 1, 1928, for causes other than personal delinquency, whether for lack of funds, lack of work, abolishment of position or otherwise; provided, that any person in the classified civil service who has served therein since January 1, 1928, and was suspended for causes other than for personal delinquency, shall be entitled upon his written request therefor, to have his name placed upon the reserve list in each such class-group in which he was regularly appointed and served beyond the period of probation and from which class he was suspended prior to January 1, 1928. Each person whose name appears on the reserve list, until regularly restored to a position in his class in the office, department, bureau or major division from which he was suspended as hereinbefore provided for in this section, shall be certified for appointment, as in this section provided for, to a position in his class in the office, department, bureau or major division from which he was suspended; *provided, that after this section takes effect, the name of any person, except as in this section provided for, who has been out of the service of the city for more than five years shall be permanently stricken from the reserve list by the board.* During suspensions other than for personal delinquency, the name of the person so suspended shall be placed and retained on the reserve list, as in this section provided for, in each class in each office, department, bureau or major division in which such person has served beyond the period of probation and from which he has been suspended for any cause other than personal delinquency." (Italics added.)

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* Subsequent opinion 132 P.2d 804.

In the exercise of the rule making power thus granted by section 125 the commission adopted rule XIX, and section 3 thereof provided: "Names of persons shall be stricken from the reserve or reemployment lists when said persons have been out of the employ of the City five (5) years."

After each of the plaintiffs had been out of the service of the city more than five years, the commission struck his name from the reserve list for the class from which he had been suspended, and refused, to restore his name to such reserve list. Within three years after the names of plaintiffs had been stricken from the reserve list, all of the plaintiffs except Fred A. Thomas made application for reinstatement to register as eligibles for the class from which they had been suspended; the board of public works approved said applications and transmitted them to the commission, and in each instance the commission denied the application for reinstatement.

The dispute centers upon the italicized portion of section 125 (b), to wit: "provided, that after this section takes effect, the name of any person, except as in this section provided for, who has been out of the service of the city for more than five years shall be permanently stricken from the reserve list by the board." Respondents contend that the presence therein of the phrase "except as in this section provided for" creates an ambiguity; that said phrase should be disregarded as surplusage, and the contemporaneous administrative construction of said provision should be adopted; that without that phrase, the section means that *in all cases* where a person has been out of the service of the city for more than five years his name shall be stricken from the reserve list; or, as an alternative, that the name of any person who had been out of the service of the city for more than five years *after* the section took effect should be stricken from the reserve list, in either of which cases, argue respondents, the plaintiffs are not entitled to have their names on the list because they were suspended in 1932; therefore the five years expired in 1937—or under the alternative interpretation, in 1938, and this action was not commenced until June, 1940.

[1-5] However, as pointed out in Montgomery v. Board of Admin., etc., 34 Cal. App.2d 514 at page 520, 93 P.2d 1046, 94 P.2d 610, practical construction of a statute can only be resorted to in order to clear up uncertainties and ambiguities. Hodge v. McCall, 185 Cal. 330, 197 P. 86;

People v. Sinicrope, 109 Cal.App.Supp. 757, 288 P. 61. The construction of a statute by an administrative board cannot change its clear language or alter its plain meaning. Hodge v. McCall, supra; People v. Kerber, 152 Cal. 731, 93 P. 878, 125 Am.St.Rep. 93; People v. Sinicrope, supra. In other words, if its meaning be doubtful, then the construction put upon it in actual administration by the officers intrusted with that administration should be given great weight by the courts in determining its true meaning. But if its meaning be not doubtful, and the regulations are in conflict with that meaning, they are simply void. Hodge v. McCall, supra. Furthermore, one of the important rules of statutory construction is that, if possible, effect must be given to each sentence, phrase and word thereof; that is to say, that such a construction should be given to a statute as will actively employ, give force to, and preserve every part thereof; and in that connection, unless the exigencies of the situation as presented from a consideration of the statute as a whole imperatively demand that some word, phrase or sentence thereof be discarded, or rendered useless, or deprived of meaning, no such part should ever be considered unnecessary or as surplusage. In re Estate of Garthwaite, 131 Cal.App. 321, 21 P.2d 465; 23 Cal.Jur. 758, and authorities there cited. See, also, Code Civ.Proc. § 1858; Ahern v. Livermore Union H. S. Dist., 208 Cal. 770, 284 P. 1105; Schrader v. City of Los Angeles, 19 Cal.App.2d 332, 65 P.2d 374; Fresno, etc., School Dist. v. De Caristo, 33 Cal.App. 2d 666, 92 P.2d 668.

[6] Upon analyzing the provisions of said section 125(b) it will be seen that the reserve list provided for therein shall include employees suspended both prior to and after the date on which section 125 became effective, to wit, May 15, 1933, and that said list shall include three distinct groups of employees: first, those suspended after January 1, 1928 (admittedly plaintiffs belong to this group); secondly, those suspended prior to January 1, 1928, but who served the city after that date; third, those who were suspended after the section took effect (May 15, 1933). The names of the first group are automatically placed on the reserve list. Those of the second group are placed on the list on written request. The section then expressly provides in clear language that as to those two groups, their names shall remain on the reserve list until regularly restored to positions in the class in the office from which they were suspended. The section then goes on to provide "that after this section takes effect, the name of any person, *except as in this section provided for,* who has been out of the service of the city for more than five years shall be permanently stricken from the reserve list by the board." (Italics ours.) Obviously, if it had been the intention to have the five-year limitation include all three groups of suspended employees, no exception whatever would have been inserted in the provision. The italicized phrase would have been omitted entirely. It would seem clear, therefore, that the very purpose of inserting the phrase was to eliminate from the operation of the five-year limitation the names of suspended employees already therein provided for, namely, those in the first and second groups. To arrive at any other conclusion would require the reading out of the charter the exception the people of the city have placed therein, and of course this may not be done, because by so doing the law itself would be changed.

[7] Respondents argue that the rejection of the contemporaneous administrative construction contended for by them would lead to absurd results in that it would permit the names of suspended employees included in the group to which plaintiffs belong to remain on the reserve list indefinitely. However, it will be noted that the charter itself provides that their names shall there remain until again certified for appointment to a position in the class and in the office from which each was suspended; and that being so, the commission would not have the power to change the law. As said in Haub v. Tuttle, 80 Cal. App. 561, 251 P. 925, 927, "The fact that said commission has operated for a number of years under the interpretation appellants are contending for here cannot be held to affect the present legal situation, for the reason that the exercise of powers by city officers, in excess of their authority, for a great length of time, will raise no presumption of a grant to the city of such powers. Vernon Irr. Co. v. City of Los Angeles, 106 Cal. 237, 39 P. 762. To the same effect is the case of City of Corona v. Merriam, 20 Cal.App. 231, 128 P. 769."

In view of the conclusion reached on the foregoing determinative issue, it becomes unnecessary to consider the other ques tions presented by the appeal. The judgment is reversed.

PETERS, P. J., and BRAY, J. pro tem., concurred.

52 Cal.App.2d 297

PAILLET v. VROMAN.

Civ. 11821.

District Court of Appeal, First District, Division 1, California.

May 28, 1942.

Rehearing Denied June 27, 1942.

Hearing Denied July 23, 1942.

1. Dismissal and nonsuit 🔑50

A waiver for an indefinite time of statutory requirement that action be brought to trial within five years after answer filed is not invalid as being contrary to "public policy" as declared in the statute. Code Civ. Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Continuance 🔑9

The right of interested litigants by stipulation in writing to postpone the trial of an action is not curtailed by any constitutional provision. Code Civ.Proc. § 583.

3. Dismissal and nonsuit 🔑50

A waiver of a statutory requirement that action be brought to trial within five years after answer filed may be continuous. Code Civ.Proc. § 583.

4. Appeal and error 🔑927(2)

Where record on appeal was not complete, it must be assumed that the facts presented on the hearing on motion to dismiss for failure to comply with statutory requirement that action be brought to trial within five years after answer filed supported trial court's denial thereof. Code Civ.Proc. § 583.

5. Pleading 🔑166

Want of consideration is a matter of "defense" which, if alleged, is deemed denied.

See Words and Phrases, Permanent Edition, for all other definitions of "Defense".

6. Pleading 🔑4

The character of a pleading is to be determined by its content rather than under a selected designation.

7. Pleading 🔑35, 166

In action to recover deficiency judgment for balance due on a note, where answer in addition to alleging affirmatively a legal defense of want of consideration set forth as a "further separate defense" want of consideration as ground for cancellation of note, such separate defense invoked equitable principles and could be disregarded as "surplusage" not requiring answer by plaintiff. Civ.Code, § 3412.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

8. Bills and notes 🔑476(1)

An answer alleging that note sued upon was given without any consideration states a good defense without the insertion of probative facts.

9. Bills and notes 🔑92(1)

Where loan was made and renewed through real estate broker with the belief on the part of lender that borrower was in fact owner of realty conveyed in trust as security for the loan, whereas in fact he was owner thereof in name only, the fact that borrower received none of the proceeds of loan did not render note given therefor void for want of consideration, since detriment suffered by lender constituted "adequate consideration".

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Consideration".

10. Usury 🔑42

A note requiring payment of interest in advance at the rate of 1 per cent. per month provided for "usurious interest". Usury Law, § 3; St.1919, p. lxxxiii.

See Words and Phrases, Permanent Edition, for all other definitions of "Usurious Interest".

11. Usury 🔑78

Generally, where a note provides for usurious interest the payee is entitled to no interest. Usury Law, § 3, St.1919, p. lxxxiii.

12. Usury 🔑76

That an instrument requires payment of usurious interest does not render the entire instrument void. Usury Law, § 3, St.1919, p. lxxxiii.

13. Limitation of actions ⚷41

Where lender brings an action to recover an indebtedness, none of the usurious payments, nor payments on renewal notes, are barred by limitation so as to preclude their use in the reduction of principal debt. Usury Law § 3, St.1919, p. lxxxiii.

14. Usury ⚷12

Where promissory note upon its face disclosed that the interest charged violated usury law, whether lender intended to violate usury law was immaterial. Usury Law, § 3, St.1919, p. lxxxiii.

15. Usury ⚷137

The usury law imposes a statutory penalty upon the receipt of usurious interest, and in determining whether payee who actually received usurious interest was liable therefor it was immaterial whether payments were directly made by the person legally liable as the original maker of the note or by a third person in his behalf. Usury Law, § 3, St.1919, p. lxxxiii.

16. Usury ⚷103

In action against the person legally liable as original maker of a note, if such maker was an innocent dupe and did not fraudulently insert a usurious rate of interest for the purpose of defeating an action for interest on the note, he was not "estopped" from urging the defense of usury. Usury Law, § 3, St.1919, p. lxxxiii.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

17. Appeal and error ⚷717

In order to discover process by which trial judge reached his conclusion, reviewing court could consider in conjunction with the evidence in the transcript on appeal trial judge's views expressed at the close of trial for the purpose of indicating the findings that should be prepared.

18. Usury ⚷103

Where maker without any intent to defraud lender and without receiving any proceeds of loan, but acting as the innocent dupe of real estate broker through whom loan was negotiated, signed note as maker and permitted title to realty conveyed in trust as security for loan to stand in his name as an accommodation for broker, maker was not "estopped" from urging defense of usury in action by lender to recover deficiency judgment for balance due on note. Usury Law, § 3, St.1919, p. lxxxiii.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Suit by Frank Paillet against Martin A. Vroman to recover a deficiency judgment for amount due on promissory note after sale of property subject to trust deed given to secure payment of the note, wherein defendant filed a cross-complaint. From a judgment in favor of plaintiff, defendant appeals.

Judgment reversed.

Russell P. Tyler and Herbert Pothier, both of San Francisco, for appellant.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for respondent.

WARD, Justice.

This is a suit for the collection of a deficiency judgment. The complaint was filed on November 28, 1927; an answer and cross-complaint on January 20, 1928; an amended answer and cross-complaint on the 24th of February, 1928, and an answer to the cross-complaint on May 5, 1928. On June 22, 1932, a stipulation was entered into between the parties extending the time within which the action might be brought to trial "to a date subsequent to February 24, 1933," the stipulation further reciting that it was intended as a waiver of section 583 of the Code of Civil Procedure and of "the right, if any, to move at any time to have this action dismissed for want of prosecution." On January 29, 1935, the parties further stipulated "that said defendant may withdraw said jury fees without waiving his right of trial by jury, and that when said action is set for trial at some subsequent date that he will then have a right to invoke the rules of the above entitled court applicable to the payment of jury fees." A motion by defendant to dismiss the action, based upon the provisions of section 583 of the Code of Civil Procedure was denied on August 14, 1939, and, following trial, judgment for plaintiff was entered on or about February 28, 1941.

The deficiency judgment arose in connection with a note, secured by a deed of trust, purportedly given plaintiff by defendant and appellant. The negotiations in the matter of the loan were carried on by a real estate broker named Shadburne through whom plaintiff was in the habit of making loans on real property. When necessary, Shadburne arranged for renewals, procuring any additional cash necessary therefor from plaintiff. He was also entrusted with the preparation of the papers in connection with the loans and passed upon their legal sufficiency. The note out of which this action arose, signed by defendant, also a client of Shadburne, was dated December 22, 1923. It was in the sum of $16,500 and bore interest at the rate of 1 per cent per month, payable in advance. No interest was paid on the note after January 18, 1927. On October 13, 1927, following proceedings in the matter, the trustee sold the property secured by the deed of trust to plaintiff for $4,000. After deducting expenses of sale and counsel fees, the balance ($3,747.25) was applied to the payment of interest from January 18, 1927, to the date of sale, the remainder, $2,289.75, being credited against the principal, leaving unpaid $14,210.25 for which amount, but without interest, plaintiff recovered judgment.

Appellant contends that the action should have been dismissed because not brought to trial within five years of the date of filing the answer; that a motion for judgment on the pleadings should have been granted; that the transaction involved the procuring of a note by fraud on the part of plaintiff's agent; that the note was without consideration; that it and the accompanying deed of trust were affected with usury, and that he is not estopped to plead the usury statute.

At the time the action was brought, section 583 of the Code of Civil Procedure required actions to be brought to trial within five years after answer filed, unless by written stipulation of the parties the time was extended. Incidentally, while the above stipulations are not a part of the record herein, they have been referred to in the briefs of both appellant and respondent.

It is appellant's contention that since no extension was obtained on motion, the stipulation did not have the effect of extending the statutory period. The first stipulation is an indefinite waiver of the provisions of section 583. Bank of America, etc., v. Superior Court, 22 Cal.App.2d 450, 71 P.2d 296; Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 219 P. 1006; Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App.2d 636, 116 P.2d 458.

[1-4] Appellant further contends that an agreement of waiver for an indefinite period is not valid. Unless a waiver for an indefinite time for bringing an action to trial is against public policy, his position is not well taken, but in this respect the statute (§ 583, Code Civ. Proc.) is a declaration of public policy unless it be repugnant to a constitutional provision. Carr v. Kingsbury, 111 Cal.App. 165, 295 P. 586; Winklemen v. Sides, 31 Cal.App.2d 387, 88 P.2d 147; Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674; S. L. Jones & Co. v. Davis, 65 Cal.App. 164, 223 P. 560. Our attention has not been called to any constitutional provision that curtails the right of interested litigants by stipulation in writing to postpone the trial of an action. A waiver may be continuous. Brownrigg v. DeFrees, 196 Cal. 534, 238 P. 714; Dexter v. Pierson, 214 Cal. 247, 4 P. 2d 932. The above reference to statements and admissions in the appellant's briefs is simply to indicate that the point is without merit, but a sufficient answer to appellant's contention is that the record on appeal is not complete, and it must be assumed that the facts presented on the hearing of the motion to dismiss supported the trial court's denial thereof.

[5] In connection with the claim that the court erred in denying appellant's motion for judgment on the pleadings, it is urged that the matter set forth in the answer as "a further separate defense" constituted matter which should have been answered. The "answer" includes a claim for recovery of alleged usurious interest. This claim is also set up by way of counterclaim and cross-complaint, which plaintiff did answer. An examination of the "answer" indicates that defendant claims the note in question was executed for the accommodation of Shadburne and plaintiff who actually owned the real property on the security of which the loan was purportedly made to Vroman; that Vroman never had any interest in the property, but at Shadburne's request consented to have title to the same stand of record in his name, and to execute the note so secured. Appellant claims that the transaction was therefore without consideration,—a matter of defense which, if alleged, is deemed denied. The answer contained a prayer for the cancellation of the instrument and that it be declared null and void.

[6-8] Appellant urges that by reason of this prayer the defense becomes an action under Civil Code, section 3412, under which an instrument may be "delivered up or cancelled." The character of a pleading is to be determined by its content rather than under a selected designation. Robertson v.

Maroevich, 42 Cal.App.2d 610, 109 P.2d 708; Cornblith v. Valentine, 211 Cal. 243, 294 P. 1065; McPheeters v. McMahon, 131 Cal.App. 418, 21 P.2d 606. The matter in question set forth "as a further separate defense," whether or not a subject for the application of section 3412, invokes equitable principles. In Shain v. Belvin, 79 Cal. 262, at pages 263, 264, 21 P. 747, an action upon a promissory note, the court said: "The sole point made is that the document headed 'Answer' contains a cross-complaint, and that inasmuch as the plaintiff filed no answer thereto the defendant should have had judgment thereon by default. The answer contains several denials, and proceeds as follows: 'And, for a further and separate answer and defense to said action, defendant avers, by way of cross-complaint,' in substance, that the note was without consideration; and then, 'for a further and separate answer and defense to the complaint herein, avers, by way of cross-complaint,' two facts and a conclusion which, when taken in connection with the other pleadings, tend to show the thing previously averred, viz., that the note was without consideration. The document concludes with a prayer 'that said note be delivered up for cancellation, for general relief, and for costs.' The judgment in favor of the plaintiff was clearly right. In the first place, the defendant's pleading does not state facts sufficient to constitute a cause of cross-complaint. Assuming for the purposes of the case that there may be circumstances under which a note which is past due may be ordered to be delivered up and cancelled, on the ground that it was without consideration, it seems clear that when the holder brings an action upon it (in which, as a matter of course, he would be entitled to a jury trial) the defendant cannot take the case away from a jury and remove it to the domain of equity, by averring affirmatively a legal defense to the action, and praying for equitable relief. * * * If matter is pleaded as a defense, it is denied by force of the statute; if it constitutes a cross-complaint, and is pleaded as such, it requires an answer from the plaintiff. It is inconsistent to say that the same matter does and does not require to be answered. The pleader should take one ground or the other, so that his adversary may know how to proceed. If he, as here, 'for further and separate answer and defense to the complaint, avers, by way of cross-complaint,' etc., the rule that a pleading must be construed against the pleader applies, and as against him it may be treated merely as a defense. The words 'by way of cross-complaint' may be treated as surplusage. Meeker v. Dalton, 75 Cal. 154, 16 P. 764." Luse v. Peters, 219 Cal. 625, 28 P.2d 357. If it be deemed simply a pleading, showing facts going to the question of want of consideration, that subject, namely, consideration, had been sufficiently pleaded by the respective parties theretofore. An answer which alleges that a note sued upon was given without any consideration states a good defense, without the insertion of probative facts. First-Trust Joint S. L. Bk. v. Meredith, 5 Cal.2d 214, 53 P.2d 958.

Appellant contends that Shadburne was respondent's agent and that there was no valid delivery of the instrument. In the amended answer and cross-complaint, he denies that there was an execution or delivery of the promissory note for "a valuable, or any consideration." In the answer and further separate defense it is alleged: "That on or about the 22nd day of December, 1923, said defendant Martin A. Vroman, made, executed and delivered unto said plaintiff a promissory note in words and figures. * * *" Assuming that appellant signed the note and deed of trust as an accommodation to Shadburne, still it must be admitted that, for the purpose of giving effect thereto, it was intended that the instruments should be delivered.

There is evidence that Shadburne informed appellant he would not be held liable; that his (appellant's) consent to having the property stand in his name and to giving a note secured by deed of trust represented an accommodation to respondent, made "for the purpose of dressing up the value of the property." Appellant's contention is that there was fraud by respondent or his agent in obtaining the instrument, and that the fraud of an agent is imputed to his principal.

There is no evidence that respondent perpetrated a fraud, and on the subject of agency the court, upon evidence from which a reasonable inference to that effect could be drawn, found: "That it is not true that, at the time of the execution of the note set forth in said complaint, or ever, or at all, said George D. Shadburne, Jr., was acting as the agent of plaintiff in loaning money on real property in said city and county of San Francisco or in the purchase of real property therein; that at all of said times said George D. Shadburne, Jr., was a real estate broker, and as such would offer to plaintiff, as the proposed lender, such loans on real estate, but that plaintiff was himself passing upon and handling his loan transactions; that at said times defendant Shadburne acted as plaintiff's agent only in the collection of interest and/or installments of principal on loans theretofore made by plaintiff." As to the consideration for the note, the court found "that there was a good and valid consideration for the execution by defendant of said note and deed of trust; that defendant was then already indebted to plaintiff in a sum exceeding $14,000, which amount, together with additional advances made by plaintiff at the time of the execution of said note, represented said sum of $16,500; that plaintiff, at the instance of said Shadburne, (the latter acting as a broker), had theretofore made various loans to defendant and to others on the security of real property in San Francisco; that the amounts of such earlier loans, when repaid, would be again loaned, such new loan being secured by the same or other real estate, with the result that, on July 12, 1922, defendant had executed to plaintiff his note for $14,000 secured by a deed of trust of the real property described in said complaint; that the note referred to in said complaint was in fact partly given in renewal of said loan of July 12, 1922; that there was a further consideration for the note referred to in said complaint in that the same, by its terms, was payable one year after the date thereof; that it is not true that plaintiff, when he accepted said last-mentioned note, or at the time of the execution of the deed of trust by which said note was secured, knew that defendant had no right, title or interest in said real property, or that he received nothing for the execution of said note and deed of trust; that, to the contrary, plaintiff then believed and understood that defendant was the actual owner of said real property, both in fact and as of record, and that he was a responsible borrower possessed of substantial means."

[9] The evidence shows that from time to time loans to defendant had been made, renewed or increased, any increase in amounts being from funds held by Shadburne for respondent or additional money advanced by the latter. The detriment suffered by the payee has been held to be adequate consideration. In Crocker Nat. Bank of San Francisco v. Say, 209 Cal. 436, 440, 288 P. 69, 71, the court said: "The fact that the defendants personally did not receive the proceeds of the note would not, of course, render the note void for want of consideration." Casner v. San Diego T. & Sav. Bank, 34 Cal.App.2d 524, 94 P.2d 65; Seth v. Lew Hing, 125 Cal.App. 729, 14 P.2d 537, 15 P.2d 190; Bridge v. Ruggles, 202 Cal. 326, 260 P. 553.

[10-11] This leaves for determination defendant's counterclaim for elimination of the usurious interest. The note, prepared by Shadburne, provided for usurious interest in that it required payment in advance at the rate of 1 per cent per month. Generally where a note provides for usurious interest the payee is entitled to no interest. The court did not determine the amount of recovery which might have been allowed after deduction of the usurious interest for the reason that it found Shadburne would have been precluded from recovering any interest on account of the usurious character of the transaction, and that defendant occupied no better position in this regard than Shadburne would have occupied had he (Shadburne) assumed record ownership of the property and personally executed the note and deed of trust.

[12, 13] Referring to the Usury Act, Stats. 1919, p. lxxxiii, § 3, it was said in Haines v. Commercial Mortgage Co., 200 Cal. 609, 619, 254 P. 956, 959, 255 P. 805, 53 A.L.R. 725, that "the context of the act gives it more of the rating of an action for debt and therefore subject to offsets and counterclaims by defendants." The entire instrument does not become void because of its usurious feature. Baker v. Butcher, 106 Cal.App. 358, 289 P. 236; Rice v. Dunlap, 205 Cal. 138, 270 P. 199. As between those of equal wrong, the position of the borrower is the stronger. Westman v. Dye, 214 Cal. 28, 4 P.2d 134; Norris v. York, 105 Kan. 448, 185 P. 43. Where the lender brings an action to recover an indebtedness, none of the usurious payments, nor payments on renewal notes, are barred by limitation so as to preclude their use in the reduction of the principal debt. Westman v. Dye, supra; District Bond Co. v. Haley, 2 Cal.2d 308, 41 P.2d 319; Taylor v. Budd, 217 Cal. 262, 18 P.2d 333. Respondent takes no exception to these principles, but contends that appellant "stands in Shadburne's shoes, and cannot assert any defense not available to the latter." We cannot approve this theory as applied to the facts of the present case. To do so would mean that appellant must assume responsi-

bility for the sins of Shadburne, when, as expressed by the court, the defendant, as the result of circumstances, was merely a "dupe" of Shadburne, and, as has often been said, "circumstances alter cases."

Respondent's position is stated as follows: "In a transaction, then, in which Shadburne was employed to draw the papers for respondent, but in which, unknown to respondent, he was in reality the principal and the real party in interest, would he have been allowed to assert that, solely because of the manner in which he had drawn the papers and because of his mistake or fraud, he had not become obligated to pay any interest whatever, but that, to the contrary, any payments he might have made, though at the time explicitly stated to be for interest and received by respondent in that belief, would in fact be applied in reduction and diminution of the principal, and that respondent would not be entitled to interest in any amount?"

[14] The findings purport to show that there was no intention by plaintiff to violate the usury law, but in a case such as this where upon its face the promissory note discloses that the interest charged does in fact violate such law, intent is immaterial. Wood v. Angeles Mesa Land Co., 120 Cal. App. 313, 7 P.2d 748; North v. Cecil B. DeMille Productions, Inc., 2 Cal.2d 55, 39 P.2d 199; Martin v. Kuchler, 212 Cal. 536, 299 P. 52. The cases cited by respondent (Perry v. Shelby, 196 Ark. 541, 118 S.W.2d 849; Cooper v. Gilbert, 10 Cir., 40 F.2d 260) and others, in respect to the importance of "intent", are not entirely in harmony with the California rule.

[15, 16] Respondent contends that the interest payments made were paid by Shadburne and not by appellant, and that the latter, as an original maker of a usurious note, is therefore precluded from rights and privileges under section 3 of the act relating to usury. Stats. 1919, p. lxxxiii. If the usurious interest was received by respondent, we can see no difference whether the payments were directly made by appellant or by a third party on his behalf, providing appellant was legally liable as the original maker of the promissory note. A statutory penalty is imposed upon the receipt of usurious interest, and not upon the source of its payment. If defendant was an innocent "dupe" in the transaction and not a corrupt, collusive confidante who fraudulently inserted a usurious rate of interest for the purpose of defeating an action for interest on the note (66 C.J., p. 278, § 257), he is not estopped to urge the defense of usury. The determination of whether Vroman was a party to a collusive, fraudulent transaction, requires a study of the findings and the evidence. The nearest approach in the findings to a suggestion that defendant may have been fraudulently connected with the transaction appears as follows: "* * * that defendant, in signing said note and deed of trust, allowed himself to be substituted in said Shadburne's place as the party to be charged."

[17] After respondent rested in rebuttal, the trial court, for the purpose of indicating the findings that should be prepared, expressed its views as to the transaction and the interest of the respective parties therein as follows: "* * * this controversy revolves around the perfidy and bad faith and corruption of George D. Shadburne, Jr. * * * I have no doubt at all that both Mr. Paillet and Mr. Vroman have come into court in perfect good faith, and that they are telling the truth according to their perception of the facts, in line with what they know about those facts. I do not think either one of these parties is acting in bad faith at all. On the one hand, I think Mr. Paillet, as a result of the chicanery and duplicity of Shadburne, and reposing undeserved confidence in him, did make a loan and parted with actual cash in making such loan, on the Sixth Street property. I am willing to make a finding to that effect. * * * I feel quite sure, and I am willing to find, that Mr. Vroman never got any of this money, that he never benefited or had any interest in the transaction, that he never had any financial interest himself in this Sixth Street property or the loan or the money derived from the loan on that property. I am deeply confident of that fact. Mr. Paillet was a large lender and an excellent client, or dupe, you might say, of Mr. Shadburne. Mr. Vroman was a small client and a smaller dupe of the same individual. * * * I feel that Mr. Vroman insofar as he was an instrument to this and other transactions in which his name was used, was simply employed by Shadburne as the means of perfecting, accomplishing his nefarious ends. * * * The evidence here, Mr. Paillet's own evidence, is to the effect that he never saw Mr. Vroman, never met him, until after Mr. Shadburne had died, when Mr. Vroman, according to Mr. Paillet's testimony, called

upon him to discuss what Mr. Paillet knew about the man who had mutually victimized them." The above quotation has been considered in conjunction with the evidence as it appears in the transcript on appeal for the purpose of discovering the process by which the trial judge reached his conclusion. Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273; Estate of Yorba, 176 Cal. 166, 167 P. 854.

[18] That the trial court was incorrect in holding that defendant was estopped from availing himself of the defense of usury and in rendering judgment for $14,210.25, is further supported by the fact that, at the opening of the trial, in a statement of the legal issues involved and the facts to be presented, the attorney for the plaintiff said: "As I understand it, the sum I just mentioned, $6,647.75, is all the plaintiff can recover in this action. We can't recover interest for any period of time under the decisions, because the covenant to pay interest was invalid." In substance this statement was repeated during the trial.

In the face of the record it is necessary to remand the case to the superior court for the purpose of rendering judgment for an amount to be determined in accordance with the views expressed herein.

The judgment is reversed.

PETERS, P. J., and KNIGHT, J., concurred.

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52 Cal.App.2d 368

WILTON v. HENKIN et al.

Civ. 13406.

District Court of Appeal, Second District, Division 1, California.

May 29, 1942.

Rehearing Denied June 22, 1942.

Hearing Denied July 27, 1942.

1. Municipal corporations 🔑592(1)

A municipality has exclusive right to legislate over internal municipal affairs, while state legislature has exclusive jurisdiction to legislate upon matters of state concern. Const. art. 11, § 11.

2. Municipal corporations 🔑592(1)

An enactment of the state legislature with regard to matter of concern to both the state and the municipalities thereof voids any act of a municipality in conflict therewith. Const. art. 11, § 11.

3. Municipal corporations 🔑592(1)

Matters of concern to both the state and the municipalities thereof may be regulated by a municipality until the state acts, and the state legislature has no power to forbid the municipality to so act. Const. art. 11, § 11.

4. Automobiles 🔑6

The provision of Vehicle Code that division 9 thereof should be applicable throughout the state, and that no local authority should enact any ordinance on matters covered thereby, is not unconstitutional on ground that it forbids municipal action in a field of concern to municipalities as well as to the state, since prohibition covered only matters with regard to which state had acted. Vehicle Code § 458, St.1935, p. 164.

5. Automobiles 🔑9

The regulation of pedestrian traffic at crosswalks is a field intended to be fully occupied by state legislation, and therefore municipal ordinance prohibiting pedestrians from crossing a roadway other than by a crosswalk in any business district is void because of conflict between ordinance and provision of Vehicle Code covering that matter. Vehicle Code, §§ 560–563, St.1935, pp. 186–188.

6. Automobiles 🔑217(3)

Where city ordinance prohibiting pedestrian from crossing roadway other than by a crosswalk in any business district was void because in conflict with Vehicle Code, trial court was in error in determining that pedestrian who was struck by automobile while attempting to cross street contrary to ordinance was guilty of negligence per se. Vehicle Code, §§ 560–563, St.1935, pp. 186–188.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by I. H. Wilton against Louis Henkin and another to recover for injuries sustained when struck by an automobile driven by the named defendant. Judgment for the defendants, and the plaintiff appeals.

Judgment reversed and cause remanded.

Thomas A. Law, of Huntington Park, and Baldwin Robertson, of Los Angeles, for appellant.

Kenneth J. Murphy, Henry E. Kappler, James V. Brewer, and John K. Ford, all of Los Angeles, for respondents.

WHITE, Justice.

By this action plaintiff seeks to recover damages for personal injuries sustained by him in an automobile accident wherein the motor vehicle was driven by defendant Henkin, allegedly engaged in the service of defendant Sopp.

At the conclusion of plaintiff's case the defendants introduced into evidence, over the former's objections, two sections of a city ordinance which will be hereinafter discussed; and thereupon both defendants rested their case and moved the court for a directed verdict. In his motion defendant Henkin contended (1) that the evidence revealed no negligence on his part, and (2) that the plaintiff was guilty of contributory negligence as a matter of law; while defendant Sopp based his motion for a directed verdict on the grounds that (1) there was no proof of agency between him and defendant Henkin, (2) there was contributory negligence on plaintiff's part as a matter of law, and (3) there was no proof of negligence on the part of defendant Henkin. In granting the motion made by each defendant, the trial court said, in part:

"Of course, there is evidence here from which the defendant could be found by the jury to have been negligent, there is no question about that in my mind. On the other hand, in view of the construction that I have placed upon that ordinance I am forced to the conclusion that the plaintiff himself was guilty of negligence in attempting to cross the street contrary to the provisions of the ordinance, and I am further convinced that the proximate cause was established as a matter of law from the violation of the ordinance. In other words, he was violating the ordinance at the time he was hit. It may be that the defendant himself was negligent in cutting a corner there and driving where he did, but if they were both negligent it doesn't help the matter any, and I am forced to— * * *."

From the judgment predicated on the verdict directed in favor of the defendants, plaintiff prosecutes this appeal.

Epitomizing the evidence in the light most favorable to plaintiff, as we are required to do in considering an appeal from a judgment based upon an order directing a verdict, the record reveals that on the evening of December 22, 1939, plaintiff, a man 70 years of age, was walking in a southerly direction along a public street or alley in the business district of the city of Huntington Park. The alley upon which plaintiff was walking intersected and crossed Slauson Avenue, which is a public street extending in an easterly and westerly direction through Huntington Park. The alley is located approximately one block west of and runs parallel to Pacific Boulevard. Pacific Boulevard runs in a northerly and southerly direction intersecting Slauson Avenue, and at its intersection therewith are located automatic traffic control signals. On the evening of the accident the street lights were on and the traffic was heavy. At the intersection of Slauson Avenue and Pacific Boulevard there were marked pedestrian crosswalks across Slauson Avenue; however, there were none across Slauson where it was intersected and crossed by the alley referred to. Before stepping into Slauson Avenue plaintiff looked to his left, which was easterly toward Pacific Boulevard, waited until the traffic signals were against traffic on Slauson, and observed that there were no cars proceeding away from Pacific Boulevard. As plaintiff proceeded into Slauson he looked in front of him; however, he did not look to his right, that is, to the west. On the north side of Slauson a car was parked westerly from the mouth of the alley and to plaintiff's right. This car was parked diagonally, headed into the curb, and extending southerly into Slauson Avenue. When plaintiff had proceeded to a point between the rear of this parked car and the center of Slauson Avenue and in a course across Slauson Avenue at right angles to the curb, he was struck by an automobile driven by defendant Henkin.

There is some conflict in the evidence in regard to the speed and route of the car driven by Henkin. However, taking the testimony most favorably to appellant, it appears that Henkin, driving the car lent him by the respondent Sopp, drove on to Slauson Avenue out of Rugby Street, which enters Slauson to the west of the alley referred to, turned right into Slauson, pulling over to the center line of Slauson. Henkin continued in an easterly direction on Slauson toward the intersection of the alley with Slauson at a speed of 20 miles per hour, and when he was 60 to 70 feet west of the alley he started across the center line of Slauson. After making a left-hand turn signal, Henkin, driving at a speed of from 10 to 15 miles per hour, turned to enter the alley. In other words, Henkin was driving on the wrong side of the street for 60 or 70 feet in anticipation of making a left-hand turn, and when he made that turn he failed to go to the right of and beyond the center of the intersection of the alley with Slauson Avenue, in violation of the law.

Henkin first saw Wilton when the latter was 15 feet from the front of Henkin's car, and Wilton was not then in the path of the car. Wilton first saw Henkin when the automobile was 6 to 8 feet from him and when he was somewhere between the end of the parked car and the center line of Slauson Avenue. Wilton was struck by the left front fender of the Henkin car while continuing to walk into the street. As soon as Henkin saw Wilton he applied his brakes and stopped within 2 feet of the place of impact.

As heretofore stated, there were received in evidence over plaintiff's objection two sections of an ordinance of the city of Huntington Park. After concluding that plaintiff was guilty of contributory negligence in violating the provisions of this ordinance, the trial court directed a verdict in favor of defendants.

It is appellant's contention that the city ordinance was void because its provisions were in conflict with the California Vehicle Code, and therefore that the directed verdict was error. The pertinent sections of the ordinance, numbered 54 and 55, provide:

"No pedestrian shall cross a roadway other than by a crosswalk in any business district.

"No pedestrian shall cross a roadway at any place other than by a route at right angles to the curb, or by the shortest route to the opposite curb, except in a marked crosswalk."

Appellant contends that the subject matter treated in the ordinance is fully covered in the Vehicle Code, sections 560 to 563, inclusive, St. 1935, pp. 186–188, and that under the provisions of section 458 of said state statute the city of Huntington Park was by legislative action prevented from passing any ordinance contrary to or in enlargement upon any provision of the Vehicle Code.

Section 458 of the Vehicle Code provides that the provisions of division 9 thereof, which includes sections 450 to 604.10, "are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein."

Section 560 of said code requires that the driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any unmarked crosswalk at an intersection. Section 562 of the same code provides that a pedestrian crossing a roadway at a point other than within a marked crosswalk, or within an unmarked crosswalk at an intersection "shall yield the right of way to all vehicles upon the roadway," though the driver is not thereby relieved "from the duty to exercise due care for the safety of any pedestrian upon a roadway." Section 563 requires that between adjacent intersections controlled by a traffic control signal device or by police officers "pedestrians shall not cross at any place except in a crosswalk."

Appellant earnestly argues that he was not violating the foregoing sections of the Vehicle Code, as section 562 contemplates that the pedestrian may lawfully cross a street at a place other than within a marked crosswalk, and that section 563 thereof does not make it unlawful to cross such an intersection as here involved, because it was not between adjacent intersections controlled by a traffic control device, the nearest traffic control being one-half block away on the east at Pacific Boulevard and three and one-half blocks away on the west at Santa Fe Avenue.

[1-4] A municipality, by authority of the Constitution of California (art. XI, § 11), "may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws," and has the exclusive right to legislate over its own internal municipal affairs (In re Ackerman, 6 Cal.App. 5, 9, 91 P. 429), while on the other hand, the State Legislature has exclusive jurisdiction to legislate upon matters which are of state concern. Between those fields which are strictly municipal and others which are exclusively of state concern, there is a field which has been designated as "not strictly municipal." It is with

this intermediate field that we are here concerned, for traffic regulation is both a municipal affair, as well as being of concern to the state. The matter is of statewide interest because some streets of a municipality necessarily form an integral part of the highway network of the state. Thus this field is one with which both jurisdictions are vitally concerned in the interest of uniformity of traffic regulation throughout the state; and by virtue of the superiority of state legislation over municipal, an enactment of the State Legislature in this field of "not strictly municipal affairs" voids any act of the municipality in conflict therewith. Until the state acts, however, the field remains subject to municipal regulation, and the State Legislature has no power to forbid the municipality to so act. Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172. Respondents suggest that section 458 of the Vehicle Code is unconstitutional on the ground that this section forbids the municipality to act in this field. A careful reading of the section reveals, however, that it is merely a succinct declaration of the law as it previously existed—that municipalities shall not enact or enforce any ordinance on matters covered by the State Legislature.

Therefore, the question here presented is whether by the foregoing legislative enactments the state intended to occupy the entire field governing the subject of pedestrian rights and duties at crosswalks. If by adoption of chapter 10 of division 9 of the Vehicle Code, and particularly sections 560 and 561 thereof, it was intended by the state to fully occupy and cover the field in question, then the aforesaid provisions of the ordinance of the city of Huntington Park are invalid and unconstitutional, by reason of which fact the trial court was in error in granting a nonsuit on the ground that plaintiff was guilty of contributory negligence as a matter of law because he violated them.

[5, 6] In the case of Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 486, decided by our Supreme Court on May 1, 1942, it was decisively and unequivocally held that "the regulation of pedestrian traffic at crosswalks is a field intended to be occupied fully by the state legislation," by reason of which the Supreme Court declared unconstitutional section 80.38 of the Municipal Code of the city of Los Angeles, which section is similar in its terms to one of the provisions contained in the ordinance of the city of Huntington Park with which we are here concerned. The action of the trial court in determining that the plaintiff herein was guilty of negligence per se by reason of the violation by him of the city ordinance of Huntington Park and granting a nonsuit upon that ground must therefore be held to be erroneous, and such error requires a reversal of the judgment predicated upon the granting of a motion for a directed verdict in favor of the defendants.

By reason of the foregoing, other points presented and urged do not require discussion or consideration, because they may not arise from the evidence as presented upon a retrial.

For the foregoing reasons, the judgment is reversed and the cause remanded for a new trial.

YORK, P. J., and DORAN, J., concurred.

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52 Cal.App.2d 500

PALM v. SMITHER.

Civ. 6714.

District Court of Appeal, Third District, California.

June 5, 1942.

Hearing Denied Aug. 3, 1942.

1. Landlord and tenant 🔑28(1)

In lessor's suit to cancel lease, which contained an option to purchase leased land, on ground of fraud by lessee, evidence supported findings which were necessary to judgment for lessor. Civ.Code, § 1572, subd. 4.

2. Appeal and error 🔑1071(1)

In lessor's suit to cancel lease, which contained an option to purchase leased land, on ground of fraud by lessee, a finding that lessor was to receive, as part consideration for lease, a percentage of proceeds derived from gold secured from mining enterprise on land as royalties was harmless and could be disregarded where such finding was not supported by evidence and was not in conflict with essential findings which supported judgment for lessor. Civ.Code, § 1572, subd. 4.

3. Landlord and tenant ⇨28(1)

Evidence warranted cancellation of a lease containing an option to purchase leased land on ground that lease and option was procured by means of false pretenses by lessee respecting his intentions to prospect for minerals on land and that lease was tainted with fraud from its inception. Civ. Code, § 1572, subd. 4.

4. Contracts ⇨94(1)

The making of promises regarding material facts, which induces one to execute a contract or alter his position to his detriment, constitutes "actual fraud" which may justify rescission of a document procured by such means, and it is not necessary that each of the material alleged false statements shall be supported by evidence to warrant rescission of instrument, it being sufficient if one or more of such statements are supported by evidence. Civ.Code, § 1572, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Fraud".

5. Contracts ⇨94(1)

Ordinarily, misrepresentations regarding value of property do not furnish basis for rescission of an instrument on ground of fraud, since such estimates are usually deemed to be mere "expressions of opinion" or "trade talk".

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Talk" and "Expression of Opinion".

6. Fraud ⇨11(2)

When positive statements of value of property are made with purpose of deceiving, and statements are made under circumstances indicating that defrauded party relies on knowledge and statements of speaker and is either persuaded to make no independent investigation thereof or is not situated so that he can reasonably do so, a positive statement of value of property may become actionable as fraudulent. Civ.Code, § 1572, subd. 4.

7. Landlord and tenant ⇨28(1)

Where lessor lived at a distance from leased land and had no reasonable opportunity to investigate its value, and lessee was familiar with land and its value and told lessor that land was not worth more than a certain amount, and lessor relied on lessee's statement in executing a lease containing an option to purchase, lessee's false statement regarding value of land was a proper ground for cancellation of lease and option. Civ.Code, § 1572, subd. 4.

8. Fraud ⇨7, 58(1)

A confidential relationship need not exist to render positive misrepresentations of the value of property actionable, but such fraud must be proved by clear and convincing evidence.

9. Contracts ⇨94(1)

Ordinarily, the mere misrepresentation of the value of property, standing alone, is not entitled to much weight in a suit to rescind an instrument on ground of fraud but when the misrepresentation is accompanied by other material false representations, it is entitled to be considered in support of a judgment rescinding instrument on that ground.

10. Evidence ⇨434(6)

In lessor's suit to cancel lease, which contained an option to purchase leased land, on ground of fraud by lessee, oral evidence of surrounding circumstances under which lease and option was procured was admissible.

11. Trial ⇨105(1)

Where evidence was received without objection, objection to such evidence was "waived".

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

12. Appeal and error ⇨204(1)

One may not complain of admission of oral evidence for the first time on appeal.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Suit by Clifford Palm against Thomas M. Smither to cancel a lease with an option to purchase land and to quiet title to the land. From a judgment for plaintiff, defendant appeals.

Affirmed.

Thomas M. Smither in pro. per.

Pugh & Pugh, of Red Bluff, for respondent.

PER CURIAM.

The defendant has appealed from a judgment which was rendered against him in a suit to cancel a lease with an option to purchase land, on the ground of fraud. The action also sought to quiet title to the land in the plaintiff.

It is contended the findings and judgment are not supported by the evidence; that the court erred in receiving oral evidence of conditions which vary the terms of the written lease, and that alleged misrepresentations on the part of the lessee, with respect to the value of the property, do not constitute a cause for rescinding the lease, in the absence of proof of confidential relationship between the parties.

The plaintiff owns 80 acres of unimproved land in the vicinity of Baird in Shasta County, which he inherited from his father. He was a druggist in Marysville. He only once saw the land in question. It had never been cultivated or used for any purpose. It was situated partly within the area of the Shasta Dam reservoir site, which is a part of the Central Valleys Project. The plaintiff did not know its value. He supposed it was useless and of small value.

The defendant was an engineer in the employ of the Pacific Gas and Electric Company, at San Francisco. He had in his possession a topographical map of the reservoir property and knew that plaintiff's land was partly within that district. He knew of the accelerated values of lands affected by that enterprise. Shortly after the award of the contract for the construction of Shasta Dam the defendant made numerous trips to Shasta County. Within a few months he procured six leases of other lands within that reservoir district for the asserted purpose of prospecting for gold and other valuable minerals, although no profitable mining enterprises had been conducted in that vicinity. All of these leases included options to purchase the lands.

September 11, 1938, the defendant visited the plaintiff at Marysville and told him he was the president of a mining corporation, called the East Belt Mining Company, which was engaged in gold mining, and that it desired to lease his Shasta County land for the purpose of prospecting for gold and other precious metals. Upon inquiry, he told the plaintiff his land was of little value; that it was assessed for only $400, and that it was not worth more than $800 and that its rental value was not more than 12½ cents per acre per year. He said that if the plaintiff would give it a lease for one year, with an option to buy the land, the company would "start operations immediately, and his intentions were to put a mill on that property." He said that they "would know within a year whether there were any minerals of value upon the property," and that if they found minerals they would buy the property. The plaintiff told the defendant he had no knowledge of the value of the property, but that if Mr. Smither said it was worth only $800 he would take his word for it. Thereupon the defendant produced a form of lease and option to purchase the land, with which he had previously supplied himself. He filled in the blank portions and procured the plaintiff to sign it in his presence. He paid the plaintiff $10 for the lease, and gave him one additional dollar to pay for an acknowledgment of the document. The lease was given to the plaintiff, who returned it to the defendant several days later. It was dated September 11, 1938, and purported to lease the property to "Thomas M. Smither, Lessee" for a term of one year from the date thereof with "the privilege of renewing this lease for each year thereafter, but not beyond the 11th day of September, 1948," for the purpose of "prospecting for minerals, and such other nonagricultural purposes as said lessee may elect." The consideration mentioned in the lease is 12½ cents per acre. The document then provides that the lessee shall have an option to purchase the land for $800 at any time "before the expiration of the foregoing lease, or any renewal hereof."

When the terms of this lease were read to the plaintiff he asked the defendant why he had named himself as lessee, instead of the East Belt Mining Company, which he had said would operate the mining enterprise. The defendant replied that he intended to immediately assign the lease to that company, and that the mining work would be commenced at once.

Within sixty days after the execution of the lease the plaintiff discovered that his land was partly within the Shasta Dam reservoir district, and on November 26, 1938, advised the defendant by letter of that fact and asked him to cancel the lease, which was refused. Prior to March 2, 1939, the plaintiff was offered $1,200 for the land. On that date he wrote to the defendant, telling him that a member of the

United States Reclamation Bureau had offered him that amount for the property, and then told him that if he intended to exercise the option to purchase the land he must do so at once. This letter was not answered.

The East Belt Mining Company was merely a family organization controlled by the defendant. It failed to pay corporation taxes and was actually defunct at the time the lease was executed. It had never owned property nor was it ever engaged in any mining enterprise. The lease was not assigned to the company. On the contrary, it was recorded in the name of the defendant. Absolutely no prospecting or work of any sort was performed on the premises within the period of a year after the lease was executed, or at all. No mill was ever constructed on the property. No effort to mine the property was ever made by the defendant, or by anyone in his behalf. At the end of the year he attempted to procure a renewal of the lease, which was refused.

After serving the defendant with a notice of rescission of the lease and option, on the grounds of fraud and failure of consideration, this action to cancel the lease and to quiet title to the land was commenced. Findings were adopted favorable to the plaintiff in every respect. Judgment was thereupon rendered in his favor, canceling the lease, and quieting title in him to the land in question. From that judgment this appeal was perfected.

[1, 2] The findings and judgment are sufficiently supported by the evidence. There is one finding, with respect to an allegation of the complaint, to the effect that plaintiff was to receive, as part consideration for the lease, a percentage of the proceeds derived from gold secured from the mining enterprise, as royalties. This finding was adopted by inference. It is not supported by the evidence, but it is harmless. It is not in conflict with the essential findings which support the judgment, and it may therefore be disregarded. All of the findings which are necessary to the support of the judgment are supported by the evidence.

[3] The chief consideration for executing the lease and option to purchase the land, on the part of the plaintiff, was the prospect which it afforded of selling the property. The amount of rent which was paid was comparatively insignificant. As an inducement for executing the lease the plaintiff was assured that if minerals were found in paying quantities, the option to purchase the land would be immediately exercised. The appellant told him that mining operations would be commenced immediately, and that they intended to put in a mill for that purpose. He also said they would know within a year whether there were valuable minerals on the property. The appellant also deceived the plaintiff by asserting that he was the president of the East Belt Mining Company, which was engaged in mining enterprises, and that the lease would be assigned to the company which would immediately commence prospecting the land for minerals. The evidence shows that the plaintiff executed the lease and option to purchase the land in reliance upon those representations. None of these promises were kept. Absolutely no effort to prospect for minerals on the land was made by the appellant, or by the mining company within the year, or at all. In fact, the mining company had never owned any property or engaged in mining enterprises. On the contrary, it was a defunct corporation possessing no legal right to engage in business. Considering all the circumstances of this case, in the light of similar transactions on the part of the appellant, of which there is evidence in the record, the court was warranted in believing that the lease and option to purchase the land was procured by means of said false pretenses; that the appellant never intended to prospect for minerals on the land, but, on the contrary, that he merely tied up the title with this lease for the purpose of speculating on making a profit by selling it at an advanced price on account of the demand for lands incident to the Central Valleys Project and that the lease was tainted with fraud from its inception. Independently of the appellant's false statements regarding the value of the land, other misrepresentations of material facts furnish ample reason for canceling the lease and option on the ground of fraud. Evidently the appellant did not intend to keep the promises which he made to the plaintiff regarding the prospecting of the land for minerals. That was the chief inducement for the plaintiff to execute the lease.

[4] The making of promises regarding material facts, which induces one to execute a contract or alter his position to his detriment, constitutes actual fraud which may justify the rescission of a document procured by such means. § 1572, subd. 4,

Civ.Code; 12 Cal.Jur. 738, § 22; Wilson v. Rigali & Veselich, 138 Cal.App. 760, 33 P.2d 455; Cox v. Klatte, 29 Cal.App.2d 150, 84 P.2d 290. It is not necessary that each of the material alleged false statements shall be supported by the evidence to warrant rescission of the instrument. It is sufficient if one or more of such material false statements are supported by the evidence. Stewart v. Crowley, 213 Cal. 694, 3 P.2d 562; Wilson v. Rigali & Veselich, supra.

[5, 6] It is true that misrepresentations regarding the value of property may not ordinarily furnish ground for rescission of an instrument on the ground of fraud, for the reason that such estimates are usually deemed to be mere expressions of opinion or "trade talk." But when such positive statements of the value of property are made with the purpose of deceiving and defrauding one, and when they are made under circumstances indicating that the defrauded party relies on the knowledge and statement of the speaker and is either persuaded to make no independent investigation thereof, or is not situated so that he can reasonably do so, the positive statement of the value of property may become actionable as fraudulent. Reton v. J. D. Millar Realty Co., 132 Cal.App. 708, 23 P.2d 419; Stumpf v. Lawrence, 4 Cal. App.2d 373, 40 P.2d 920; 12 Cal.Jur. 749, § 28.

[7-9] In the present case the plaintiff lived at a distance from the land and had no reasonable opportunity to investigate the question of its value. He was a druggist at Marysville. The appellant had made frequent trips to Shasta County and he was familiar with the land in question and with land values in that vicinity. He was an engineer in the San Francisco office of the Pacific Gas and Electric Company. He told the plaintiff positively its value was not more than $800. The plaintiff told him he did not know its value, but would rely on the appellant's statement in that regard. Under such circumstances, we are of the opinion the false statement regarding the value of the land may be a proper ground for cancellation of the lease and option. It is not necessary that a confidential relationship shall exist in order to render actionable positive misrepresentations of the value of property, but it is true that such fraud under such circumstances must be proved by clear and convincing evidence. The existence of a confidential relationship merely renders it more probable that the injured party relied on the false statement regarding the value of property. Standing alone, the mere misrepresentation of the value of property is ordinarily not entitled to much weight. But when it is accompanied by other material false representations, such as occurred in the present case, we are of the opinion it is entitled to be considered in support of a judgment rescinding the instrument on the ground of fraud.

[10] The court did not err in receiving oral evidence of the surrounding circumstances under which the lease and option to purchase the property was procured in this suit to cancel the instrument on the ground of fraud. Darrow v. Houlihan, 205 Cal. 771, 272 P. 1049; Mooney v. Cyriacks, 185 Cal. 70, 81, 195 P. 922. In the Darrow case, supra [205 Cal. 771, 272 P. 1050], it is said in that regard: "The trial court permitted the defendants to introduce parol evidence in support of their separate defense in which it was alleged that the agreement of exchange, in its inception, was tainted with fraud, and that its execution was induced by fraudulent representations. Such evidence was admissible in support of that theory despite the written contract."

In Jones on Evidence, Civil Cases, 3d Ed., p. 660, sec. 435, it is said: "It may always be shown that a document in question never had any legal existence, and on this ground rests the very important exception to the general rule of exclusion, that duress or fraud in the inception of the contract may be proved, although accompanied by the most solemn formalities. Such proof does not recognize the contract as ever existing as a valid agreement, and is received, from the necessity of the case, to show that that which appears to be a contract is not and never was a contract. If the fraud is clearly proven, one of the essential elements of the contract—consent—is wanting. Thus, it may be proved by parol that any material part of the contract was fraudulently omitted or inserted by the other party * * * or that a part of the contract was not reduced to writing because of the fraud of one of the parties, in which case the whole transaction is open to explanation by parol evidence. For the purpose of proving fraud, verbal statements which are material and fraudulent, although made before or at the same time with the written agreement, may be proved.

In such case the rule that prior negotiations are merged in the written agreement does not apply."

[11, 12] Moreover, evidence of the challenged oral statements were received without objection on the part of the appellant. The objection to that evidence was thereby waived. One may not complain of the admission of such oral statements for the first time, on appeal. Caine v. Polkinghorn, 54 Cal.App. 387, 201 P. 936; Bonner v. Finney, 110 Cal.App. 518, 294 P. 466; Nunez v. Morgan, 77 Cal. 427, 19 P. 753; Tebbs v. Weatherwax, 23 Cal. 58; Inner Shoe Tire Co. v. Tondro, 83 Cal.App. 689, 257 P. 211; 92 A.L.R. 812, note; 2 Cal.Jur. 267, § 84.

The judgment is affirmed.

PEOPLE v. COSTELLO.*

Cr. 2210.

District Court of Appeal, First District,
Division 1, California.
June 3, 1942.

Rehearing Denied June 18, 1942.

Hearing Granted July 2, 1942.

1. Criminal law ⇨572

In prosecution for grand theft, evidence supporting accused's defense of alibi was so weak as to justify jury's rejection thereof.

2. Criminal law ⇨1036(1)

When an accused makes no objection at trial to any testimony offered against him, it is presumed that accused "waives" any objection he might have interposed thereto and accused cannot make his objection thereto for the first time on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Criminal law ⇨696(5)

If it is apparent from the question that an answer will contain evidence necessarily inadmissible, a motion to strike comes too late unless preceded by an objection to the question.

4. Criminal law ⇨1036(1)

In prosecution for grand theft where accused did not object to questions regarding previous arrests and convictions until after accused's cross examination was finished, objections thereto could not be made for the first time on appeal.

5. Criminal law ⇨1035(3), 1037(1)

In prosecution for grand theft where accused made no assignments regarding alleged misconduct by the district attorney or the court during the trial, accused could not urge on appeal that asking of questions regarding her previous criminal record constituted misconduct by the district attorney or the court.

6. Witnesses ⇨275(5)

In prosecution for grand theft where accused's direct examination showed the manifest untruth that during the nine years accused had been married she had been living with and was supported by her husband, questions regarding previous arrests and convictions on charges of immoral conduct and grand theft were not beyond the scope of legitimate cross-examination.

7. Criminal law ⇨1172(2)

In prosecution for grand theft, where trial court properly instructed on burden of proof, presumption of innocence, and weight and sufficiency of evidence, instruction constituting a disparaging comment on accused's defense of alibi was not prejudicial as placing burden of proof upon accused or instructing that accused was required to establish her alibi defense by a preponderance of the evidence. Pen.Code, §§ 1093, 1127; Const. art. 6, § 19.

8. Criminal law ⇨829(7)

In prosecution for grand theft, where trial court fully covered doctrines of reasonable doubt and presumption of innocence by instructions given, refusal to give accused's proposed instructions relating to defense of alibi and dealing more particularly with such doctrines was not prejudicial.

9. Criminal law ⇨1172(2)

Where basic criticism of instruction regarding defense of alibi that it contravened rule that a trial court may not comment on the facts was indulged in cases decided prior to adoption of constitutional amendment abolishing such rule and conferring upon trial court the right to comment on the evidence, the criticism theretofore directed by reviewing courts against such instructions was no longer a ground for reversal. Const. art. 6, § 19.

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* Subsequent opinion 135 P.2d 164.

10. Criminal law ⚷755½, 757(1)

Under constitutional provision authorizing trial court to instruct the jury regarding the law and make such comment on the evidence and credibility of witnesses as is necessary for determination of the case, trial court may comment upon the evidence as a whole and upon the testimony and credibility of any witness providing the comment is temperately and fairly made and is not so argumentative or contentious as giving it the character of an act of advocacy. Const. art. 6, § 19.

11. Criminal law ⚷755½

Each case involving a trial court's comment upon the evidence must necessarily turn upon its own peculiar circumstances and trial court should be cautious in the exercise of such power with a view to protecting the rights of an accused. Const. art. 6, § 19; Pen.Code, §§ 1093, 1127.

12. Criminal law ⚷1036(2)

In prosecution for grand theft, where people's witness was shown to have been convicted of a felony and then gave equivocal answers concerning use of his automobile by accused, district attorney's questions regarding such matters on cross-examination, to which accused did not object, were not erroneous.

13. Criminal law ⚷1030(1)

Where the circumstances relied upon by accused as showing trial judge's disqualification were known to accused before trial began and accused did not suggest below that trial judge was disqualified, accused could not complain on appeal that trial judge was disqualified.

14. Criminal law ⚷1030(1)

Complaint that trial judge was disqualified from trying criminal case because of facts fully known to accused before trial cannot be made for first time on appeal.

PETERS, P. J., dissenting.

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Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

June Costello was convicted of grand theft, and she appeals.

Affirmed.

Kenneth C. Zwerin and Fabian D. Brown, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The defendant was charged with having committed the crime of grand theft, to wit, with having stolen a wallet containing $12 from the person of John De Matei. At the trial she sought to prove an alibi, but the jury returned a verdict finding her guilty as charged. From the judgment of conviction and the order denying her motion for new trial she prosecutes this appeal. There is no claim made that the evidence is insufficient to support the verdict. The grounds of appeal, as they are stated on the opening page of appellant's brief, are, improper interrogation of appellant by the trial court and the district attorney, and the giving of erroneous instructions to the jury.

The victim of the theft was an employee of the San Francisco board of works. The crime was committed on May 12, 1941, and De Matei fixed the time of its commission at "around 20 minutes after 9" in the evening. He was walking along the sidewalk on his way home when a sedan occupied by two women drove up along side of him and stopped. One of the occupants of the car, a colored woman afterwards identified by De Matei as the appellant, asked if he knew a man living thereabouts named Tony who played an accordion. He replied he did not, whereupon she got out of the car, approached De Matei, and looking at the car said, "Have I got a flat tire?" Thus attracting De Matei's attention, she thrust her hand into the back pocket of his pants and extracted therefrom his wallet containing $12 in currency. Realizing what had happened, De Matei called out, "Give me that wallet," whereupon she tossed the wallet to her companion in the car, saying, "Put it away, ditch it." She then got back into the car, and as the car dashed away it ran into another car; but the sedan immediately backed away and continued in its flight. A day or two later at the city prison De Matei positively identified appellant as the woman who had stolen his wallet, and he positively identified her again at the trial. De Matei was not a user of intoxicants, so it cannot be said that his observation of the appellant at the time his wallet was stolen was confused by indulgence in liquor.

Other evidence was introduced by the prosecution from which it may reasonably be inferred that the sedan which was used in committing the crime belonged to a man named Allen who lived in an apartment in the same house in which appellant and her husband lived, and who at the time of the trial was on probation after having been convicted in the federal court of forgery.

[1] The evidence introduced by appellant in support of her alibi consisted of her own testimony and that given by a witness named Gilroy. Appellant claimed that she was home during the entire evening of May 12, 1941, and Gilroy gave testimony to the effect that he called at appellant's home that night between 9 and 9:30, and that appellant talked with him from a widow upstairs. Since no contention has been made that the verdict is wanting in evidentiary support, it becomes unnecessary to dwell upon the evidence more than to say that there were certain contradictions and weaknesses in the testimony given by appellant and Gilroy to justify the jury in rejecting the testimony of both. On the other hand, assuming that the jury believed that Gilroy did see and talk to appellant at her home that night, it might well have concluded from the circumstances shown by the evidence that he arrived there just after appellant had returned from the commission of the offense.

During the cross-examination of appellant it was disclosed that she had been theretofore arrested in San Francisco, Portland, and Salt Lake City on certain charges of immoral conduct, and toward the close of her cross-examination she admitted in response to questions propounded by the court that previously she had been brought before that same court on a charge of grand theft—stealing a wallet—and had been released on probation after serving a year in the county jail. Appellant contends that the asking of the questions which brought out these answers constituted prejudicial error.

[2-4] The rule is, however, that "When a defendant in a criminal case makes no objection at the trial of the charge against him to any testimony offered against him, it is to be presumed that, if such testimony is legally improper and objectionable, he waives any objection he might have interposed thereto. He certainly cannot make his objection for the first time on appeal." People v. Thourwald, 46 Cal.App. 261, 270, 189 P. 124, 128. Furthermore, "When it is apparent from the question that the answer will contain evidence necessarily inadmissible, then a motion to strike out comes too late, unless preceded by an objection to the question * * *." People v. Williams, 127 Cal. 212, 216, 59 P. 581, 583; People v. Scalamiero, 143 Cal. 343, 76 P. 1098. Here the cross-examination revealing the matters about which complaint is now made was allowed to go on without objection or protest; and finally an objection was made to a question asked by the district attorney, but the objection was interposed after the witness had already answered it, and even then no motion was made to strike it out. Later on and after appellant had already stated that she had been arrested in Salt Lake City and in Portland and San Francisco, objection was made to the question: "What were you arrested in Salt Lake City for?" The answer was not responsive, and the question was asked again, but no objection was made thereto. Eventually the court asked appellant several questions which developed the fact that previously she had been before that court on similar charges, and had been sentenced to the county jail. But no objections whatever were made to any of those questions until the cross-examination had been finished. Thereupon counsel for appellant stated: "I think, if the Court please, I am going to object to this question by your Honor, and ask it be stricken out." From the foregoing it is apparent that since no timely objection was made to any of the questions now complained of, the objections thereto cannot be made for the first time on appeal.

[5, 6] Nor may appellant now urge that the asking of the questions constituted misconduct on the part of the district attorney or the court because no assignment of misconduct was made at any time during the trial. Aside from the points above discussed, it would appear that the asking of the questions was not beyond the scope of legitimate cross-examination because by appellant's direct examination it was made to appear that during the nine years she had been married she had been living with her husband and was supported by him, which manifestly was not the truth. Therefore, by her own testimony, appellant

opened the door to the cross-examination about which she now complains. People v. Hoffman, 199 Cal. 155, 248 P. 504; People v. Masolini, 107 Cal.App. 192, 290 P. 77.

Among the instructions given by the court was the following: "The effect of an alibi, when established, is like that of any other conclusive fact presented in a case, showing as it does that the party asserting it could not have been at the scene of the crime, and therefore could not have participated in it, which is, when credited, a defense of the most conclusive and satisfactory character. The fact, however, which experience has shown, that an alibi as a defense is capable of being and has been occasionally successfully fabricated, that even when wholly false its detection may be a matter of very great difficulty, and that the temptation to resort to this as a spurious defense may be very great especially in cases of importance,—these are considerations attendant upon this defense which call for some special suggestions upon the part of the Court. Hence I respectfully suggest to you ladies and gentlemen of the jury that while you are not to hesitate at giving this as a defense full weight, that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant, or as creating a reasonable doubt which entitles the defendant to an acquittal, still you are to scrutinize the testimony offered in support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you."

Appellant contends that the giving of the instruction constitutes reversible error. The position taken by respondent, as stated in the attorney general's brief, is that "The instruction given by the court on the subject of the defense alibi under the circumstances was not improper." With respect to the propriety of the instruction itself, the reports disclose that the particular form of instruction here given has been challenged in twelve cases, and while the courts have criticized the instruction and advised against giving the same, in each of those twelve cases it has been held that the giving thereof did not justify a reversal of the judgment, and accordingly the judgment of conviction in each case has been affirmed. Those cases are: People v. Lee Gam, 69 Cal. 552, 11 P. 183; People v. Levine, 85 Cal. 39, 22 P. 969, 24 P. 631; People v. Lattimore, 86 Cal. 403, 24 P. 1091; People v. Winters, 125 Cal. 325, 57 P. 1067; People v. Wing, 31 Cal. App. 785, 161 P. 759; People v. Purio, 49 Cal.App. 685, 194 P. 74; People v. Barr, 55 Cal.App. 321, 203 P. 827; People v. Smith, 189 Cal. 31, 207 P. 518; People v. Hammer, 74 Cal.App. 345, 240 P. 56; People v. Arnold, 199 Cal. 471, 250 P. 168; People v. Johnson, 203 Cal. 153, 263 P. 524; People v. Gist, 28 Cal.App.2d 287, 82 P.2d 501.

On the other hand, there are five cases involving instructions on alibi as a defense in which the convictions were reversed; but an analysis of those five cases shows the following: In People v. Roberts, 122 Cal. 377, 55 P. 137, and People v. Garratt, 93 Cal.App. 77, 268 P. 1071, the form of the instruction given was different from the one here given, and in People v. Nichols, 69 Cal.App. 214, 230 P. 997, the court gave only a portion of the instruction here given. In each of the remaining two cases, People v. Girotti, 67 Cal. App. 399, 227 P. 936, and People v. Thorp, 104 Cal.App. 379, 285 P. 916, the instructions given were substantially the same as the one here given, but the real ground of the reversal in each case was based on certain erroneous rulings on the admissibility of evidence. Because of the foregoing differentiating reasons we are of the opinion that the above group of five cases cannot be held to be controlling over the group of twelve cases above cited which dealt with the form of instruction here given; and especially in view of the affirmance in People v. Arnold, supra, wherein many of the previous cases are reviewed.

The decision in People v. Girotti, supra, one of the cases wherein a reversal was ordered, in support of the reversal cites and quotes from five other cases, and that particular portion of the decision is quoted in People v. Nichols, supra, also reversed. But it is to be noted that in four out of the five cases so cited (the Lee Gam, Levine, Lattimore, and Smith cases), the judgments of conviction were affirmed. In the fifth case cited, People v. Roberts, supra, a reversal was ordered, but as already pointed out the instruction there was essentially different from the form of the one here given. It contained language which the court held conveyed the meaning that the burden was on the defendant to prove his innocence; and that he was required to establish his alibi defense by a preponderance of evidence, which of course is not the law.

[7] In the present case the court gave additional instructions which obviously overcame the objectionable features pointed out in the instruction given in the Roberts case. Among the instructions so given in the present case were these: "This defendant pleaded not guilty to the charge. Hence it is incumbent in this case, as in all cases, for the State of California to establish the guilt of the defendant to a moral certainty and beyond a reasonable doubt." "In this particular case the state contends that the defendant committed the offense in person. She had to be there to take the purse of Mr. De Matei. The defendant Mrs. Costello contends that at the time of the offense, at the time the offense was committed, if it was committed, she was at some other place, that is to say she was at her home. Naturally a defendant could not be in two places at the same time, and in this contradiction of the witnesses the jury must determine for themselves where lies the truth. In so judging you will take into consideration the appearance and the apparent candor and the fairness of the respective witnesses, the probability of their statements, its coincidence with other facts or features of the case which you may deem have been established, and, generally, those rules of ordinary experience and general observation by which intelligent people decide as to controverted propositions of fact." And then after giving the instruction here challenged, the court gave these additional instructions: "Every defendant in a criminal action is presumed to be innocent until the contrary is proven, and in case of a reasonable doubt whether guilt has been satisfactorily shown, the defendant is entitled to an acquittal." The court then defined the term reasonable doubt, which was followed by this instruction: "You are not bound to decide in conformity with the testimony of any witness or number of witnesses who do not satisfy your minds, as against other testimony or other witnesses who do satisfy your minds. In other words, it is the quality of the evidence, rather than the quantity, that should control you, provided, of course, it satisfies you of its truthfulness." And further on it charged the jury as follows: "* * * you are, of course, the sole judges of the evidence in this case * * *. And a defendant's testimony should not be rejected merely because such person is the defendant. The testimony of a defendant is to be weighed in the same manner and measured by the same standard as that of any other witness in the case."

[8] In that state of the record, there can be no more legal justification for the reversal of the conviction herein than there was in the group of twelve cases above cited, in which the convictions were affirmed. Nor can it be held that the refusal to give appellant's proposed instructions 4 and 5 warrant a reversal. While they related to the defense of alibi, they dealt more particularly with the doctrines of reasonable doubt and presumption of innocence, and as will be seen, both of those doctrines were covered in other instructions.

[9] In any event, the basic ground of the criticism running through the decisions against the instruction here given apparently is that the giving of such an instruction contravened the long established rule prevailing in this state that a trial court may not comment on the facts; and it is to be noted that all of the cases above cited (except the Gist case) wherein such criticism was indulged were decided prior to the adoption of the 1934 amendment to section 19 of article VI of the state Constitution, which abolished that rule and expressly conferred upon trial courts the right to comment on the evidence. It seems clear, therefore, that the criticism theretofore directed by the reviewing courts against the propriety of such construction can no longer be considered a ground for reversal.

That portion of the 1934 amendment here pertinent declares: "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on *the evidence and the testimony and credibility of any witness* as in its opinion is necessary for the proper determination of the case." (Italics ours.) And in conformity with said amendment the legislature amended sections 1093 and 1127 of the Penal Code accordingly. The code amendments are substantially the same, and are as follows: "In charging the jury the court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case and in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court." In the case of People v. Ottey, 5 Cal.2d 714, 56 P.2d 193, 200, (a death case) is to be found a most instructive interpretation of the scope of said constitutional amendment. On account of the length of the opinion no attempt to quote its essential portions will be made here; but from an examination thereof it will be seen that the power thus conferred on the trial court by the amendment is extremely broad. It permits the court to comment not only on the testimony of a witness, but upon the evidence generally and the weight thereof as it appears to the court. It may analyze and dissect it, comment on its bearing and weight, as it appears to the court. In so commenting it may single out the defendant's testimony for special comment. Even "Expressions of the court's opinion as to the guilt or innocence of the defendant have been held to be within the scope of 'comment,' so long as the province of the jury as defined by the constitutional section is not invaded." (Citing many cases.) However, in this regard the court goes on to say that such power "should be exercised cautiously and only in exceptional cases." A later case holding to the same effect is People v. Gosden, 6 Cal.2d 14, 56 P.2d 211, 218, a death case. In that case the trial court in its instructions stated that to its mind certain matters had not been "satisfactorily explained"; that he, the judge, saw no reason for disbelieving certain witnesses for the prosecution. It also calls attention to certain medical testimony and then gave "its opinion as to the weight of this evidence." In a still later case, People v. Eudy, 12 Cal.2d 41, 82 P.2d 359 (also a death case) the trial court in commenting on the evidence told the jury that "an ingenious counterfeit of mental infirmity should never furnish immunity to guilt," but the defense of insanity should be weighed fully, fairly and justly.

[10, 11] Stated broadly, the trial court may under the constitutional provision, comment upon the evidence as a whole or upon the testimony or credibility of any witness providing its comment is temperately and fairly made and is not argumentative or contentious to a degree which makes it characteristically an act of advocacy. Its comment is not confined to a colorless recital, by way of summing up the facts. Such a conclusion would destroy and render ineffectual the very purpose of the constitutional amendment. It is impossible to set down a hard and fast rule, each case must necessarily turn upon its own peculiar circumstances. Trial courts should, of course, be cautious in their exercise of this power with a view to protecting the rights of defendants. People v. De Moss, 4 Cal.2d 469, 50 P.2d 1031. "In other words," said the court in People v. Ottey, supra, "it was the intention to place in the trial judge's hands more power in the trial of jury cases and make him a real factor in the administration of justice in such cases, instead of being in the position of a mere referee or automaton as to the ascertainment of the facts." Obviously, in view of the present state of the law, the giving of the instruction here challenged can no longer serve as ground for reversal.

[12] Allen was called as a witness by the prosecution, and by way of preliminary questions the district attorney brought out the fact that Allen had been previously convicted of a felony; subsequently, and obviously to the surprise of the district attorney, Allen gave equivocal answers concerning the use of his car by appellant; whereupon the district attorney subjected him to a cross-examination on those matters. Appellant complains that the asking of the questions was error. There is utterly no merit in the point; first, because no objection whatever was made by the appellant to the asking of any of those questions; furthermore, Allen was the prosecution's witness, so that if as such he was discredited by the asking of the questions it operated only to the prejudice of the prosecution's case.

[13, 14] The remaining instruction complained of was a mere commonplace instruction, and in view of the facts of the case the trial court was justified in giving it. Nor is there any merit whatever in appellant's final point that the trial judge was disqualified from trying the case. It appears from the record that the circumstances relied upon as showing disqualification were fully known to appellant before the trial began; and the code sections set up a complete procedure which may be followed where it is claimed disqualification exists. Here no suggestion was ever made, at the opening or during the course of the trial, nor at the time of imposing

sentence, that the trial judge was disqualified. Complaints of this kind cannot be made for the first time on appeal.

The judgment and order appealed from are affirmed.

WARD, J., concurred.

PETERS, Presiding Justice (dissenting).

I dissent. As pointed out in the majority opinion, the sole person to identify the defendant or who placed her near the place of the crime, was the prosecuting witness. The prosecution failed to prove that the car possessed by Allen was the car used by the thief, and failed to connect defendant with Allen's car on the night in question. Of course, the evidence of the prosecuting witness is sufficient to sustain the judgment, and appellant makes no contention to the contrary. The state of the record, however, is important, demonstrating as it does that this is not a case where the evidence is conclusive as to defendant's guilt. Her defense was an alibi, which defense she supported not only by her own testimony, but by that of the witness Gilroy. The majority opinion refers to "certain contradictions and weaknesses in the testimony given by appellant and Gilroy." I find no such contradictions or weaknesses in Gilroy's testimony. He told a coherent, straightforward story, and was not impeached in any way. As presented to the jury, the case was one where the jury was required to determine whether the prosecuting witness should be believed, or whether the testimony of defendant and her witness Gilroy cast a reasonable doubt on that testimony. It is obvious, that, in view of the weakness of the prosecution's case, any material error in the instructions could not help but be prejudicial to defendant.

The trial court gave but one instruction on the defense of alibi. That instruction is quoted in full in the majority opinion, and need not be repeated here. The trial court refused to give two other instructions offered by defendant. They read as follows:

"You are instructed if the evidence here produced is sufficient in your minds to create a reasonable doubt whether defendant was present at the place where the crime charged is alleged to have been committed, or was at some other place where she could not have committed it, then you must give the defendant the benefit of such doubt and acquit her.

"The Court instructs the Jury that if you do not believe from the evidence that the defendant was present at the time and place when and where the offense, if any, was committed but that she was at some other and different place or places, or if you have a reasonable doubt as whether this is the case, you will find her not guilty. The defendant is presumed to be innocent until her guilt is established by legal evidence beyond a reasonable doubt, and if you have a reasonable doubt of her guilt you will acquit her."

The instruction given by the trial court and quoted in the majority opinion has been the subject of frequent discussion in many cases. There is no case in California that has ever held that the giving of that instruction, or any instruction substantially similar, was proper. Without exception the courts have held that the giving of such instruction was error, but have differed on whether, under the facts of the particular case, such error was prejudicial. In addition to the seventeen cases cited in the majority opinion, see, also, annotations in 14 A.L.R. 1426, and 67 A.L.R. 122, on the subject "Instructions disparaging defense of alibi," where cases from many states are collected and discussed.

The reasons why such instruction is erroneous are obvious. The instruction refers to alibi evidence as a "defense", which implies that it must be proved by defendant by a preponderance of the evidence. It states that alibi evidence should be scrutinized otherwise and differently from other evidence, which is not the law. The jury is told that this defense must be established to their satisfaction. That means it must be established by a preponderance of the evidence. That is not the law. No such burden is cast on the defendant. The instruction obviously casts the burden of proof on this issue on defendant.

In People v. Girotti, 67 Cal.App. 399, 227 P. 936, the same instruction here challenged was given. The court held that this constituted prejudicial error and reversed the judgment. After first quoting the instruction the court stated (67 Cal. App. page 403, 227 P. page 937): "In People v. Levine, 85 Cal. 39, 42 [22 P. 969], 24 P. [631], 632, it is said: 'The defense of alibi is, in our judgment, not one requiring that the evidence given in support of it should be scrutinized otherwise or differently from that given in support of any other issue in a cause.' In People

v. Lattimore, 86 Cal. 403, 405, 24 P. 1091, 1092, it is said: 'If trial courts will cease to give this particular form of instruction, the ends of justice will be equally as well subserved, and the administration of the laws less embarrassed.' In People v. Roberts, 122 Cal. 377, 378, 55 P. 137, 138, the trial court had instructed the jury that, 'when satisfactorily proven,' an alibi is a good defense. The Supreme Court said: 'When a jury is told that any particular fact must be established to their satisfaction, such statement can only mean that such fact must be established at least by a preponderance of evidence; yet there is no such burden cast upon a defendant charged with a crime, except in certain particular instances which are in no sense presented here. * * * It is thus apparent that the alibi, to be efficacious to a defendant, need not be "satisfactorily proven," and need not be established to the satisfaction of the jury.' In People v. Smith, 189 Cal. 31, 37, 207 P. 518, 521, an instruction substantially identical with that in the instant case was under consideration. The court said: 'In People v. Roberts, 122 Cal. 377, 55 P. 137, a similar instruction was held to be reversible error, upon the grounds that they constitute a charge upon the weight of the evidence, and that they cast the burden of proof upon the defendant.' If the jurors are to 'be *satisfied* that a *fabricated* defense is not being *imposed* upon' them, the burden is cast upon the defendant to satisfy them that such defense is not *fabricated;* that is, that it is true. The instruction not only casts an unwarranted burden upon the defendant, but casts suspicion upon his defense and the evidence produced in support thereof. It is essentially an argument against the defendant, legitimate if made by the district attorney, but an invasion of the province of the jury when made by the court. The giving of the instruction has been condoned in a number of cases where the rights of the defendants did not appear to have been prejudiced thereby. Where a defendant presents substantial proof of an alibi, the jury should be left free to pass upon the weight thereof, under the rules of evidence applicable to other questions of fact; and, if unsubstantial proof is produced, the jury may be trusted to reject it. The instruction should never be given."

In People v. Nichols, 69 Cal.App. 214, 230 P. 997, it was held that the giving of a substantially similar instruction was reversible and prejudicial error, and that such error could not be cured by the provisions of article VI, section 4½ of the Constitution. The court stated (69 Cal. App. page 223, 230 P. page 1000): In support of the giving of the above, the people rely upon the case of People v. Barr, 55 Cal.App. 321, 203 P. 827, where a similar instruction was given, and was held not to constitute reversible error. In that case, however, other cases holding the giving of such instruction to be erroneous appear not to have been considered. It is also pointed out that such an instruction should not be given. Under the provisions of section 4½ of article 6 of the state Constitution, whether the giving of an erroneous instruction does or does not constitute reversible error depends, in large measure, upon the conclusion of the Court of Appeal as to whether there has or has not been a miscarriage of justice by reason thereof. If it appears to the appellate court that the conclusion of the jury would have been the same with or without the instruction, then and in that case it cannot be said that a miscarriage of justice has resulted, but, where there is a strong conflict in the evidence, and the determination of the cause depends upon the credibility to be given to certain witnesses by the jury, and the court gives an erroneous instruction which tends to disparage such witnesses in the estimation of the jury, then and in that case we think that the people are not entitled to rely upon the provisions of the constitutional provision referred to, but that the defendant has not, under such circumstances, been given a fair and impartial trial to which all persons accused of crime are entitled."

In People v. Thorp, 104 Cal.App. 379, 285 P. 916, and People v. Garrett, 93 Cal. App. 77, 268 P. 1071, judgments were reversed where substantially similar instructions were given. The last case is particularly instructive not only because the erroneous instruction was given, and held to be prejudical, but also because a proper instruction on the question, substantially similar to those offered by defendant in the instant case, was offered and was refused. As in the instant case, the erroneous instruction was the only one given on the subject. The court stated (93 Cal.App. page 79, 268 P. page 1072):

"The giving of this instruction is also assigned as error. It is true that in a number of cases where an instruction similar to the one in question was given convictions were upheld. However, in no decision in this state to which our attention has been called has this form of instruction been given unqualified approval. On the contrary, it has repeatedly been the subject of adverse criticism. The reference in it to evidence of an alibi as a defense is objectionable. People v. Roberts, 122 Cal. 377, 55 P. 137; People v. Winters, supra [125 Cal. 325, 57 P. 1067]. There is no reason why evidence tending to show that at the time of the commission of the offense the defendant was at another place than that at which it was committed so that he could not have been a party thereto should be scrutinized differently from any other proof. As was said in People v. Lattimore, 86 Cal. 403, 24 P. 1091 * * * 'But in this case, as in the Levine case, the charge of the court, taken as a whole, was so full and fair to the defendant that we cannot conceive that any injury resulted to the defendant from this unnecessary instruction in regard to the scrutinizing of the evidence given in support of the defense of alibi.' In this and other decisions, where it has been said that it is undesirable to give instructions of this nature, the instructions, taken as a whole, have been full and fair and have made the law clear as to the particular issues tendered by the evidence of an alibi; but in the instant case this is not true. No other instruction was given on the subject and the one first above quoted containing a correct statement of the law was refused. The giving of a general instruction to the effect that the jury must be convinced of the guilt of the defendant beyond a reasonable doubt to convict was not sufficient to remove the prejudice to the defendant necessarily resulting from the errors above specified. People v. Visconti, supra [31 Cal.App. 169, 160 P. 410, 411].

"The record presented does not warrant upholding the judgment appealed from under article 6, § 4½, of the Constitution. Without reciting the evidence in detail, it is sufficient to say that in addition to the testimony in support of the defendant's claim of alibi, a direct conflict was presented upon all other material points. It is not only possible, but quite probable, that had the members of the jury been informed that if the evidence tending to prove an alibi was sufficient to raise a reasonable doubt in their minds as to the guilt of the defendant they must acquit, the result might have been different and the defendant found not guilty."

It is true that in several cases the courts have held that the giving of the challenged instruction was error but, under the facts, was not prejudicial. Thus in People v. Hammer, 74 Cal.App. 345, 240 P. 56, the error was held not prejudicial because the evidence given by defendant demonstrated his guilt. In People v. Arnold, 199 Cal. 471, 250 P. 168, cited by respondent, the court held that the error was not prejudicial because nine proper instructions on this phase of the law were given. The court concluded its discussion with this comment (199 Cal. page 504, 250 P. page 182): "Nevertheless, we again call to the attention of district attorneys who continue to offer, and to trial courts which continue to give them, that in so doing they assume an unnecessary risk." In People v. Smith, 189 Cal. 31, 207 P. 518, and People v. Johnson, 203 Cal. 153, 263 P. 524, the error was held not to be prejudicial because in those cases there was no evidence of alibi. All of the other cases cited in the majority opinion fall within one of these groups.

Each case must turn on its own facts. In every case where the erroneous instruction alone was given on the defense of alibi, and no proper instruction was given, and where the defendants offered substantial evidence on this defense, the giving of the instruction has been held to be reversible and prejudicial error. That is exactly the problem here presented. The defendant offered not only her own testimony but that of a corroborating witness, to substantiate her claim of innocence. The only testimony (legally sufficient it is true to sustain the verdict) offered by the prosecution was that of the prosecuting witness. He could not identify the automobile and no other witness connected this defendant with the offense. Under such circumstances, to attack by an erroneous instruction the sole defense of defendant, to belittle and disparage that defense, to tell the jury that such defense must be proved to their "satisfaction," (i. e., by a preponderance of the evidence) was error of a most serious and prejudicial nature. Such admitted error cannot be cured by the provisions of article VI, section 4½ of the Constitution.

The majority opinion quotes several general instructions that were given, and holds that these instructions overcame the error in the alibi instruction. No authority is or can be cited for that proposition. In every case where the erroneous instruction was held to be prejudicial, it is safe to assume that general instructions similar to those quoted in the majority opinion were given. It is not sound law to hold that a general instruction can cure the error in a specific instruction. If that were the law there would seldom, if ever, be a case where any instruction could be held to be prejudicial.

The majority opinion seeks to uphold the instruction as a fair comment on the evidence under article VI, section 19, of the Constitution. The point is clearly without merit, and was not urged in the respondent's brief. The erroneous instruction did not purport to be a comment on the evidence, but a statement of the law. The trial judge correctly instructed that the jury was "bound to accept the law as given by the Court." When the trial judge purports to instruct on the law the jury must accept his statement thereof. But the jury alone determines the facts. When the trial judge comments on the evidence, under the authority now conferred upon him, his comment is not binding on the jury. He must, under the very constitutional provision conferring the power, "inform the jury in all cases that the jurors are the exclusive judges of all questions of fact." It follows, of course, that when the alleged comment appears as an integral part of the instructions it cannot be justified as a mere comment on the evidence.

The complete answer to this point is that the instruction was not a comment on the evidence, but a misstatement of law. It went far beyond the realm of comment, and erroneously stated the law. It told the jury to scrutinize alibi evidence differently from other evidence. It told the jury that this defense must be established to their "satisfaction," which implies that it must be proved by a preponderance of the evidence. The instruction casts the burden of proof on defendant. In these various respects the instruction misstates the law. See People v. Hammer, supra; People v. Ross, 89 Cal.App. 132, 264 P. 314.

The majority opinion states that "the basic ground of the criticism running through the decisions against the instruction here given apparently is that the giving of such an instruction contravened the long established rule prevailing in this state that a trial court may not comment on the facts." While it is true that that is one of the criticisms of the instruction given by the courts, it is not the "basic ground" of the criticism. The basic fallacy in the instruction is that the jury is told that alibi evidence must be scrutinized otherwise and differently from other evidence. The jury is told that this defense must be established to its "satisfaction." That means it must be established by a preponderance of the evidence. The instruction casts the burden of proof on this issue on the defendant. That this is the "basic ground" of the decisions is amply demonstrated by the quotations set forth above.

I am also of the opinion that the questions asked of the defendant by the prosecutor and by the trial judge, which brought out that she had been arrested but not convicted on several prior occasions, constituted error. I am of the opinion that counsel for defendant raised sufficient objection to the questions.

For the foregoing reasons I believe the judgment and order appealed from should be reversed and the cause remanded for a new trial

52 Cal.App.2d 391

JOSEPH v. BECK et al.

Civ. 11905.

District Court of Appeal, First District, Division 1, California.

June 1, 1942.

1. Judgment 🔑829(3)

A ruling, in action in federal court to determine adverse claims to property, that sale of property in bankruptcy court was void because adjudication of bankruptcy was made by referee, rather than by court, was controlling in action to quiet title in state court, involving same parties. Bankr. Act § 74, 11 U.S.C.A. § 202.

2. Bankruptcy 🔑38

A debtor who surrendered his property to exclusive jurisdiction of bankruptcy court by filing petition for extension and composition could not maintain action in state court to quiet title to such property, which had been sold in bankruptcy proceedings, even if adjudication of bankruptcy was invalid. Bankr.Act § 74, sub. m, 11 U.S.C.A. § 202, sub. m.

3. Parties ⟹65(1)

Where action in state court to quiet title was barred because bankruptcy court had exclusive jurisdiction of property involved, denying leave to file supplemental complaint eliminating bankruptcy court officers from action, on ground that they had been discharged since original complaint was filed, was not an abuse of discretion. Bankr.Act § 74, sub. m, 11 U.S.C.A. § 202, sub. m.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action to quiet title by Anthony Joseph against C. H. Beck and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Carey Van Fleet, of San Francisco, and Louis C. Levy, of Fresno, for appellant.

M. G. Gallaher and W. B. Backlund, both of Fresno, for respondents.

KNIGHT, Justice.

Plaintiff brought this action to quiet title to certain property known as St. Joseph's Winery. Demurrers were interposed by all but two defendants; one of these two defaulted, and the other filed a disclaimer; the demurrers were sustained without leave to amend, and subsequently plaintiff was denied leave to file a supplemental complaint. Judgment was entered February 11, 1941, whereby it was ordered, adjudged and decreed that the demurrers were sustained on the grounds that the complaint did not state facts sufficient to constitute a cause of action against said defendants and that the court had no jurisdiction of the subject of the action; and that the defaulting and disclaiming defendants had no right, estate, interest or title in the property described. From the judgment so entered plaintiff appeals.

It appears from the complaint and exhibits attached thereto that prior to April 18, 1935, plaintiff owned and operated said winery, and on said date filed in the United States District Court a petition for "debtor-relief" under section 74 of the Bankruptcy Act, as amended March 3, 1933; 11 U.S.C.A., § 202, requesting that he be allowed to file an extension and composition proposal under said section. The matter was referred to defendant McDowell, referee in bankruptcy (the order of reference is not part of the record), who appointed defendant McKinney trustee. A meeting of the creditors was called, an extension and composition proposal was submitted, and was rejected by the creditors; further time was given the debtor to submit an additional proposal, but on July 16, 1935, no additional proposal having been filed, the matter was considered at a creditors' meeting at which the debtor's attorney and a majority of the creditors were present; and on that date the referee ordered that plaintiff be declared and adjudged a bankrupt. Thereafter the property was sold by the trustee to defendant E. M. Jones, and later the Sunnyside Winery was organized and took over the winery; but it became financially involved, and on January 14, 1940, was adjudicated a bankrupt. The property then passed to defendants Hollins and Smith, referee in bankruptcy and trustee of the bankrupt corporation respectively, and was sold to Home Title Co., and finally to defendants Beck et al., who took possession and operated the winery.

[1] The cause of action plaintiff attempts to set forth in the complaint is based upon the theory that the order adjudging him a bankrupt was void in that it was made by the referee and not by the District Court; that therefore all subsequent proceedings had, including the sale of the property to Jones, were nullities; and that such being the case he is entitled to recover possession of the property. However, this same theory was advanced by plaintiff without success in the federal court in a similar action brought therein to accomplish the same purpose (Joseph v. Rowell, 9 Cir., 108 F.2d 592), and obviously the adverse ruling therein is here controlling. That action was brought in the United States District Court before the Jones sale was completed, "to determine adverse claims to real and personal property," and two of the defendants were the referee and trustee in bankruptcy involved in the Jones sale. Plaintiff consented to a dismissal as to the defendants who purchased the property in the bankruptcy proceedings, and certain other named defendants; and the referee and trustee moved the court to dismiss as to them. The motions were granted, and plaintiff appealed. The order was on December 21, 1939, affirmed by the Circuit Court of Appeals, the court stating: "It is apparent from the complaint

and bill of particulars that a petition has been filed by the appellant as debtor in the United States District Court for the Southern District of California, Northern Division, under 11 U.S.C.A., §§ 201 and 202, providing for the relief of debtors by composition and extension of their debts. The act provides that the filing of a debtor's petition seeking relief under the act 'shall subject the debtor and his property, wherever located, to the exclusive jurisdiction of the court in which the order approving the petition' is filed. 11 U.S.C.A., § 202, sub. m. See In re Gunder, 7 Cir., 88 F.2d 284. The fact that the referee in the bankruptcy proceedings may have exceeded his authority in making the orders complained of in the complaint (a question we do not pass upon) could not oust the bankruptcy court of its exclusive jurisdiction over the debtor's property. The appellant having surrendered his property to the bankruptcy court, which thereby acquired exclusive jurisdiction over the property, cannot assert ownership thereof, as against the officers of the court, or those purporting to act as such, in any other court."

[2] The complaint herein alleges that the petition plaintiff filed in the bankruptcy court was filed under the provisions of section 74 of the Bankruptcy Act, 11 U.S.C.A., § 202, and subdivision (m) of that section provided: "The filing of a debtor's petition or answer seeking relief under this section shall subject the debtor and his property, wherever located, to the exclusive jurisdiction of the court in which the order approving the petition or answer as provided in subdivision (a) is filed. * * *" Accordingly it must be held here, as it was in the federal case, that when plaintiff filed his petition in the bankruptcy court under the provisions of said section 74 he surrendered the property to the exclusive jurisdiction of the bankruptcy court; and that being so, he would be in no position to maintain the suit even though it could be held, as he contends, that the order of adjudication was invalid, because the property would still be under the exclusive jurisdiction of the bankruptcy court, pending proper administration in that court. If on the other hand the adjudication was valid, plaintiff is not in a position to maintain the action because title to the property passed to the trustee, and by subsequent trustee's sale to Jones.

[3] Nor did the court abuse its discretion in denying leave to file the supplemental complaint. The purpose thereof was to eliminate the bankruptcy court officers from the case upon the ground that they had been discharged since the original complaint was filed. It is apparent, however, that notwithstanding such discharge, exclusive jurisdiction of the property was still in the bankruptcy court; therefore the elimination of these officers from the case would have had no bearing whatever upon plaintiff's right to maintain the action.

In view of the conclusion reached on the determinative point, it becomes unnecessary to consider the other contentions made by the respective parties.

The judgment is affirmed.

BRAY, J. pro tem., and PETERS, P. J., concurred.

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52 Cal.App.2d 512

MILLER et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 6733.

District Court of Appeal, Third District, California.

June 5, 1942.

1. Appeal and error 🔑150(2), 330(1)

Where one of two assignees of a subsequently litigated claim for conversion of money died after trial and decedent assignee's claim was assigned to his co-assignee before judgment, defendant was not entitled to have subsequently taken appeal by surviving assignee dismissed as to assignee's former interest, since the cause of action did not abate at decedent assignee's death nor did the cause of action lapse upon sale of decedent assignee's interest to his co-assignee. Code Civ.Proc. § 385.

2. Appeal and error 🔑150(2)

Where one of two assignees of subsequently litigated claim for conversion of money died after trial and action did not abate and decedent assignee's entire interest was purchased by his co-assignee before entry of judgment, surviving assignee alone was authorized to give notice of appeal therefrom and neither decedent assignee's executrix nor his trustee was authorized to take an appeal. Code Civ.Proc. §§ 385, 963.

3. Appeal and error ⇨150(2)

Where one of two assignees of subsequently litigated claim for conversion of money died after trial and decedent assignee's entire interest was assigned to his co-assignee before judgment, decedent assignee's executor was not authorized to appeal, in view of statute providing that a litigant has no right of appeal until judgment is actually rendered, notwithstanding statute authorizing an attorney of record representing litigant in pending proceeding to give notice of appeal on his client's death any time before appointment of an executor. Code Civ.Proc. §§ 385, 941, 963.

4. Abatement and revival ⇨72(2)

Where one of two assignees of subsequently litigated claim for conversion of money died after trial and entire interest of decedent assignee was transferred to his co-assignee before judgment, substitution of decedent assignee's executrix was not authorized by statute authorizing trial court to allow an action to be continued by or against a deceased party's representative or successor in interest since decedent assignee's estate was no longer interested in the action. Code Civ.Proc. § 385.

5. Abatement and revival ⇨72(9)

Where one of two assignees of subsequently litigated claim for conversion of money died after trial and decedent assignee's entire interest was transferred to his co-assignee before judgment, decedent's co-assignee was the only person entitled thereafter to represent such interest in the pending litigation. Code Civ.Proc. § 385.

6. Abatement and revival ⇨47, 72(2)

The statute providing that an action may be continued in name of original party on transfer of his interest or that trial court may allow transferee to be substituted in the action means that when a transfer of interest in subject-matter of a pending suit is made by a living party to a stranger or to another person by death of a party to the action, the suit may be properly continued in name of the original party or if deceased party's estate claims an interest in the litigation the representative may be substituted as a party and the statute does not require substitution of a plaintiff acquiring his co-plaintiff's joint interest either from him or from his executor. Code Civ.Proc. § 385.

7. Abatement and revival ⇨47, 71

The purpose of "substitution of parties" to an action on death or transfer of an interest is that there may be some individual or entity to represent the transferred interest during continuation of the litigation.

See Words and Phrases, Permanent Edition, for all other definitions of "Substitution of Parties".

8. Abatement and revival ⇨72(9)
Parties ⇨59(4)

If an interest is transferred during litigation by death or assignment to a stranger to the action, a "substitution of parties" should be made, but if a party to an action acquires the joint interest of his coplaintiff by purchase from the owner or from his estate after his death surviving owner need not again be made a party to the action to represent his own interest in the litigation, but deceased's death eliminates deceased from the litigation and does not cause trial court to lose jurisdiction of the subject-matter.

9. Abatement and revival ⇨72(9)

Where one of two assignees of subsequently litigated claim for conversion of money died after trial and entire interest of decedent assignee was transferred to his co-assignee before judgment, the co-assignee was not required to be substituted in the action to enable him to continue the litigation. Code Civ.Proc. § 385.

10. Appeal and error ⇨412

Where notice of appeal from judgment against plaintiff was given in behalf of both plaintiffs as assignees of a subsequently litigated claim by the surviving assignee who had purchased interest of decedent assignee before entry of judgment, appeal was ineffectual so far as it purported to apply to the decedent assignee's interest since his estate no longer had an interest in the litigation. Code Civ.Proc. § 963.

11. Appeal and error ⇨412

Where notice of appeal from judgment against plaintiff was given in behalf of both as assignees of a subsequently litigated claim by surviving assignee who had purchased interest of decedent assignee before entry of judgment, the notice authorized surviving assignee to represent the entire interest in the litigation. Code Civ.Proc. § 385.

Action by J. M. Miller and another against Bank of America National Trust and Savings Association and another for conversion of funds. Named plaintiff died and his co-plaintiff purchased decedent's interest in the action from his estate and judgment was rendered against plaintiff, and plaintiff appeals. On defendant's motion to dismiss the action and surviving plaintiff's cross-motion to substitute as assignee of decedent's interest.

Motion denied, and cross-motion granted.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellants.

G. D. Schilling, D. Bianco, and C. H. White, all of San Francisco, H. L. Preston, of Ukiah, and Rich, Weis & Carlin, of Marysville, for respondents.

PER CURIAM.

The respondents moved this court to dismiss the action on the ground that it abated as to the interest of J. M. Miller on account of his death, which occurred before the judgment was entered. The appellant then moved this court to substitute, as party plaintiff, Robert Powell, the assignee of Miller's interest. Both motions were heard on affidavits. The cause was not submitted on the merits of the appeal.

The facts upon which the appeal to this court was perfected occurred as follows: The defendant, Chico Production Credit Association, the lienholder of certain warehouse receipts, for a quantity of grain, delivered them to the Bank of America National Trust and Savings Association, with written instructions to sell the grain to designated dealers for a specified sum of money, and to pay said lienholder from the proceeds of sale the sum of $240.09, and to remit the balance directly to the owner, L. M. Miller. The bank sold the grain and paid the lienholder said sum of $240.09, as directed, but refused to remit to the owner any portion of the balance of the proceeds of sale. On the contrary, the bank retained and applied the balance of said money toward the satisfaction of an outlawed judgment which the bank then held against L. M. Miller and others. It does not appear that, at the time of that transaction, L. M. Miller was either a customer of, or a depositor in, that bank. This suit for conversion of the funds was then commenced.

Before the commencement of this action, the claim of L. M. Miller was duly sold and assigned to the original plaintiffs, J. M. Miller and Robert Powell, for "a valuable consideration." During the trial, a nonsuit was granted with respect to the lienholder of the warehouse receipts, Chico Production Credit Association, which was an original party defendant. An appeal from the order for nonsuit was promptly perfected by the plaintiffs. That separate appeal is now pending. After completion of the trial and submission of the cause on its merits, the court entered a minute order to the effect that judgment would be granted against the plaintiffs, and directed findings to be prepared accordingly.

On February 16, 1939, before the findings were adopted, the plaintiff, J. M. Miller, died. His death was not called to the attention of the court. Findings were not adopted or filed until November 15, 1940. In the meantime the will of J. M. Miller, deceased, was admitted to probate and Varletta Megonigal was appointed and qualified as executrix of the will. On December 16, 1940, distribution of the estate was made. By the terms of that decree, "for value received," the entire interest of the estate in this suit for conversion was distributed March 21, 1941, to Varletta Megonigal, as trustee, with full power to sell or convey the chose in action. She subsequently sold and conveyed that interest to this appellant, Robert Powell. After that transfer of title to the chose in action, judgment was rendered against plaintiffs. It was entered on March 28, 1941. On the following day, notice of appeal from that judgment was served and filed by the plaintiff Robert Powell in behalf of both plaintiffs.

October 31, 1941, the bank filed in this court its notice of motion to dismiss the appeal as to the deceased plaintiff, J. M. Miller, on the ground that the action abated as to the subject-matter of the suit with respect to the interest of the deceased at the time of his death, no substitution having been made or authorized as provided by section 385 of the Code of Civil Procedure. Thereupon, the plaintiff, Robert Powell, filed in this court his opposition to the motion to dismiss the action, and also filed notice of motion to substitute himself for the deceased, pursuant to the assignment of property interest heretofore mentioned. Both motions were supported by affidavits in behalf of the respective parties and submitted for determination.

The cause was not submitted on the merits of the appeal.

[1, 2] Respondents' motion to dismiss the action as to the former interest of the deceased, J. M. Miller, is denied. This cause of action did not abate at the death of J. M. Miller, nor did it lapse upon sale and transfer of his interest in the suit to Robert Powell. Section 385 of the Code of Civil Procedure provides:

> "An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

[3-6] Since the action did not abate and the entire interest of the decedent in the property involved in this suit was purchased and acquired by the joint owner and co-plaintiff, Robert Powell, before the rendering and entry of judgment, the assignee alone had the right to give notice of appeal therefrom. The entire title to the property right of the deceased in the pending litigation having passed to Powell before the judgment was rendered or entered, neither the executrix nor the trustee of the estate had authority to take the appeal. It is true that section 941 of the Code of Civil Procedure authorizes the attorney of record, who represents a litigant in a pending proceeding, to give notice of appeal, in the event of the death of his client, "at any time before the appointment of an executor" when the litigant, at the time of his death, had "a right of appeal." A litigant has no "right of appeal" until the judgment is actually rendered. § 963, Code Civ.Proc. In the present case, since the judgment was not rendered until March 28, 1941, and the entire interest therein had been previously transferred to Powell, the executrix had no authority to appeal. Under section 385 of the Code of Civil Procedure, "In case of the death * * * of a party, the court, on motion, *may* allow the action or proceeding to be continued *by or against* his representative or successor in interest." (Italics ours.) Apparently the last-quoted language would not authorize the substitution of the executrix under the circumstances of this case, for the reason that she had sold and transferred the interest of the estate of Powell, who was already a party plaintiff. She therefore no longer represented the deceased with respect to that interest, either as executrix or as trustee. The estate no longer possessed an interest in that chose in action. The plaintiff, Powell, was the only person who was entitled to represent that interest in the pending litigation after he acquired title thereto by purchase and assignment. The last paragraph of section 385 provides that "In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." We assume the language of that section means that when a transfer of interest in the subject-matter of a pending suit is made by a living party to a stranger to the action, or to another person by virtue of the death of a party to the action, the suit may be properly continued in the name of the original party, or, if the estate of the deceased party still claims an interest in the litigation, the court may properly substitute the representative of the estate as a party to the action. But certainly there is nothing in the language of that section which requires the substitution of one already a party plaintiff, who, pending the trial, acquires by purchase and assignment the balance of the joint interest of his co-plaintiff, either from him in his lifetime, or from his executor or administrator in the event of his death.

[7-9] The purpose of a substitution of parties to an action, in the event of death or the transfer of an interest, is that there may be some individual or entity to represent the transferred interest during the continuation of the litigation. When the interest is transferred during litigation, by death or by assignment to a stranger to the action, it follows that a substitution of parties should be made. But when one, who is already a party to the action, acquires the joint interest of his co-plaintiff during the litigation, by purchase and transfer from the owner in his lifetime, or from his estate after his death, there is neither reason nor statutory requirement that the surviving owner of that interest shall again

be made a party to the action in order that he may represent his own interest in the litigation. By his death, the deceased party to the litigation is merely eliminated therefrom. The court does not thereby lose jurisdiction of the subject-matter. The surviving joint owner of the property, under the circumstances of this case, has merely increased his holdings to include the entire property. It is therefore unnecessary that Powell should be substituted to enable him to continue the litigation.

[10, 11] The notice of appeal was given in this case in behalf of both Powell and the deceased. It may be conceded that the appeal was ineffectual so far as it purports to apply to the interest of the deceased party since the estate no longer has an interest in the litigation. But the notice of appeal authorized Powell to represent the entire interest in litigation.

The case of Deiter v. Kiser, 158 Cal. 259, 110 P. 921, relied upon by the respondent in support of its motion to dismiss the action as to Miller's interest, is not in point. In that case there was no transfer or assignment of the chose in action by the estate of Deiter. The entire interest remained in his estate. It belonged to the estate when the notice of appeal was taken. The court properly said that when Miller died his attorney lost authority to represent him in the action for any purpose.

The motion to dismiss the action as to the former interest of J. M. Miller, deceased, is denied. The motion to substitute Robert Powell as plaintiff in the place of said deceased is granted.

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52 Cal.App.2d 450

LOS ANGELES COUNTY v. CRAIG.

Civ. 13511.

District Court of Appeal, Second District,
Division 2, California.

June 2, 1942.

Hearing Denied July 30, 1942.

1. Statutes 🔑225

Courts must, when reasonably possible, harmonize apparently conflicting statutory provisions, and, if such provisions can be reasonably construed so as to avoid conflict, such construction should be adopted.

2. Counties 🔑215

Where the county of Los Angeles brought an action in the superior court of Los Angeles county against a resident of Santa Barbara county under the Welfare Code authorizing a county granting aid to "maintain" an action in the superior court of such county to compel nonsupporting relatives of the recipient to reimburse the county, defendant's motion for change of venue to Ventura county, under the Code section providing for transfer of an action by one county against a resident of another county to a county in which neither party resides, was properly granted, as "maintain" as used in the Welfare Code, means to bring or to institute an action. Code Civ. Proc. § 394; St.1941, p. 3199, § 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Maintain".

3. Statutes 🔑225½

Where two apparently conflicting statutes can be reconciled, the rule that a special statute dealing expressly with a particular subject controls and takes priority over a general statute is inapplicable.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by the County of Los Angeles against C. Delmar Craig to recover such portion of aid granted by plaintiff to a relative of defendant as defendant is able to pay. From an order granting defendant's motion for change of venue, plaintiff appeals.

Affirmed.

J. H. O'Connor, Co. Counsel, and Gerald G. Kelly, Deputy Co. Counsel, both of Los Angeles, for appellant.

T. H. Canfield, of Santa Barbara, for respondent.

McCOMB, Justice.

From an order granting defendant's motion for a change of venue of an action from Los Angeles County to Ventura County, pursuant to the provisions of section 394 of the Code of Civil Procedure, plaintiff appeals.

These are the undisputed facts:

Plaintiff, county of Los Angeles, filed an action pursuant to the provisions of section 2224 of the Welfare and Institutions Code, St.1941, p. 3199, against defendant, a resident of Santa Barbara County.

Section 394 of the Code of Civil Procedure, so far as applicable in the present case, reads thus: "Whenever an action or proceeding is brought by a county * * * against a resident of another county * * * the action or proceeding must be, on motion of either party, transferred for trial to a county * * * other than the plaintiff * * * and other than that in which the defendant resides * * *."

Section 2224 of the Welfare and Institutions Code, among other things, provides that if the recipient of a pension has a spouse or adult child within the state who is pecuniarily able to support such recipient, the county board of supervisors shall request the proper county legal officer to proceed against the nonsupporting relative to recover for the county such portion of the aid granted as the relative is able to pay. This section contains also this provision: "Upon such demand the district attorney or other civil legal officer of the county granting aid shall, on behalf of said county, *maintain* an action, in the superior court of the county granting said aid, against said relative, in the order named, to recover for said county such portion of the aid granted as said relative is able to pay * * *." (Italics ours.)

This is the sole question necessary for us to determine:

Is section 394 of the Code of Civil Procedure available to a defendant who comes within the purview thereof when sued under the provisions of section 2224 of the Welfare and Institutions Code?

[1] This question must be answered in the affirmative. It is the established law in California that it is the duty of courts when reasonably possible to harmonize apparently conflicting code provisions and, if such provisions can be reasonably construed so as to avoid conflict, such construction should be adopted. (Stowe v. Merrilees, 6 Cal.App.2d 217, 220, 44 P.2d 368; Rose v. Superior Court of Imperial County, 80 Cal. App. 739, 751, 252 P. 765; 59 Cor.Jur. (1932) 1051, § 621.)

[2, 3] We find that the word "maintain" has had commonly attributed to it as used in respect to actions three meanings, to wit:

(1) To begin, to bring, to commence, to institute;

(2) To carry on, to continue or persevere in or with;

(3) To commence and prosecute to a conclusion that which has already been begun. (38 Cor.Jur. (1925) 336, § 4; People v. Yant, 26 Cal.App.2d 725, 727, 80 P.2d 506.)

Therefore, applying the rule of construction above stated to the code section in question in the instant case, we must adopt the first meaning attributed to the word "maintain" and not the second or third as urged by plaintiff, which would result in requiring us to hold that the suit must be retained through its various stages in the county where instituted and that section 394 of the Code of Civil Procedure is inapplicable. Thus we find that the word "maintain" used in section 2224 in the Welfare and Institutions Code, supra, is the equivalent of saying, to begin, to bring, to commence, or to institute; and as a result both section 394 of the Code of Civil Procedure and section 2224 of the Welfare and Institutions Code, supra, as thus construed, are reconcilable and harmonized. Therefore, the provisions of section 394 of the Code of Civil Procedure are available to defendant. The conclusion which we have reached is in accordance with a similar determination on a like question by the United States District Court for New Jersey. (See Ricciardi v. Lazzara Baking Corp., 32 F.Supp. 956, 958.) Since the two Code sections can be reconciled, the rule that a special statute dealing expressly with a particular subject controls and takes priority over a general statute is inapplicable and cases such as Brill v. County of Los Angeles, 16 Cal.2d 726, 732, 108 P.2d 443, are not here in point. Likewise the language in California Sav. & L. Soc. v. Harris, 111 Cal. 133, 138, 43 P. 525, and Roullard v. Gray, 38 Cal.App. 79, 81, 175 P. 479, is not controlling in the present case, for the reason that the facts in the latter two cases are entirely different from those in the instant case.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

52 Cal.App.2d 475

NEAD v. SPECIMEN HILL MINING CO.

Civ. 6675.

District Court of Appeal, Third District, California.

June 4, 1942.

1. Trover and conversion 🔑40(6)

In action for conversion of mining machinery and equipment, plaintiff's testimony as to market value of such property *held* sufficient to support trial court's findings and judgment for plaintiff in amount of such valuation as damages.

2. Sales 🔑218½

In action for conversion of mining machinery and equipment, sold by plaintiff to lessee of mining claim subsequently purchased by defendant, evidence *held* sufficient to show, at least in support of judgment for plaintiff, that plaintiff and lessee intended that title to such personalty should not pass to lessee until he fully paid purchase price.

3. Sales 🔑460

A conditional contract for sale of personalty need not be made in writing at time of transfer thereof, but oral agreement between parties at time of sale is sufficient.

4. Fixtures 🔑27(1)

Where written agreement for sale of mining machinery and equipment merely confirmed parties' previous oral contract, reserving title to such personalty in vendor until it was fully paid for, buyer's installation and use thereof in mine leased by him did not constitute them "fixtures" or render them inseparable part of realty. St. 1939, p. 1108, § 2601.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixture".

5. Sales 🔑199

The passing of title to specific personalty depends on intention of parties to transaction. Civ.Code, § 1738.

6. Sales 🔑199

The intention of parties to oral contract for sale of personalty with respect to passing of title thereto should be determined from their declarations and conduct and the surrounding circumstances. Civ.Code, § 1738.

7. Fixtures 🔑3

A buyer of mining machinery and equipment, installed by him in his leased mine without having fully paid purchase price thereof, did not own it, and hence did not "affix his property" to mine within statute providing that when person affixes his property to another's land, without agreement permitting him to remove it, it belongs to landowner, unless he chooses to require its removal by person affixing it. Civ.Code, § 1013.

See Words and Phrases, Permanent Edition, for all other definitions of "Affix His Property".

8. Fixtures 🔑27(1)

An owner of real property or one having interest therein, such as lessee, may agree with vendor of machinery or other personal property, subsequently used on or attached to realty by purchaser, that such property shall retain its character as personalty and that title thereto shall remain in vendor until purchase price is fully paid, despite statute recognizing personalty used on or attached to realty as fixture. Civ. Code, § 1013.

9. Fixtures 🔑27(3)

An agreement between owner of realty and seller of machinery or other personal property, subsequently used on or attached to realty by buyer, that such property shall retain its character as personalty, and that title thereto shall remain in seller until full payment of purchase price, will prevail against subsequent purchaser of realty with actual or constructive notice of such seller's title to personalty.

10. Sales 🔑480(6)

In action for conversion of mining machinery and equipment, sold by plaintiff to lessee of mining claim subsequently purchased by defendant, evidence *held* sufficient to show that defendant acquired title to claim with full knowledge of plaintiff's sale of such personalty to lessee with reservation of title in plaintiff until full payment of purchase price.

11. Sales 🔑472(3)

A corporation, whose officers had actual knowledge that one from whom lessee purchased mining machinery and equipment installed in mine claimed title thereto under conditional sale contract long before conveyance of such claim to corporation by lessee, is bound by such contract.

12. Sales ⚷480(6)

A corporation, purchasing mining claim from lessee's assignee with actual knowledge that mining machinery and equipment thereon were purchased by lessee from another on conditional sale contract, reserving title in vendor, and installed with such understanding between parties thereto, is liable for conversion of such personalty by appropriating and using it.

13. Sales ⚷359(2)

In action for balance due on purchase price of merchandise sold to defendant by plaintiff, plaintiff's testimony as to value of such property and evidence of rental value thereof *held* sufficient to support judgment for plaintiff in amount testified to.

Appeal from Superior Court, Tuolumne County; J. A. Smith, Judge Assigned.

Action by H. C. Nead against the Specimen Hill Mining Company for the purchase price of merchandise sold and delivered to defendant by plaintiff and damages for conversion of mining machinery and equipment. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harold E. Haven, of San Francisco, for appellant.

Rowan Hardin, of Sonora, for respondent.

PER CURIAM.

Judgment was rendered for the plaintiff in the sum of $1,198.37, and interest from July 20, 1940, for merchandise sold and delivered to the defendant, and for the further sum of $975.79, as the value of mining machinery and equipment which were furnished by the plaintiff to J. O. Gillice, a lessee of a mining claim, upon a conditional sale contract, and subsequently converted by the defendant after it had purchased the claim. From that judgment the defendant has appealed.

It is conceded the defendant owes plaintiff $482.37, upon the unpaid portion of the purchase price of the merchandise. The appellant contends that the balance of the judgment is not supported by the evidence because the machinery and equipment which were installed and used in the operation of the mine, under the provisions of section 2601 of the Public Resources Code of California, St.1939, p. 1108, became fixtures on, and an inseparable part of, the real property, and therefore passed to the defendant as purchaser of the mining claim.

The respondent asserts that the provisions of the code above cited have no application to the facts of this case, for the reason that Mr. Gillice purchased the machinery and equipment on a conditional sale contract, agreeing with the plaintiff that title to the property should not pass until the purchase price was fully paid. The purchase price of the property was never fully satisfied.

John Kojovich became the owner of the Iron Duke Quartz Claim, in Mariposa County, by deed dated June 22, 1925. That claim is incidentally involved in this suit. Mr. Kojovich died testate on March 23, 1936. His will was admitted to probate and Frank Maschio was appointed executor thereof. Pursuant to an order of the probate court, which was procured in said estate, a written lease of the mining claim and an option to purchase it for $9,000, upon payments of specified installments on or before January 27, 1939, was executed to J. O. Gillice on April 27, 1936. He immediately took possession of the claim and purchased from the plaintiff at various times prior to June 30, 1938, on a conditional sale contract, mining machinery and equipment which were installed on the premises and used in operating the mine. Pursuant to their previous agreement, J. O. Gillice signed and delivered to the plaintiff on July 5, 1938, a written statement enumerating the various items of said property which were "delivered to the Iron Duke Mine" and specifying in said document the respective purchase prices thereof. This contract was recorded October 11, 1940, in volume 8 at page 194, of the Mariposa County Records. It contains the following agreement reserving title to the machinery in the vendor until the purchase price thereof is fully paid: "The above items including Page 1 are the property of the Nead Machinery Co., title of which shall remain with them until the full amount is paid. The above equipment was delivered to the Iron Duke Mine, Mariposa County."

Mr. Gillice failed to exercise his option to purchase the mine, or to make the payments therefor as specified in the lease and option. March 4, 1939, he assigned the lease and option to purchase the mining claim to Mrs. Alvina F. Bulkley, who was president of the defendant, Specimen Hill Mining Company. The Iron Duke Mining

Claim was distributed in the estate of John Kojovich, deceased, to two parties named Runjavac and Saso. They deeded the claim to Mrs. Bulkley, June 29, 1939. She conveyed it to the defendant, Specimen Hill Mining Company, October 13, 1939. The machinery and equipment in question were used in the mining operations of the last-mentioned company. Some of it was disposed of by that company. The defendant, mining company, claims title to the machinery and equipment, under section 2601 of the Public Resources Code, as fixtures and as a part of the mining claim.

This suit was commenced in December, 1940. The complaint was couched in two counts. The first cause was for the balance of the purchase price of merchandise which plaintiff sold to the defendant. The second cause was for damages for conversion of mining machinery appropriated and used by the defendant. The court adopted findings to the effect that all allegations of the complaint are true, and that the statements of the answer in conflict therewith are untrue. Judgment was rendered for the plaintiff as prayed for. From that judgment this appeal was perfected.

The judgment and findings are supported by the evidence. The mining claim was leased to J. O. Gillice, April 27, 1936. He took possession of the property and operated the claim for nearly three years. He assigned the lease March 4, 1939, to Alvina F. Bulkley, who afterward became president of the defendant, Specimen Hill Mining Company. During the period of time that Mr. Gillice operated the mine, he purchased from the plaintiff, from time to time, on a conditional sale agreement, machinery and equipment which were installed and used in the Iron Duke Quartz Mine. There is satisfactory evidence to show that when the mining claim was transferred to Mrs. Bulkley on June 29, 1939, the machinery and equipment in question came into her possession. There is evidence that when she transferred the mining claim on October 13, 1939, to the Specimen Hill Mining Company, of which she was president, the machinery and equipment passed into the possession of the mining corporation. The plaintiff, Mr. H. C. Nead, testified in that regard:

"Q. When was that machinery placed upon the Specimen Hill Mine? A. From about February to June 1938."

During the trial the respective attorneys in this suit signed and filed a written stipulation, dated March 22, 1941, which provides in that regard: "It is further stipulated that the property described in plaintiff's Exhibit 3 *was delivered to and used or installed upon the Iron Duke Mining Claim,* the Commercial Quartz Claim or the Pedro Placer Mining Claim." (Italics ours.)

The plaintiff, Mr. H. C. Nead, testified repeatedly that the machinery and equipment were sold to Mr. Gillice on a conditional sale agreement. The clear result of that transaction is that the respective parties agreed the machinery and equipment should not become fixtures on the mining claim, and upon the contrary that the title to that property was to remain in the vendor until the purchase price was fully paid. Pursuant to that understanding and agreement, Mr. Gillice signed a written document on July 5, 1938, which is referred to as a conditional sale contract, and delivered it to the plaintiff, in which he itemizes certain machinery and equipment, together with the agreed purchase price thereof, and specifically declares, in accordance with their previous agreement, as hereinbefore quoted, that the title to the property shall remain in the plaintiff until the purchase price is fully paid.

The plaintiff always asserted to the representatives of the defendant corporation, including Mrs. Bulkley, the president, and the attorney, Harold E. Haven, who was the secretary of the company, that the machinery and equipment were sold to Mr. Gillice on a conditional sale contract. In response to a question propounded to Mr. Nead by defendant's attorney, Mr. Haven, he so declared. The following colloquy occurred in that regard:

"Q. Did you ever tell me that you had that as a basis of your claim on the property? A. Yes sir, I certainly did, because as many times as I talked to you about it, I am sure I told you I had this conditional sales contract."

That agreement regarding the title to the machinery and equipment was introduced in evidence and marked Plaintiff's Exhibit 3. At the trial, Mr. Haven, the defendant's attorney, stated in open court, with respect to that exhibit, as follows: "I will stipulate that the total of the items shown by Plaintiff's Exhibit Three is $1808.49; that the total of the credits for property returned is $328.00, making a net of $1480.48," remaining unpaid.

Mr. L. G. Thompson, who had charge of the mine after the defendant took possession of it, including the machinery and equipment in question, signed a written acknowledgement of possession, on the part of the defendant, of the identical items of machinery and equipment which are mentioned in said Exhibit 3, with the exception of a few articles thereof, which were missing. Thompson's statement was received in evidence and marked Exhibit 4. The disposal of one of those missing articles was testified to by Mr. Nead as follows:

"Q. * * * You said you could tell where one of these engines went. Where did you get that information, and where did it go to? A. I got the information from the fellow who got it. It went to the man who bought the little mill that was on the property at the time Mr. Thompson took it over, and started operating.

"Q. Did you give it to that party? A. No sir.

"Q. Do you know who did? A. I suppose Mr. Thompson. Anyway—shall I explain?

"Q. Yes, you might explain that. A. This party who bought the mill came into our yard. Something was said about the Iron Duke Mine. He said, 'I bought a mill from there, and also got a Dodge engine.' I said 'I am glad to know where the Dodge engine went, because that was mine'."

The foregoing evidence adequately shows that the machinery in question came into the possession of the defendant. The plaintiff demanded return of the property, which was refused. Some of it was apparently sold and disposed of by the defendant. With the exception of a few articles of the property which were repossessed by the plaintiff, of the agreed value of $328, as Mr. Haven stated, none of that property has been restored to plaintiff. On the contrary, it was converted to the use of the defendant, upon its claim that the machinery and equipment were acquired as fixtures and as inseparable parts of the real property. It follows that, unless the defendant acquired title to the machinery and equipment under section 2601 of the Public Resources Code, the plaintiff is entitled to judgment for the return of the property or to an award for the reasonable value thereof. There is some evidence of an acknowledgment on the part of the attorney for the appellant, who was acting as its secretary, that the defendant did not claim title to the machinery and equipment. There is also evidence of a promise that if plaintiff would procure from Mr. Thompson a certified list of the property which came into the possession of the mining corporation, it would be either returned to the plaintiff or paid for. Mr. Nead testified in that regard:

"Q. Didn't I ask you to find out how much of the equipment was left on the property, and get Mr. Thompson to 'OK' the list, so that I could take it up for you? A. You asked me to get a list for Mr. Thompson to 'OK,' and you would either return or pay for it."

[1] The record contains sufficient evidence of the value of the machinery and equipment converted by the defendant to support the findings and judgment with respect to that cause of action. Mr. Nead, who was perfectly familiar with the property in question and with the market value thereof, testified to that valuation.

[2-4] In spite of the fact that the machinery and equipment were installed and used on the Iron Duke Mining Claim, which was subsequently purchased by the defendant, we are convinced the record shows that it was not the intention of the plaintiff, or of Mr. Gillice, that title thereto should pass to the vendee until the purchase price was fully paid. On the contrary, it appears that it was the intention of the parties that title to that property was not to pass to Gillice until he had fully paid for the machinery and equipment. At least, in support of the judgment, there is ample evidence to that effect. That agreement in writing was subsequently made between the parties. It was not necessary that such conditional contract should have been made in writing at the time of the transfer of the property. That was a conditional sale of personal property. It is sufficient if it was orally agreed to between the parties at the time of the sale. The subsequent written agreement in the present case merely confirmed the previous oral contract to reserve the title to the personal property in the vendor until it was fully paid for. That being true, it follows that the installing and use of the machinery and equipment in the mine did not constitute them as fixtures thereon, or render them an inseparable part of the realty. It was an agreement they should remain as personal property.

[5-7] The passing of title to specific personal property depends upon the intention of the parties to the transaction. § 1738, Civ. Code. In the absence of a written contract, the intention of the parties

with respect to the passing of title to personal property should be determined from the declarations, the conduct of the respective parties and the surrounding circumstances. Bond Inv. Co. v. Blakeley, 83 Cal.App. 696, 701, 257 P. 189. Certain rules for ascertaining the intention of the parties, applicable to the passing of title to property, are prescribed by section 1739 of the Civil Code. None of those rules appears to apply to the present case. There is nothing in section 1013 of the Civil Code, upon which the appellant relies, in conflict with what we have previously said regarding the right of the parties to a transfer of property to preserve by mutual agreements its character as personal property. That section merely says that: "When a person affixes *his property* to the land of another, without an agreement permitting him to remove it, the thing affixed * * * belongs to the owner of the land, unless he chooses to require the former to remove it."

It is only when a person affixes "his property" to the land of another, that he may not remove it except as provided in that section. In the present case, if by agreement the plaintiff and Gillice agreed that the former should reserve the title to the machinery until the latter had fully paid for it, and the purchase price was not fully paid, then Mr. Gillice did not own the machinery and equipment, and therefore he did not "affix his property" to the mine when it was installed therein for the purpose of operating the claim.

[8, 9] It is a well-recognized principle of law that, in spite of the existence of a statute which ordinarily recognizes personal property which is used on or attached to real property, as fixtures, the owner or one who has an interest in the realty, such as a lessee thereof, may agree with a vendor of machinery or personal property which is subsequently used on or attached to the realty, that it shall retain its character as personal property, and that the title thereto shall remain in the seller until its purchase price has been fully paid. That agreement will prevail against a subsequent purchaser of the real property with actual or constructive notice of the vendor's title to the personal property. Teater v. Good Hope Dev. Corp., 14 Cal.2d 196, 207, 93 P.2d 112; Dauch v. Ginsburg, 214 Cal. 540, 544, 6 P.2d 952; P. J. Freiermuth Co. v. Faustino, 120 Cal.App. 136, 7 P.2d 370; Oroville-Wyandotte Irr. Dist. v. Ford, 47 Cal.App.2d 531, 118 P.2d 340; 12 Cal.Jur. 566, §§ 6 and 7; 88 A.L.R. 1321, note; 13 A.L.R. 454, note.

[10] In the present case there is adequate evidence that the defendant acquired title to the mining claim with full knowledge that the plaintiff, by agreement with Mr. Gillice, the lessee, sold to him the machinery and equipment reserving title in the vendor until the purchase price was fully paid. Mr. Nead testified that he talked with Mrs. Bulkley, the president of the defendant corporation, and with Mr. Thompson, the overseer of defendant's mine, regarding that fact in the spring of 1939, before the defendant bought the mining claim. He testified in that regard:

"It was after Mr. Gillice's death that I got in touch with Mrs. Bulkley, and told her I was going to remove our equipment from the mine, and she asked me not to do that; that they would sure lease the property and operate it, and this equipment being on the property, would be an advantage to sell it, and I would also get my money for the equipment. I talked to Mrs. Bulkley several different times between along in the spring of 1939, and up until the time that Mr. Thompson took charge of the property.

"Q. Did you ever talk with Mr. Thompson about it? A. Yes sir, I notified him I think the first time I was over there, after he had taken charge, of what property was ours. And then later on I got the 'OK' of Mr. Thompson of what property they could use."

[11] The defendant was not incorporated until June 8, 1939. The mining claim was not conveyed to Mrs. Bulkley until June 29, 1939. It was not conveyed to the Specimen Hill Mining Company until October 13, 1939. The machinery and equipment were all placed on the mining property on or before the end of June, 1939. There appears to be no doubt that the officers of the defendant corporation had actual knowledge of the fact that plaintiff claimed title to the personal property by virtue of a conditional sale contract with J. O. Gillice long before the mining claim was conveyed to the company. The defendant is therefore bound by that agreement.

In the case of P. J. Freiermuth Co. v. Faustino, supra, it was held that a purchaser of land, who, prior to acquiring title thereto, had knowledge of a conditional sale agreement between the vendor and the purchaser of well casing and a pumping unit which were installed on the real property, by the terms of which the seller retained title to the personal property until the purchase price was fully paid, was bound by that agreement although the conditional sale contract was not recorded. In 12 Cal. Jur. 568, section 7, it is said with respect to what constitutes notice to a subsequent purchaser of real property of title to personal property which has been attached to the realty: "To constitute one a purchaser with notice within the rule, it is not necessary that he have notice of the conditional contract, but only that he have notice that the character of personalty might attach to the property. For instance, if a tenant is in possession of the premises, information that the property in question has been installed by the tenant is sufficient notice to put him on inquiry within the rule, notwithstanding the tenant may state that he has paid for it in full."

In 22 American Jurisprudence, page 729, sections 17 and 18, it is said: "Such an agreement may be implied from circumstances or from the fact that the property is sold under a conditional sale contract. * * * A purchaser or subsequent mortgagee of land with notice of an agreement that an article attached to the realty shall remain personal property takes, subject to such agreement, and cannot claim the article annexed."

[12] We therefore hold that the mining machinery and equipment which were involved in the second count of the complaint, were purchased from the plaintiff on a conditional sale contract which reserved the title thereto in the vendor, and installed on the mining claim with that understanding between the parties; that the defendant subsequently purchased the real property with actual knowledge of that fact, and that it is therefore liable for conversion of the personal property.

[13] This disposes of the only question raised on appeal, as indicated by the statement which is printed on the flyleaf of its opening brief. The first cause of action is based on other merchandise which was furnished and delivered to the defendant. With respect to that count, judgment was rendered for the plaintiff in the sum of $1,198.37. The appellant concedes that there is owing and unpaid on that account the sum of $482.37. The balance of that judgment is supported by the evidence. In support of the first cause of action, Mr. Nead testified as follows:

"Q. Then as a summary Mr. Nead, as I get your testimony, the value of the property which you sold to the Specimen Gold Hill Mining Company, which has not been paid for, according to this record, if I get it correctly, totals $1198.37 * * * together with the rental? A. Yes sir, $1198.-37."

The record contains ample evidence of the rental value of that property.

The judgment is affirmed.

* * *

52 Cal.App.2d 415

BRELAND et al. v. TRAYLOR ENGINEERING & MFG. CO. (three cases).

Civ. 11789.

District Court of Appeal, First District, Division 1, California.

June 2, 1942.

Rehearing Denied July 2, 1942.

1. Appeal and error 🔑996

Where appellant conceded that trial court's finding that driver of automobile with which plaintiff's automobile collided was negligent was supported by certain inferences from the evidence, finding was conclusive.

2. Appeal and error 🔑996

In order to establish defense of contributory negligence against a verdict of a jury or a finding of the trial court, the evidence must be such that the reviewing court can say that there is no substantial conflict on the facts and that from the facts, reasonable men can draw but one inference which points unerringly to the negligence of the plaintiff proximately contributing to his own injury.

3. Automobiles 🔑244(35)

Evidence sustained a judgment for plaintiffs for injuries sustained in intersectional collision between plaintiff's automobile and an automobile driven by defendant's employee on ground of negligence of the employee in traveling through blind intersection at high and excessive rate of speed.

4. Appeal and error ⇨1051(1)

In action for injuries sustained in intersectional collision between plaintiff's automobile and an automobile driven by defendant's employee wherein the evidence clearly established that the employee's automobile was traveling through blind intersection at excessive rate of speed at time of collision, any error in admitting as against defendant evidence of an admission regarding speed at which employee's automobile was driven, made by a codefendant who was riding in the employee's automobile was not prejudicial.

5. Appeal and error ⇨1008(1)

When a motorist approaching an intersection sees an approaching automobile, whether motorist acts as a reasonable man in not continuing to watch the automobile is generally for the trier of the facts.

6. Appeal and error ⇨1008(1)

Where plaintiff motorist observed automobile approaching intersection from motorist's right at a time when such automobile was twice the distance from intersection as motorist's automobile was, and the motorist did not continue to watch the approaching automobile, and as he entered the intersection he looked to the right and observed the approaching automobile an instant before collision, whether motorist exercised reasonable care in keeping proper lookout, and whether he acted as a reasonable man in not again looking at the approaching automobile until entering the intersection were questions for trial court.

7. Appeal and error ⇨1008(1)

In automobile accident case tried without jury, trial court's finding on question of contributory negligence could not be disturbed on appeal.

8. Master and servant ⇨302(1)

Under the "going and coming rule" an employer is not liable for injuries sustained by third persons through negligence of an employee while the employee is going to or coming from his work but the rule is subject to exceptions.

See Words and Phrases, Permanent Edition, for all other definitions of "Going and Coming Rule".

9. Master and servant ⇨302(1)

In determining liability of an employer for injuries sustained by third party as result of negligence of an employee while he is going to or coming from work, if the employer pays transportation expenses of the employee, it is a possible although not conclusive inference that the employer has impliedly agreed that service to him shall start from the time the employee leaves home and shall continue until he arrives back at his home.

10. Evidence ⇨75

In determining whether an employee was acting within the scope of his employment at time of an automobile accident so as to render the employer liable for injuries sustained by third persons in the accident, the trial court as trier of facts was entitled to give weight to fact that employer failed to produce evidence concerning nature of the employment contract. Code Civ. Proc. § 1963, subd. 5; § 2061, subds. 6, 7.

11. Evidence ⇨75

Although a defendant is not under duty to produce testimony adverse to himself, if he fails to produce evidence that would naturally have been produced, he must take the risk that the trier of facts will infer that if the evidence had been produced it would have been adverse. Code Civ.Proc. § 1963, subd. 5; § 2061, subds. 6, 7.

12. Appeal and error ⇨1008(1)

Where employee was paid subsistence and transportation costs to California where employee was required to do work for employer in connection with installation of rotary kiln for employer's customer, and was paid living expenses while he was in California, and reasonable inference from testimony was that employee was paid mileage for use of an automobile and the employee was paid on monthly salary basis, whether employer impliedly agreed that while employee was driving automobile to and from work he should be deemed to be acting within the course and scope of his employment so that employer was liable to third persons for injuries sustained as result of negligent operation of the automobile by the employee was for the trial court as trier of facts.

13. Appeal and error ⇨1052(8)

The alleged erroneous admission of testimony which was merely cumulative and related to issue on which trial court could have made no finding other than that made, was not prejudicial.

◆

Appeal from Superior Court, Santa Clara County; Charles W. Davison, Judge.

Actions by R. H. Breland and wife and by Millie Breland, a minor, etc., and by

Ruth Breland, a minor, etc., against the Traylor Engineering & Manufacturing Company and others, for injuries sustained in automobile accident, wherein the defendant William G. Bachman filed a cross-complaint against R. H. Breland. The actions were consolidated for trial and tried without a jury. Judgment was entered against the defendant Bachman on his cross-complaint. From an adverse judgment, the defendant Traylor Engineering & Manufacturing Company appeals.

Affirmed.

Rehearing denied; KNIGHT, J., dissenting.

Louis Oneal, Maurice J. Rankin, and Duncan Oneal, all of San Jose, for appellant.

Frank V. Campbell and Campbell, Rankin & Hayes, all of San Jose, for respondents.

PETERS, Presiding Justice.

Plaintiffs brought three actions against defendants for damages resulting from injuries sustained by plaintiffs in an automobile accident which occurred sometime between 7:30 and 8 o'clock in the morning of November 23, 1939. The plaintiffs R. H. Breland, and Anna R. Breland, husband and wife, brought one action, while the other two actions were brought by the minor children of the Brelands, Ruth and Millie. In all complaints the named defendants were the Traylor Engineering and Manufacturing Co., sole appellant; Consolidated Steel Company of Los Angeles, later dismissed by stipulation; Clara Hoffman, owner of one of the cars involved in the collision, who was served as a nonresident owner of a car operated in this state, and against whom a default judgment was entered; and William G. Bachman, in whose favor judgment was rendered. Bachman filed a cross-complaint against R. H. Breland. These four actions were consolidated for trial, and tried without a jury. Judgment was entered in favor of Breland on Bachman's cross-complaint, and that portion of the judgment has become final. Judgment was also entered against Traylor Engineering and Manufacturing Co., and against the defaulting defendant Clara Hoffman awarding R. H. Breland $5,428.50, Anna R. Breland $500, Millie Breland $4,015.81, and Ruth Breland $278.94. From this judgment Traylor Engineering and Manufacturing Co. has appealed.

Appellant company maintains its place of business at Allentown, Pennsylvania. It sold to Permanente Corporation, for installation at the latter's plant located near Monte Vista in Santa Clara County, California, and which is about 10 miles from San Jose, a large rotary kiln. As part of its contract with Permanente Corporation appellant company sent two of its employees, Chapman and defendant Bachman, to California to assist in the installation of the kiln. Bachman, who did not appear as a witness at the time of trial but whose deposition was taken by plaintiffs prior to trial, testified in his deposition that it was his duty to supervise the alignment of the kiln, and that Chapman was in charge of all welding. Bachman had been furnished business cards by appellant company on which, immediately under Bachman's name, appeared "Construction Superintendent, Traylor Engineering & Mfg. Co., Allentown, Pa." The design of the kiln, and all materials for its construction, were furnished by appellant company, but the installation of the kiln, except as noted, was performed by the Consolidated Steel Company of Los Angeles.

Appellant company allowed Chapman and Bachman their railroad fare and subsistence to California, although both men drove to California by automobile, Bachman in his own car, and Chapman in a car registered in the name of defendant Clara Hoffman, who accompanied him on the trip. Bachman came to California first, arriving early in September, 1939. Chapman arrived about two weeks later, after Bachman had notified appellant company that he was needed. Both men had been employed by appellant company for many years, and had frequently worked together in supervising erection of kilns sold by appellant company. Bachman testified that after arriving at San Jose the appellant company, in addition to salary, paid all of his living expenses and allowed 5 cents a mile for transportation to and from the Permanente plant. He "assumed" the same arrangement had been made with Chapman. Upon Chapman's arrival the two men first used Bachman's car to drive to the Permanente plant, but later shifted to the Hoffman car driven by Chapman. Thereafter, the two men commuted to the factory in the Hoffman car, driven by Chapman. It is a reasonable inference from Bachman's testimony that Chapman was paid 5 cents a mile by appellant company for furnishing such transportation, and that the company knew the men were using an automobile for this purpose. In addition to monthly salaries both men received all their living expenses from appellant company.

The job upon which these men were working was a "rush" job and frequently required them to work on Sundays and holidays. On November 23, 1939, which was Thanksgiving Day, Chapman picked Bachman up at his hotel and started toward the Permanente plant. There is no doubt, and Bachman so testified, that the men were on their way to work. At the intersection of Stevens Creek Road with Bascom Avenue the automobile driven by Chapman, a Studebaker sedan, collided with the car in which the plaintiffs were driving, a Ford sedan driven by plaintiff R. H. Breland. The accident resulted in the death of Chapman, serious injuries to R. H. Breland, and Millie Breland, and minor injuries to Anna Breland, Ruth Breland and Bachman.

So far as pertinent here, the trial court found that Chapman and Bachman were employees of appellant company; that at the time of the accident Chapman was driving the car within the course and scope of his employment with appellant company; that Chapman was negligent; that his negligence proximately caused the accident; that Bachman was not negligent; and that plaintiffs were not guilty of contributory negligence. Based on these findings, the judgment above set forth was entered.

[1] Appellant urges that the findings that Chapman was guilty of negligence are not supported. This point is urged although appellant concedes that the findings are supported by certain inferences from the evidence. Since this is so, this court has no power to disturb the finding. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183.

[2] Appellant also urges that the evidence, as a matter of law, establishes that R. H. Breland was guilty of contributory negligence, and that the findings to the contrary are unsupported. In this connection, appellant seems to have overlooked the rule that in order to establish the defense of contributory negligence as against a verdict of the jury or finding of the trial court, "the evidence must be such that the appellate court can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference which inference points unerringly to the negligence of the plaintiff proximately contributing to his own injury." Crawford v. Southern Pacific Co., supra, 3 Cal. 2d page 429, 45 P.2d page 184. If this well-settled rule be kept in mind, there is no doubt that the findings in reference to negligence and contributory negligence are supported.

As already noted, the accident occurred at the intersection of Bascom Avenue, which runs north and south, and Stevens Creek Road, which runs east and west. The Breland car was traveling northerly on Bascom Avenue, while the car driven by Chapman was traveling westerly on Stevens Creek Road. As Breland approached the intersection, for the last 100 feet or so, there was nothing to obstruct his view, either to his right or left. As Chapman approached the intersection there was nothing to obstruct his view to the left, from which direction respondents were approaching, but his view to the right was obstructed, so that the intersection, as to him, was a blind intersection. The two cars came together near the center of the intersection, both of them being badly smashed, the Ford so badly that it was sold for junk.

R. H. Breland testified that, prior to approaching the intersection, he was driving about 40 miles per hour; that as he approached he slowed down to about 30, and that he continued to slow down until he reached the intersection; that he was then going about 25 miles per hour; that as he approached he was looking ahead; that he was "looking everywhere"; that when he was about 60 to 65 feet from the intersection he saw the Chapman car coming from his right; that at that time the Chapman car was "over twice the distance" from the intersection that he was; that he did not keep his eyes on that car; that he saw another car going in or coming out of a service station slightly to his left; that as he pulled into the intersection he looked to his left and then to his right; that he then saw the Chapman car "so close to me with the terrific speed, that I tried to give myself a left turn, and by that time the car was upon me, and 'Boom!'" Mrs. Breland testified that she saw the Chapman car as they approached the intersection, but that she did not continue to look at it "because the car was so far away that I just dismissed it from my mind."

Officer Bohnett of the State Highway Patrol arrived at the scene of the accident shortly after its occurrence. He testified that in the Chapman car were some blue prints, a large plumb bob, a level, and a satchel of small tools; that there was no evidence on the highway that brakes had been applied by either driver prior to the collision; that tire burns on the highway led from the point of collision 35 feet to a telephone pole on the northwest corner and from there 9 feet to the Chapman car; that the Chapman car was north of the pole and the Breland car was 12 feet west of the pole; that there were no tire burns leading to the Breland car; that the Breland car was damaged in the front and right side, while the Chapman car had been hit on the left side about the center; that the pole with which the Chapman car came into contact was set in concrete and that the Chapman car hit it with such force that it was moved 3 inches at the base.

[3] From this brief resumé of the evidence it is obvious that the finding of the trial court that Chapman was negligent is amply supported. The evidence of the two Brelands, and the physical facts, demonstrate that the Chapman car must have been traveling at a very high and excessive rate of speed.

[4] On this issue of negligence, appellant urges that the trial court erroneously admitted certain evidence of Officer Bohnett and Dr. Amaral. Officer Bohnett testified that Bachman stated to him at the latter's hotel during the forenoon of the day of the accident that the Chapman car was going between 35 and 40 miles per hour at the time of the accident. Dr. Amaral testified that Bachman stated to him at the hospital where Bachman was treated shortly after the accident that they had got started late and were going pretty fast, and that is all he knew. Appellant urges that these statements were no part of the res gestae, were hearsay as to it, and were inadmissible. Appellant relies on the rule that unless statements as to the cause of an accident are part of the res gestae, employees have no power to bind their employer by such admissions unless evidence is offered that power to make such statements was within the scope of their authority. Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 379, 104 P. 986; Luman v. Golden Ancient Channel M. Co., 140 Cal. 700, 74 P. 307; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286. It is not now necessary to discuss the extent or proper application of that rule. There can be no doubt, and appellant concedes, that the statements were admissible as against Bachman, who was a defendant and cross-complainant. The record indicates that as to Bohnett's testimony the trial court probably admitted the evidence merely as to Bachman. However, if it be conceded that his testimony and the testimony of Dr. Amaral on this issue was also admitted against appellant, and if it be conceded that it was error to admit such testimony against appellant, such evidence was merely cumulative of other admissible evidence on the issue of speed of the Chapman car. The physical facts speak more eloquently than the evidence of Bohnett and Dr. Amaral on this issue. After reading the record we are of the opinion that on the issue of Chapman's negligence, the question was not a close one. The evidence is quite clear that the Chapman car was traveling through a blind intersection at a high and excessive rate of speed. Therefore, if error was committed in the admission of the challenged testimony, it could not have been prejudicial to appellant.

[5-7] The contention that the evidence shows that R. H. Breland was guilty of contributory negligence as a matter of law is equally untenable. This contention is based upon Breland's testimony that he observed the Chapman car coming from his right when he was within 60 to 65 feet from the intersection, and that he did not look again to his right until he entered the intersection. It seems to be the thought of appellant that Breland, as a matter of law, was required to keep a constant lookout to his right. The only case cited by appellant on this point is Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201. In that case, in affirming a judgment in favor of the plaintiff, and in holding that an implied finding of negligence on part of defendant was supported, the court pointed out that the evidence showed plaintiff's car entered the intersection first from the right, and in commenting on the failure of defendant to keep a proper lookout, stated (12 Cal.App.2d page 683, 55 P.2d page 1203): "It was his duty to keep a reasonably vigilant lookout for vehicles approaching the intersection from both directions." That sentence cannot be distorted into a holding that, as a matter of law, under all circumstances, one approaching an intersection must keep a constant lookout both ways. Where a driver sees an approaching car, whether

he acted as a reasonable man in not keeping his eye on that car, is generally a question of fact for the trier of the fact. R. H. Breland testified that when he saw the Chapman car it was "over twice the distance" from the intersection that he was. Mrs. Breland testified the Chapman car was so far from the intersection that when she saw it she "just dismissed it from my mind." Whether Breland exercised reasonable care in keeping a proper outlook, and, whether he acted as a reasonable man in not again looking at the Chapman car until he entered the intersection, were questions of fact. The finding of the trial court on this question cannot now be disturbed. Lundgren v. Converse, 34 Cal.App.2d 445, 93 P.2d 819; Lee v. Stephens, 8 Cal.App.2d 650, 47 P. 2d 1105.

[8] Appellant strenuously urges that there is no evidence at all to support the findings that Chapman was acting within the scope of his employment at the time of the accident. In this connection appellant relies on the rule that, under normal circumstances, an employee is not within the course and scope of his employment while going to or coming from work. There are numerous cases which establish the proposition that, where a person is injured by an employee, or where the employee is injured, while going to or coming from his work, the employer is not liable either to the injured third person for damages or to the employee for compensation. Humphry v. Safeway Stores, Inc., 4 Cal.App.2d 589, 41 P.2d 208; Postal Tel. Cable Co. v. Industrial Acc. Comm., 1 Cal.2d 730, 37 P.2d 441, 96 A. L.R. 460; Holopoff v. Industrial Acc. Comm., 131 Cal.App. 554, 21 P.2d 649; Nussbaum v. Traung Label, etc., Co., 46 Cal.App. 561, 189 P. 728.

This so-called "going and coming rule" is not without exceptions. It is not the law that in every case where the employee is going to or coming from work the employer is not liable for the negligence of his employee, or is not liable to his employee for compensation. This court recently had occasion to point out that there are many exceptions to the so-called "going or coming rule." Western P. & S. Co. v. Industrial Acc. Comm., 49 Cal.App.2d 108, 121 P.2d 35. Many exceptions to the rule are there mentioned. See, also, Brown v. Montgomery Ward & Co., Inc., 104 Cal.App. 679, 286 P. 474; Dillon v. Prudential Ins. Co. of America, 75 Cal.App. 266, 242 P. 736; Curcic v. Nelson Display Co., 19 Cal.App.2d 46, 64 P.2d 1153; Western Pac. R. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 224 P. 754; Leffert v. Industrial Acc. Comm., 219 Cal. 710, 28 P.2d 911; Whiting-Mead Com. Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518; Freire v. Matson Navigation Co., 19 Cal. 2d 8, 118 P.2d 809; Smith v. Industrial Acc. Comm., 18 Cal.2d 843, 118 P.2d 6. In the Western Pipe & Steel Company case, supra, a widow of an employee was held entitled to a death benefit where her husband, the employee, was killed while on his way to dinner off the premises of his employer, where the employee was required to work overtime and was paid at an hourly rate while securing his dinner. It was held that under such circumstances the commission was justified in finding that an implied contract existed whereby the employer had agreed that service should continue during the dinner hour. There are also many cases holding that where transportation is furnished as an integral part of the contract of employment to convey the employee to and from his place of work, injuries to the employee while in such vehicle are compensable as being within the course and scope of the employment. Dominguez v. Pendola, 46 Cal.App. 220, 188 P. 1025; Trussless Roof Co. v. Industrial Acc. Comm., 119 Cal.App. 91, 6 P.2d 254.

[9] In the present case both Chapman and Bachman were employees of appellant. Bachman was "construction superintendent" of appellant and Chapman was in charge of all welding. Bachman testified on his deposition that both men were on a monthly salary basis; that they were on their way to work at the time of the accident; that their traveling and subsistence expenses were paid by appellant while on their way to California; that while living at San Jose and working at Permanente Corporation their living expenses were also paid by appellant. It is a reasonable inference from Bachman's testimony that appellant paid Chapman 5 cents a mile for using the Hoffman car to drive back and forth to and from work. It should be here mentioned that appellant failed to produce any evidence at all on the question of the relationship between itself and Chapman and Bachman. The question thus presented is whether, under such cir-

cumstances, the findings that Chapman was acting in the course and scope of his employment at the time of the accident are supported by the evidence. We think it is a possible, although not conclusive, inference from the evidence that by the arrangement above described the appellant company impliedly agreed that while Chapman was driving to and coming from work he should be deemed to be acting within the course and scope of his employment. Where the employer pays the transportation expenses of his employees on their way to and from work it is a possible, although not conclusive, inference that the employer has impliedly agreed that service to him shall start from the time the employee leaves home and shall continue until he arrives back at his home. This is not a new concept. The problem is discussed in an annotation appearing in 87 A.L.R. 250, entitled: "Right to compensation for injury while going to or from work as affected by fact that compensation covers the time involved or cost of transportation, or both." In that annotation, after setting forth the general rule that injuries received while going to or coming from work are not compensable, it is stated: "An exception to this rule, however, is generally recognized where the employee's compensation covers the time involved in going to or from his work, or an allowance is made for the cost of transportation." Many cases are then discussed. Running through the cases is the thought that when transportation is furnished or an allowance is made by the employer for such transportation, it is a permissible inference that the employer has impliedly agreed that the employment shall be continuous from the time the employee leaves home and shall continue until he returns. See discussion on the general principle in Western P. & S. Co. v. Industrial Acc. Comm., supra.

[10] In the present case that inference receives added support from the fact that appellant, although it defended the action, failed to produce any evidence at all on the issue as to the nature of its agreement with Chapman and Bachman. We think the trial court was justified in giving some weight to this fact. Section 2061 of the Code of Civil Procedure provides that juries shall be instructed: "6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, 7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." Section 1963 of the Code of Civil Procedure in listing disputable presumptions, in subdivision 5, provides: "That evidence willfully suppressed would be adverse if produced." In Dooley v. West American Com. Ins. Co., 133 Cal.App. 58, 63, 23 P.2d 766, 768, the court in upholding a finding of agency stated, after reviewing the evidence, "* * * and we are of the opinion, in view of the fact that appellant must have possessed evidence as to whether or not Vianelli was acting for it in so doing, which evidence was not produced at the trial although appellant defended the action, that such suppressed evidence would have been adverse to it had it been in fact produced." In Barty v. Collins, 109 Cal.App. 94, 97, 292 P. 979, 980, it was urged by a principal that his agent was on vacation at the time of the accident. The fact that "during the trial, no attempt was made by the corporation to show by their records or by the testimony of executive officials that Collins was actually on his vacation or the exact date when it began" was commented on by the court in upholding a finding of agency. See, also, Puckett v. Draper, 156 Va. 238, 158 S.E. 68; Robinson v. George, 16 Cal.2d 238, 105 P.2d 914.

[11] The rule of these code sections and cases is predicated on common sense, and public policy. The purpose of a trial is to arrive at the true facts. A trial is not a game where one counsel safely may sit back and refuse to produce evidence where in the nature of things his client is the only source from which that evidence may be secured. A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of the fact will infer, and properly so, that the evidence, had it been produced, would have been adverse. Wigmore, in his usual trenchant style, states the rule as follows: "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause." 2 Wigmore on Evidence, 3d Ed., § 285.

[12] It follows, therefore, that the findings that Chapman was acting in the course and scope of his employment are supported by the evidence, and by reasonable inferences therefrom.

The last contention of appellant is that the trial court committed prejudicial error in admitting the testimony of the witness Paslaqua. This witness was permitted to testify as to statements made to him by Bachman the day following the accident in which Bachman is alleged to have stated that appellant company paid all his and Chapman's expenses while they were away from Pennsylvania, and that the operator of the car (Chapman) was allowed 5 cents a mile while going to or coming from work for the use of the car. Appellant urges that these unsworn statements were hearsay as to it, and urges that such statements of an agent not part of the res gestae were not within the scope of Bachman's authority.

The facts in reference to the admission of this testimony are as follows: After overruling appellant's objection that such testimony should be admitted solely as to Bachman, the trial court suggested that appellant look over Paslaqua's testimony and move to strike out the objectionable parts. Later appellant moved to strike out all of Paslaqua's testimony, and in particular all conversations of the witness with Bachman. The court denied the motion stating "it might be proper at some time to renew it." The motion was not renewed. Respondents urge that appellant's failure to press its motion constituted a waiver. D'Avanzo v. Manno, 16 Cal.App.2d 346, 60 P.2d 524.

[13] Whether a waiver occurred need not now be decided. It may be assumed that no waiver took place, and it also may be assumed that it was error to admit the evidence as against appellant. Such assumed error could not have been prejudicial. Everything to which Paslaqua testified had been testified to by Bachman in his deposition, or may be inferred from his testimony. The court could have made no other finding but that Bachman and Chapman were paid subsistence and transportation by appellant. The real point in the case is not whether it was proved that transportation was paid, but whether that fact together with the circumstances mentioned, brought the acts of Chapman within the scope of his employment. The evidence of Paslaqua was merely cumulative, and even if erroneously admitted, could not have prejudiced appellant. Inouye v. McCall, 35 Cal.App.2d 634, 96 P.2d 386; Fechtner v. Costa, 16 Cal.App.2d 691, 61 P.2d 473.

No prejudicial error having occurred at the trial, and the findings being amply supported, the judgment appealed from should be, and is, affirmed.

BRAY, J. pro tem., and KNIGHT, J., concurred.

52 Cal.App.2d 485

GORE et al. v. BINGAMAN et al.

Civ. 12146.

District Court of Appeal, First District, Division 1, California.

June 5, 1942.

1. Appeal and error 🔑1097(1)

The doctrine of the "law of the case" will be applied to decisions of District Courts of Appeal after such decisions have become final.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Appeal and error 🔑1099(2)

Where defendants permitted District Court of Appeal decision to become final without raising a jurisdictional question, such decision was the "law of the case" and "res judicata" of jurisdictional issue upon appeal from second superior court judgment entered in accordance with instructions of District Court of Appeal on the prior appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Eva Gore and others against Joseph W. Bingaman, trustee, etc., and others to quiet title to a share of income from trust property and for a declaratory judgment to establish plaintiffs' rights under a trust. From a judgment of the Superior Court entered pursuant to a remittitur of the District Court of Appeal, Maude A. Dobinson appealed to the Supreme Court, 124 P.2d 17, which transferred the case to the District Court of Appeal.

Judgment affirmed.

Fitzgerald, Abbott & Beardsley, of Oakland, for appellant.

Weinmann, Quayle & Berry, of Oakland, and George Olshausen, of San Francisco, for respondents.

WARD, Justice.

This appeal (being the second taken in the case) was transferred to this court by the Supreme Court. Gore v. Bingaman, 20 Cal.2d 118, 124 P.2d 17.

The original judgment was rendered by the Superior Court of Alameda County, and an appeal being taken, this court rendered its decision thereon, reversing the judgment of the trial court, and ordering judgment to be entered for plaintiffs. Gore v. Bingaman, 29 Cal.App.2d 460, 85 P.2d 172. A rehearing was denied and an application to have the cause determined by the Supreme Court was also denied. Thereupon the remittitur was duly issued, and judgment after remittitur entered by the trial court as directed. The plaintiffs were appellants on that appeal.

The present appeal is prosecuted by defendant upon the theory "that, since the District Court of Appeal had no jurisdiction of the subject-matter of the former appeal, its purported judgment of reversal and direction were, and each of them was, wholly void. It is prosecuted upon the further theory that the second judgment rendered by the superior court, namely, the judgment from which this appeal is prosecuted, being in turn wholly dependent upon the validity of said void judgment rendered by the District Court of Appeal, was in turn rendered by a court that had no jurisdiction whatever * * *, either to set aside said judgment in favor of appellant, or to render said second judgment against the appellant and in favor of the plaintiffs."

[1] This contention is fully answered in Gore v. Bingaman, 20 Cal.2d 118, 124 P.2d 17, 19, which disposes of the jurisdictional question as follows: "* * * the doctrine of law of the case will be applied to decisions of the District Courts of Appeal after those decisions have become final." This upon the theory that in the first appeal the question of jurisdiction was not raised; that no application was made for transfer of the cause to the Supreme Court before decision and that the application for hearing before the Supreme Court did not recite that jurisdiction was not vested in the District Court of Appeal. While there are certain exceptions to the rule, this appeal, as noted in Gore v. Bingaman, 20 Cal.2d 118, 124 P.2d 17, does not come within them.

No question is now raised that the judgment as entered did not follow the remittitur.

[2] In the Supreme Court and in oral argument before this court the attorney for appellant conceded that the judgment entered by the trial court was in exact accordance with the instructions of this court on the prior appeal. The sole point now urged by appellant is that the original decision of this court was erroneous and should not be held to be res judicata on this appeal. The point is without merit. Gore v. Bingaman, 20 Cal.2d. 118, 124 P.2d 17.

The judgment appealed from is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

* * *

52 Cal.App.2d 374

W. J. JONES & SON, Inc., v. INDEPENDENCE INDEMNITY CO. et al.

Civ. 13052.

District Court of Appeal, Second District, Division 3, California.

May 29, 1942.

1. Insurance 🔑44

Order of superior court extending previous liquidation order appointing insurance commissioner liquidator of insurance company's assets not in control of receivers, to cover all assets of company located in the state, gave insurance commissioner right to dividends which had accrued within the state on bank receiver's certificate issued to insurance company, though certificate was allegedly not within the state, since the certificate was merely "evidence" of the debt and not the debt itself, and possession of the certificate was not necessary to entitle insurance commissioner, as liquidator, to dominion over the dividends.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

2. Insurance ⚷44

The fact that dividends which had accrued on bank receiver's certificate issued to judgment debtor, or checks representing the dividends, had never been in the actual possession of the insurance commissioner, as liquidator of the judgment debtor, did not signify that he was not entitled to such possession under court order appointing him as liquidator, and did not entitle judgment creditor to levy execution on the dividends held by the bank receiver. Code Civ.Proc. § 685.

3. Attachment ⚷183

If attachment lien was not merged in lien of execution, it ended at the expiration of three years after the issuance of the writ of attachment, which could not have been later than the date of the levy of the attachment. Code Civ.Proc. § 542b.

4. Execution ⚷146(1)

Levy of execution did not bind property after one year from the date of the issuance of the execution.

5. Insurance ⚷44

Where, at time of order appointing insurance commissioner liquidator of judgment debtor, lien of judgment creditor's execution had ceased, and lien of attachment ended before time of judgment creditor's appeal from order denying motion for issuance of execution, judgment creditor had no lien on claim of judgment debtor against bank on bank receiver's certificate, notwithstanding provision of the insurance code that rights of creditors of an insurance company in liquidation shall be fixed as of the date of entry of the order of liquidation. Code Civ.Proc. § 685; St.1935, p. 542, § 1019.

6. Insurance ⚷44

Superior court which made liquidation order appointing insurance commissioner liquidator of insurance company was authorized to issue such injunctions or orders as might be deemed necessary to prevent the obtaining of preferences, judgments, attachments, or other liens against such company or its assets, and the making of any levy against the company or its assets. St.1935, p. 543, § 1020.

7. Insurance ⚷44

Insurance commissioner, as liquidator of insurance company, had the duty to collect the company's assets and distribute them ratably among the creditors, subject to certain priorities. St.1935, pp. 542, 543, 545, 552, §§ 1019, 1020, 1025, 1033, 1037, 1057.

8. Insurance ⚷44

Unsecured general creditor of defunct insurance company would not be permitted to levy on and obtain insurance company's assets, to which insurance commissioner, as liquidator of insurance company, was entitled under superior court's order, since, if unsecured general creditor was permitted to do so, other creditors would be deprived of any share in the dividends, and the unsecured general creditor would obtain a "preference" or a greater percentage than the other creditors. St.1935, pp. 542, 543, 545, 552, §§ 1019, 1020, 1025, 1033, 1037, 1057.

See Words and Phrases, Permanent Edition, for all other definitions of "Preference".

9. Appeal and error ⚷854(2)

If the trial court's decision was correct, the decision was required to be sustained on appeal regardless of the considerations which might have moved trial court to its conclusions.

◆

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by W. J. Jones & Son, Incorporated against the Independence Indemnity Company and others. The plaintiff obtained a judgment against defendants, and the judgment was satisfied only partially. From an order denying plaintiff's motion for issuance of execution on any sums or credits due from the First National Bank of Beverly Hills to one of the defendants, the plaintiff appeals.

Order affirmed.

Chandler & Wright, John F. Gilbert, and Oliver S. Northcote, all of Los Angeles, for appellant.

Hester Webb, of San Francisco, and W. P. Wood and Morton L. Barker, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff appeals from an order denying its motion for issuance of execution under section 685 of the Code of Civil Procedure.

The following facts, as shown by affidavits in support of and in opposition to the motion, are undisputed:

On April 17, 1933, appellant levied an attachment on all assets of defendants held by the receiver of the First National Bank of Beverly Hills. On April 21, 1933, the receiver responded to the attachment as follows: "You are advised that I am unable to locate property of any description except that the records show that Receiver's Certificate No. 1654 for the sum of $5,021.88 has been issued and delivered to International Re-Insurance Corp., and a first dividend of 15 per cent has been paid on the claim. The certificate is the outstanding evidence of a proven claim against this failed bank and must be presented for endorsement when each subsequent dividend is delivered. Because of the notice of garnishment, I have entered on my records a hold order against delivery of subsequent dividend checks."

On June 13, 1933, appellant obtained a judgment against respondents for $21,368.70, which was satisfied partially, leaving a balance of $8,536.36. On June 17, 1933, a writ of execution was levied on any sums or credits due from the said bank to respondent International Re-Insurance Corporation, by serving the receiver of the bank. The receiver made no reply thereto. When the writ of execution was levied, the assets of said respondent were in the possession of receivers appointed by the United States District Court.

On June 28, 1933, the Insurance Commissioner of California was appointed liquidator of said International Re-Insurance Corporation by the superior court at San Francisco, with the exception that the order of said court exempted control of assets which were under control of the receivers appointed by the United States District Court. On December 3, 1934, the United States Supreme Court dismissed the said receivership proceeding as to said International Re-Insurance Corporation. Mitchell v. Maurer et al., 293 U.S. 237, 55 S.Ct. 162, 79 L.Ed. 338.

On January 10, 1935, the liquidation order of the superior court was extended to cover "all assets of said International Re-Insurance Corporation located in the State of California," and since said time said insurance commissioner has been the liquidator of said respondent.

Dividends on the bank receiver's certificate No. 1654 in the aggregate sum of $1,841.35, and the receiver's checks representing such dividends, are held by the bank receiver.

Further alleged facts recited in the affidavit in support of the motion are: that the bank receiver's certificate No. 1654, representing the claim of respondent, International Re-Insurance Corporation, against the bank has never come into possession of said insurance commissioner, but in the opinion of said commissioner said certificate had been forwarded to the primary receiver for said respondent at respondent's office in Pennsylvania; that said certificate cannot be found by the primary receiver and the location of said certificate is unknown; that appellant has sought diligently to locate assets belonging to respondents; that the bank receiver refused to pay the dividend to appellant on the ground that said insurance commissioner also has demanded payment thereof.

Further alleged facts recited in the affidavit in opposition to the motion are: that no steps were taken by appellant to enforce collection from the bank receiver of monies deposited with the bank by the International Re-Insurance Corporation; that more than five and one-half years have elapsed since the levy of execution, and more than four and one-half years have elapsed since the expiration of the lien created by the levy of execution.

Appellant contends (1) that the order of the superior court at San Francisco made on January 10, 1935, by which its previous order of liquidation was extended to cover "all assets of said International Re-Insurance Corporation located in the State of California," did not apply to receiver's certificate No. 1654, for the reason it was not and has not been located in California; (2) that the dividends or checks representing the same have never been in the possession of the insurance commissioner; and (3) that under the Insurance Code and the order of the superior court at San Francisco, the superior court at Los Angeles did have jurisdiction to make the order for issuance of the execution herein sought.

[1] As to point (1): The receiver's certificate was evidence only of the indebtedness from the defunct bank to the defunct

insurance company. The evidence of the debt was not the debt itself. No provision of law is cited giving such receiver's certificates any legal standing, even as evidence of the debt, and examination of the provisions of the United States Code regarding liquidation of national banks fails to disclose any such provision. The certificate is nothing more than the receiver's memorial of the action taken in approving the claim. If the certificate should be destroyed (or as shown in this instance could not be found), the thing it represented, namely, the fact that the defunct bank was indebted to said respondent, would still exist and might be proved by other evidence. Possession of the said evidence, the receiver's certificate, was not necessary to entitle the insurance commissioner, as liquidator, to have control of and to exercise dominion over the claim of the defunct insurance company against the defunct bank. The dividends accrued, which were allocated to respondent and held by the bank for respondent, were therefore assets of respondent within California to which the insurance commissioner was entitled under the order appointing him liquidator.

If, as appellant contends, the certificate was the asset and the physical possession of it was necessary in order for the liquidator to exercise dominion over the claim against the bank and receive the dividend, then it would seem by the same reasoning that appellant's asserted right to an execution would be limited to an execution upon the asset, the certificate, rather than the dividends. If, as appellant contends further, the certificate was a negotiable instrument, then execution, if any, should be levied upon the instrument in the hands of the holder, rather than serving the writ of execution upon the maker. Gow v. Marshall, 1891, 90 Cal. 565, 569, 27 P. 422.

[2] As to point (2): The fact that the dividends or checks representing them have not been in actual possession of the insurance commissioner does not signify that he is not entitled to such possession of them under the order appointing him liquidator. The dividends were payable to, and were an asset of, the insurance company. The insurance commissioner would be entitled thereto under the order appointing him, subject to any lien upon the specific property which was obtained more than four months prior to the liquidation order.

[3-5] As to point (3): Appellant's attachment lien may have been merged in the lien of the execution; but if not, it ended at the expiration of three years after the issuance of the writ (Code Civ.Proc. § 542b), the date of which does not appear but cannot have been later than the date of the levy, April 17, 1933. The levy of execution did not bind the property after one year from the issuance of the execution, which occurred June 17, 1933. Thus at the time of the order of liquidation, made January 10, 1935, the lien of plaintiff's execution had ceased, and if the lien of the attachment was then in force, it, too, ended on or before April 17, 1936, so that, at the time the order appealea from was made, appellant had no lien of any kind on the claim of respondent against the bank, but was an unsecured general creditor. This conclusion is not precluded by the provision of section 1019 of the Insurance Code, St.1935, p. 542, that the rights of creditors of an insurance company in liquidation "shall * * * be fixed" as of the date of entry of the order of liquidation. At that date plaintiff's right of lien, if any, was a mere attachment lien which would end by operation of law on April 17, 1936. When that date passed without further action to enforce that lien it was gone. The order did not operate to alter or extend it.

[6-7] The court which made the liquidation order was authorized to "* * * issue such other injunctions or orders as may be deemed necessary to prevent * * * (d) The obtaining of preferences, judgments, attachments, or other liens against such person or its assets. (e) The making of any levy against any such person or its assets." § 1020, Ins.Code. Section 1057 of the Insurance Code provides that the commissioner shall be deemed to be a trustee for all the creditors. It was his duty to collect the assets (§ 1037, Ins.Code) and distribute them ratably among the creditors (§ 1025, Ins.Code), subject to certain priorities (§ 1033, Ins.Code) in which appellant is not included.

[8] If appellant, an unsecured general creditor, were permitted to levy on and obtain the dividends held by the bank receiver, the other creditors would be deprived of any share in those dividends, and appellant would obtain a preference or a greater percentage than other creditors.

The trial court did have general jurisdiction of the subject matter and the parties, but in view of the fact that the liquidation proceedings were pending in another court, and in view of the provisions of the Insurance Code, particularly section 1020, it would have been an error in the exercise of judgment to authorize the issuance of the writ of execution.

[9] The trial court did not abuse its discretion. Although the court stated it would have granted the motion if it had been a matter of discretion only, it did exercise discretion in its determination that the motion should be denied. The reason for the ruling is not material. If the decision is correct it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. Rapp v. Southern Service Co., 1931, 116 Cal.App. 699, 705, 706, 4 P.2d 195.

The order denying the motion is affirmed.

SHINN, Acting P. J., and SHAW, Justice pro tem., concurred.

52 Cal.App.2d 468

DRISCOLL v. EAST-WEST DAIRYMEN'S ASS'N et al.

Civ. 6433.

District Court of Appeal, Third District, California.

June 4, 1942.

Hearing Denied July 30, 1942.

1. Statutes 🔑227

The word "may" used in statutes in some instances has the effect of "must" but generally the word "may" carries no mandate and it is only when the context indicates or the object to be attained compels such a construction that the imperative is deemed the legislative intent.

See Words and Phrases, Permanent Edition, for all other definitions of "May" and "Must".

2. Agriculture 🔑6

The word "may" as used in provision of Agricultural Code that each cooperative association under its by-laws may provide for the manner of determining the value of a member's interest and make provision for its purchase by association on withdrawal of member does not mean "must" and under the provision, an association may or may not provide for immediate purchase and payment of interest of members voluntarily withdrawing. St.1933, p. 257, § 1200.

3. Agriculture 🔑6

Since cooperative marketing associations have become firmly implanted in the national scheme, courts will be reluctant to construe statutes so as to destroy such an agency without the consent of the majority of its members.

4. Agriculture 🔑6

A by-law of a dairymen's cooperative marketing association which provided that interests of members in the association's property should be payable on liquidation of association was valid, and members, who voluntarily withdrew from association which was a solvent, going concern and was not in process of liquidation, could not recover their share of money paid in and remaining in the funds of the association. St.1933, pp. 255–264 and p. 257, §§ 1191–1221 and § 1200.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Patricia Driscoll against the East-West Dairymen's Association and others for moneys paid to the named defendant, a cooperative association, by plaintiff's assignors who withdrew from the association. From an adverse judgment, plaintiff appeals.

Affirmed.

For prior opinion, see 122 P.2d 379.

John J. Taaffe, of San Francisco, C. Ray Robinson and Willard B. Treadwell, both of Merced, and George B. Harris, of San Francisco, for appellant.

J. L. Royle, of Fresno, and F. M. Ostrander, of Merced, for respondents.

PER CURIAM.

The case was presented in the trial court upon an agreed statement of facts supplemented by evidence illustrative and in elaboration of the agreed statement. There is little dispute as to the facts, the question here presented being one of construction.

The plaintiff is the assignee of a large number of persons, and her rights depend entirely upon the rights of her assignors. We will hereafter use the term "plaintiff," without regard to any assignment, treating plaintiff as though she were pursuing her individual cause, giving to her the status of her assignors. The defendant Dairymen's Association is a non-profit organization created and existing under the laws of this state, the statute governing such associations being now found in the Agricultural Code, § 1191 et seq., St.1933, p. 255 et seq., having been taken directly from the Civil Code, § 653bb et seq. Inasmuch as there was no change other than in the creation of a separate code, we will cite the law by reference to the appropriate sections of the Agricultural Code only.

The general scheme of cooperative association is found in the Agricultural Code, constituting chapter IV thereof, and embracing sections 1191 to 1221, inclusive. Section 1200, St.1933, p. 257, provides that each association formed under the provisions of the chapter shall adopt for its government and management a code of by-laws not inconsistent with the chapter. This same section 1200 provides that:

"Each association, under its by-laws, may provide for any or all of the following matters: * * *

"(j) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or upon the expulsion of a member or forfeiture of his membership, or at the option of the association, the purchase at a price fixed by conclusive appraisal by the board of directors; and the conditions and terms for the repurchase by the corporation from its stockholders of their stock upon their disqualification as stockholders. In case of the expulsion of a member, and where the by-laws do not provide any procedure or penalty, the board of directors shall equitably and conclusively appraise his property interest in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion."

The defendant association, here involved, did adopt by-laws. The particular by-laws around which the controversy centers are as follows:

By-law No. 8. Property Rights and Interests: The property rights and interests of each member shall be unequal, that is to say, the interest of each member in the property of the Association shall be in the same proportion as the amount contributed or paid into the Association by him for handling his products, during the term of five years immediately prior thereto, bears to the total amount paid in or contributed to the Association by all of the members of the Association for handling their products, and such interest shall be payable upon liquidation of the said Association. And as regulating the amounts to be paid in as membership fees, the following by-law was adopted, and stood as the governing law of the association:

By-law No. 9. Membership Fee: "Each person upon becoming a member of the Association shall pay to the Association one-half cent per pound on every pound of butterfat delivered by him to the Association, or marketed or disposed of through the facilities provided by this Association; said sum to become due and payable on the first day of each and every month, and said sum shall be deductible by said Association from the sums due each member for milk delivered during the preceding month."

The foregoing, with occasional addition, will serve as sufficient background from which the controversy may be reviewed.

The plaintiff had been a member of the defendant association, entitled to all privileges of membership under the by-laws. Acting within the scope of the said by-laws and in full compliance therewith, plaintiff chose to withdraw from membership and did so. While a member she had paid dues consisting of certain moneys deducted from the amounts received on her account by the association for milk which she had marketed through the association. Having withdrawn, she demands that the money paid in by her and remaining in the funds of the association be accounted for and her share thereof determined and paid to her.

The defendants concede that the plaintiff has some right or interest in the funds of the association, but claim that any distribution must, pursuant to the by-law hereinbefore set forth, be deferred until liquidation of the association. The trial court sustained the contention of defendants and determined that plaintiff was not entitled to any present accounting, nor was she entitled to have her liquidation rights presently determined.

The question here to be determined relates to the validity of the by-law on distribution of assets and rights of withdrawing members.

It may again be noted that plaintiff here is the assignee of a large number of persons whose rights are unequal, and among whom, upon distribution, differences, both in sums due and in rights accruing, might arise. Many points are urged by the respective parties in support of the judgment and by way of attack thereon. But regardless of what form the attack takes, it always comes back to the one point, namely, the validity of the by-law. A determination of this point will dispose of the appeal and render unnecessary further inquiry or consideration of the many other contentions made, whether in support of the judgment or contra. It is agreed that the association is a solvent, going concern and not in process of liquidation. The by-law questioned sets forth the interest of each member in the property of the association and provides that such interest in the property shall be payable upon the liquidation of the association. The first attack on the by-law is that the same is in direct contravention of the general law, inconsistent with the provisions of the chapter of the Agricultural Code, and that it is a by-law not within the power of the association to adopt.

[1, 2] The governing section (§ 1200, Agr.Code) provides that each association formed under the provisions of the chapter, under its by-laws, *may provide for* "* * * the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member." Appellant argues that the permissive *"may"* becomes *"must"* and that no discretion nor alternative remains in the association in regard to its by-laws; in other words, that all associations are commanded to adopt by-laws and that such by-laws are set forth in the section quoted. It is conceded that in certain instances the word "may" has the effect of "must." But, ordinarily, the use of the permissive term carries no mandate. It is only where the context indicates or where the object to be attained compels such a construction that the imperative shall be deemed the legislative intent. The Legislature, in adopting the provisions setting up a voluntary non-profit organization, would not ordinarily cast the mandatory provisions in permissive form. If it had been the legislative intent to set up a rule of conduct for all such associations and to prescribe and limit the rights and liabilities accruing through membership therein, it would have done so without the unnecessary mechanics of separate by-laws for each organization to be thereafter formed. We note also that the subdivision of section 1200 quoted (subd. j) refers to by-laws governing expulsion and what the by-laws may provide in that respect. It is apparent that the term "may" does not mean "must" in the latter case, for the obvious reason that provision is made for the expelled members in cases where the by-laws are silent. It is thus apparent that while the associations might or might not provide for immediate purchase and payment for the interests of members voluntarily withdrawing, it could not enforce expulsion without fair compensation.

[3] We hold that the phrasing of the section does not compel or warrant the mandatory construction. We may then consider the general purposes of all such legislation and the end sought to be accomplished thereby. The general purpose is reflected in the name chosen to designate the association, viz., "Cooperative." It was the legislative plan, conforming to a then manifest public policy, to permit and encourage, without the hampering restrictions peculiar to profit corporations, the pooling of interests between those engaged in similar enterprises and the securing of united action for the common benefit. From the inception of these organizations the scheme was deemed to be for the personal benefit of the members only to the extent that the individual profited through the operation of the enterprise. Tomes have been written on the purposes of cooperative associations. But nowhere has it been argued that the paramount

concern was the advancement of the individual interest, as such. There is no need to wander into history or trace the growth of the cooperative idea. Cooperative marketing associations have become an established factor in the economic plan of the country, fostered and encouraged by legislative enactment, judicial construction and administrative policy. Thus firmly implanted in our national scheme, courts will be reluctant to construe statutes so as to destroy such an agency without the consent of a majority of its members. It is conceded that the present rule of statutory construction and of judicial decisions looks toward the general policy of the law as distinguished from the rule of private property or private rights in the abstract. As far as these announced ideas may apply to the instant case, there seems to be a dearth of California authority. However, the subject has been quite fully discussed in other jurisdictions. Clear Water Citrus Growers Ass'n v. Andrews, 81 Fla. 299, 87 So. 903; Burley Tobacco Growers' Co-op. Ass'n v. Tipton, 227 Ky. 297, 11 S.W.2d 119; Texas, etc., Cotton Ass'n v. Lennox, 117 Tex. 94, 297 S.W. 743. See, also, Hanna on Law of Co-operative Marketing Associations. In Evans and Stokdyk on The Law of Co-operative Marketing, at page 84, we find it stated:

"The members' demand for service is responsible for the creation of them (facilities of the corporation) and any advantage he may claim is only in proportion to the use he makes of them. His purpose is not primarily that of acquiring property interest, but merely of providing a means of marketing his products during the period of his membership. There is no logical ground upon which he should be permitted arbitrarily to withdraw his interest at the expense of the life of the association."

[4] In the case before us, plaintiff and her assignors have received in full all paid dues they were entitled to receive, namely, the benefits accruing to them from the organization and collective marketing during the period of their membership. The plan of the defendant association and its members was and is to further expand to the extent of procuring or erecting permanent plants and equipment, and the funds available therefor inure to the benefit of those who, at present, constitute the association and to those who may subsequently join therein. Plaintiff became a member by his own volition and submitted to the by-laws which are now attacked.

It would be a futile task to attempt any present accounting, in the absence of a right to distribution or payment, for the obvious reason that, in a going concern, the amount due upon future distribution would vary and become subject to the vicissitudes of the intervening period.

The questioned by-law, being in all respects valid and binding, is determinative of the rights of all parties to the present action.

The judgment is affirmed.

20 Cal.2d 418

INTERNATIONAL ASS'N OF CLEANING AND DYE HOUSE WORKERS et al. v. LANDOWITZ et al.

S. F. 16344.

Supreme Court of California.

June 9, 1942.

1. Injunction ⚷102

An ordinance providing a code of fair competition in the cleaning and dyeing industry, and providing that one violating the ordinance shall be deemed guilty of a misdemeanor punishable by fine or by imprisonment or both, was a "penal law", the violation of which would not be restrained in absence of specific authorization. Gen.Laws Supp.1935, Act 8780f; Civ.Code, § 3369, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Penal Law".

2. Injunction ⚷102

Generally a court of equity will not restrain violation of the penal law. Civ.Code, § 3369, subd. 1.

3. Trade-marks and trade-names and unfair competition ⚷68(1)

The phrase "unfair competition", when carried beyond its traditional scope in equitable actions, does not have a fixed meaning in absence of statutory definition, and courts of equity are loath to enjoin conduct on that ground in absence of specific authorization.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair Competition".

4. Trade-marks and trade-names and unfair competition ⚷68(2)

Violation of penal ordinance providing a code of fair competition in the cleaning and dyeing industry and setting up schedule of minimum prices could not be enjoined on ground that such violation constituted "unfair competition" within statute authorizing courts to enjoin unfair competition. Gen.Laws Supp.1935, Act 8780f; Civ.Code, § 3369, subds. 1, 3.

5. Injunction ⚷102

The repeal of statute authorizing action to enjoin violation of ordinance establishing code of fair competition constituted a withdrawal of statutory authority to bring such an action. Gen.Laws Supp.1935, Act 8780f; Gen.Laws 1937, Act 8784, § 6.5; St.1941, p. 1847, § 30028.

6. Statutes ⚷273

Where a statutory remedy is repealed without a saving clause and no rights have vested under the statute, the right to maintain an action based thereon is terminated.

7. Appeal and error ⚷1107

Generally, a reviewing court will review action of trial court as of the time when it was rendered.

8. Appeal and error ⚷1107

Where matters of which the reviewing court had judicial knowledge occur subsequent to trial court's action, and have effect of destroying basis of plaintiff's cause of action, the reviewing court may dispose of the case on such grounds, especially if the effect of a statutory alteration is to lend conclusive support to the trial court's determination.

9. Appeal and error ⚷854(2)

If trial court's judgment is correct, the reviewing court need not concern itself with the reasons which impelled the trial court to act.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the International Association of Cleaning and Dye House Workers, etc., and others, against Carl Landowitz and others, to enjoin defendants from continuing to violate provisions of an ordinance of the City and County of San Francisco, known as the Cleaning and Dyeing Code. From an adverse judgment, the plaintiffs appeal.

Affirmed.

Charles R. Garry, of San Francisco, for appellants.

Walter C. Frame, of San Francisco, amicus curiae on behalf of appellants.

Gus C. Ringole, of San Francisco, and J. W. O'Neill, of Oakland, for respondents.

GIBSON, Chief Justice.

This action was brought on behalf of the plaintiff union by its president to enjoin the defendants from continuing to violate the provisions of Ordinance No. 5.491 of the city and county of San Francisco, known as the Cleaning and Dyeing

Code. The plaintiff union is composed of retail cleaners who own and operate one man shops, and defendants are the individual owners and operators of cleaning and pressing shops in San Francisco. Ordinance No. 5.491 is a so-called "code of fair competition" which became effective on April 26, 1937, and was adopted pursuant to the provisions of Stats.1935, chap. 814, p. 2212. (Deering's Gen.Laws, 1935 Supp., Act 8780 f.) The code provided generally for the regulation of competitive practices among cleaners and dyers and set up a schedule of minimum prices which might be charged by members of the industry. Plaintiffs allege that defendants have continuously violated the provisions of the ordinance by cleaning garments at prices less than those set forth in the ordinance and that they have advertised to the general public that they would continue to perform cleaning services at such prices. Alleging that no adequate remedy at law exists, plaintiffs seek to enjoin defendants from committing further violations of the ordinance, a procedure which was specifically provided for in cases such as this by Stats.1937, page 1215 (Deering's Gen.Laws, 1937, Act 8784, § 6.5). The Superior Court of the City and County of San Francisco sustained a general demurrer to plaintiffs' complaint without leave to amend, and plaintiffs bring this appeal from a judgment thereafter rendered in favor of defendants.

The superior court held that the complaint failed to state a cause of action upon the ground that the ordinance was unconstitutional. See In re Kazas, 22 Cal.App.2d 161, 70 P.2d 962; In re Landowitz, 22 Cal.App.2d 733, 71 P.2d 334; In re Herrick, 25 Cal.App.2d 751, 77 P.2d 262; People v. Osborne, 17 Cal.App.2d Supp. 771, 59 P.2d 1083. It is urged on appeal that these cases are out of line with modern authority (see Herrin v. Arnold, 183 Okl. 392, 82 P.2d 977, 119 A.L.R. 1481; City of Mobile v. Rouse, 233 Ala. 622, 173 So. 266, 111 A.L.R. 353), and plaintiffs contend that under recent cases this court would be justified in sustaining the constitutionality of the ordinance involved here. The constitutionality of the ordinance is no longer an issue, however, in connection with this appeal, for we are satisfied that the judgment of the superior court must be affirmed, entirely apart from the question whether the ordinance is constitutional.

[1, 2] Ordinance No. 5.491 was enacted under the specific authority of Stats. 1935, page 2212 (as amended by Stats. 1937, p. 1215, Deering's Gen.Laws, 1937, Act 8784.) The present injunction proceeding was instituted under section 6.5 of that statute, which provided: "Any person, firm, corporation, trade association, the people of the State of California or proper official of the State or a political subdivision, may maintain an action to enjoin the commission or continuance of any act in violation of any provision of a code adopted under the provisions of this act * * *." In 1941, however, the Legislature repealed both Stats.1935, page 2212, and Stats.1937, page 1215. (Stats. 1941, ch. 526, p. 1847, Business & Professions Code, § 30028.) The repeal of these enabling statutes, under which Ordinance No. 5.491 was adopted, has an important bearing on the validity of the ordinance, but it has an even more immediate relation to plaintiffs' right to maintain the present action. The ordinance involved here is clearly penal in nature, providing in article 13, "Any person, firm or corporation violating any provision or provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine * * * or by imprisonment * * * or by both such fine and imprisonment." In view of the well-established doctrine that equity will not ordinarily restrain the violation of a penal law (Civ.Code, § 3369, subd. 1; People v. Lim, 18 Cal.2d 872, 880, 118 P.2d 472; Perrin v. Mountain View Mausoleum Ass'n, 206 Cal. 669, 671, 275 P. 787; see 14 Cal.Jur. 211) and in view of the fact that this ordinance is clearly penal in nature, it follows that plaintiffs' action in equity to restrain its violation requires specific authorization, in the absence of which it must be held that the complaint fails to state a cause of action.

The complaint in this action is entitled "Action for an Injunction to Restrain Violations of the Cleaning and Dyeing Code, Ordinance No. 5.491 of the City and County of San Francisco, Pursuant to the Provisions of Chapter 814, Statutes of 1935, as Amended by the Statutes of 1937." The statutory authority for such an action in equity, which was formerly provided by the statutes referred to, has now been withdrawn. Unless some other basis for the action exists, therefore, no cause of action is stated and the judgment of the superior court must be affirmed. No other authorization for this action has been called to our attention. Since 1933, it is true, section 3369 of the Civil Code has provided that any person performing an act of unfair competition may be enjoined. As used in that section, unfair competition means "unfair or fraudulent business practice and unfair, untrue or misleading advertising * * *." Civ.Code, § 3369, subd. 3. Omitting the question of false advertising which is not involved in this case, the statutory definition of "unfair competition" thus incorporated in Civil Code, § 3369, is not essentially different from that which has historically furnished the basis for equity injunctions against unfair competition. Such injunctions were not directed against business practices like the ones involved here which, if unfair, are made so under special statute. Those actions ordinarily involved the fraudulent passing off of one person's goods as those of another. American Philatelic Soc. v. Claibourne, 3 Cal.2d 689, 697, 46 P.2d 135; A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 531, 532, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947; see Nims, Unfair Competition (2d ed. 1917), p. 547; Chaffee, Unfair Competition (1940) 53 Harv.L.Rev. 1289, 1301; 24 Cal.Jur. 628. In recent years the common law concept of unfair competition has been broadened by statutes which range from prohibitions against "unfair methods of competition" (see Derenberg, Trade-Mark Protection and Unfair Trading (1936), pp. 160 et seq.; Montague, Unfair Methods of Competition (1915) 25 Yale L.J. 20; (1935) 21 Va.L.Rev. 545, 546-551) to the so-called "codes of fair competition" adopted during the recent economic depression. See Chaffee, op.cit. supra, pp. 1307, 1308.

[3-9] The phrase "unfair competition" when carried beyond its traditional scope in equitable actions, however, does not have a fixed meaning in the absence of statutory definition. Courts of equity, therefore, are loath to enjoin conduct on that ground in the absence of specific authorization therefor. See Chaffee, op.cit. supra, pp. 1316 et seq. The reasons underlying this rule are similar to those governing courts of equity in the issuance of injunctions against nuisances. We recently held in such a case that where the conduct sought to be enjoined was not within the traditional equitable jurisdiction, it must be brought clearly within the statutory definition of the term "nuisance" and could not be predicated on the vague definitions of that term found in the early criminal law. People v. Lim, supra, 18 Cal.2d page 880, 118 P.2d 472. Civil Code, section 3369, contains no broader a definition of the term "unfair competition" than existed at common law and in itself furnishes no basis for an injunction against the violation of the penal ordinance involved in this case. Where the Legislature has sought to regulate methods of competition by means of injunction, it has specifically described the conduct which is prohibited. It has provided that such conduct might be enjoined in equity and the courts have accepted the new duties which the Legislature has thus imposed upon them. See Wholesale T. Dealers Bureau v. National, etc., Co., 11 Cal.2d 634, 662, 663, 82 P.2d 3, 118 A.L.R. 486; Business & Professions Code, §§ 17070, 17535, Stats.1941, pp. 1843, 729. This was the practice followed by the Legislature in enacting the statute upon which codes of fair competition, such as the one involved in the present case, were based. See Stats.1937, p. 1215, Deering's Gen.Laws, 1937, Act 8784, § 6.5. The repeal of Act 8784 in 1941, however, constituted a withdrawal of the statutory authority upon which this equitable cause of action was based. Where a statutory remedy is repealed without a saving clause and where no rights have vested under the statute, it is established that the right to maintain an action based thereon is terminated. See Penziner v. West American Finance Co., 10 Cal.2d 160, 170, 74 P.2d 252; Southern Service Co., Ltd., v. Los Angeles County, 15 Cal.2d 1, 11, 12, 97 P. 2d 963. It follows that the trial court, which held that the complaint did not state a cause of action and which rendered a judgment for defendants, reached a result which is clearly correct under the present facts of this case apart from the question of the constitutionality of the ordinance. It is true that ordinarily an appellate court will review the action of the trial court as of the time when it was rendered, but where matters of which the court has judicial knowledge occur subsequent to the trial court's action and have the effect of destroying the basis for the plaintiff's cause of action, it has been held that the appellate court may dispose of the case upon those grounds. Sewell v. Johnson, 165 Cal. 762, 769, 134 P. 704, Ann. Cas.1915B, 645; see 2 Cal.Jur. 807. This is particularly true where the effect of a

statutory alteration is to lend conclusive support to the trial court's determination because if the judgment is correct, the appellate court need not concern itself with the reasons which impelled the trial court to act. "In other words, it is judicial action, and not judicial reasoning or argument, which is the subject of review; and, if the former be correct, we are not concerned with the faults of the latter." Van Fleet, J., in Davey v. Southern Pacific Co., 116 Cal. 325, 48 P. 117, 118; see 2 Cal.Jur. 808 et seq.

The judgment for defendants is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concur.

20 Cal.2d 435

PEOPLE v. KEARNEY.

Cr. 4407.

Supreme Court of California.

June 9, 1942.

Rehearing Denied July 6, 1942.

1. Infants 🔑**20**

Evidence was sufficient to support conviction of lewd conduct with a 10-year old child. Pen.Code, § 288.

2. Criminal law 🔑**302(4)**

Under statute providing that verdict of acquittal of one or more counts shall not be deemed to be an acquittal of any other count, the dismissal of statutory rape count, upon district attorney's motion, did not operate to acquit defendant on count charging lewd conduct with a child, based on the same act. Pen.Code, §§ 288, 954.

3. Criminal law 🔑**822(6)**

In prosecution for lewd conduct with child, instruction charging jury in language of statute defining offense as to intent with which act must have been committed and instruction charging jury in language of statute as to wilfulness with which act must have been done should be read together and, when so read, instructions fully and fairly advised jury as to necessity for proof of both intention and wilfulness required by statute defining offense. Pen.Code, § 7, subd. 1, § 288.

4. Criminal law 🔑**1172(6)**

In prosecution for lewd conduct with child, where information and evidence were clear as to specific time and place of commission of offense, and there was no defense of alibi, instruction relative to time of commission of offense could not have been prejudicial to defendant.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Proceeding by the people against Perry Kearney on two charges of lewd conduct with a child and statutory rape. The charge of rape was dismissed. From a judgment of conviction as to count of lewd conduct, the defendant appeals.

Affirmed.

For prior opinion, see 120 P.2d 156.

Rehearing denied; CARTER, J., dissenting.

Morris Lavine, Gladys Towles Root, and Eugene V. McPherson, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen. and Bayard Rhone, Deputy Atty. Gen., for respondent.

PER CURIAM.

In an information filed by the District Attorney of Los Angeles County the defendant Kearney was charged in separate counts with (1) violation of section 288 of the Penal Code, on March 22, 1941, (2) violation of the same statute, on March 13, 1941, and (3) rape, committed on the latter date. In each instance the alleged victim was a ten-year-old girl. Prior to submission of the case the third count (rape) was dismissed upon motion of the district attorney. The jury found defendant guilty on the remaining two counts charging violation of section 288, supra. Upon motion a new trial was granted, however, on count one. Judgment was entered on count two sentencing defendant to the state penitentiary, but execution thereof was suspended and defendant has been placed on probation for a period of five years upon condition that he spend one year thereof in the county jail, the court recommending that the year be served on the honor farm. This is an appeal from the judgment and the order denying a new trial on count two.

[1] Defendant urges that the story related by the prosecutrix "is so inherently

improbable" as to require a reversal of the judgment. Examination of the record refutes the contention. Minor inaccuracies and uncertainties in the testimony of the prosecutrix do not serve to destroy her credibility as a witness or render her story unbelievable. On the contrary, a reading of the record indicates that a child of such tender years could have related the story with such detail and consistency only if she had actually undergone an impressionable experience such as that narrated by the prosecutrix and which led to defendant's conviction on count two. In our narrative we shall refer only to those portions of the testimony addressed to the latter count, for there is nothing so inherently improbable about any portion of the story of the prosecutrix, regardless of the count to which it is addressed, that would tend to suggest improbability as to the part relating to count two, upon which defendant stands convicted. We turn now to the evidence addressed to the latter count.

The prosecutrix lived with her parents in property belonging to defendant and situated across the street from defendant's home. On the afternoon of March 13, 1941, the mother of the prosecutrix and the wife of defendant were engaged in a telephone conversation, during the course of which it was mutually agreed that the prosecutrix might visit with the Kearneys as had been her custom on prior occasions. According to the prosecutrix, she arrived at defendant's home shortly after 1:00 p.m., at which time the defendant was in the kitchen. Defendant's wife was also present. The wife and prosecutrix read a newspaper together in the kitchen. Shortly thereafter, a woman called and defendant's wife accompanied her into the living room and closed the door, leaving prosecutrix and defendant alone in the kitchen. After a brief conversation with the prosecutrix, defendant opened the door that leads to the bathroom and then perpetrated an act, detailed by her, that unquestionably constituted a violation of section 288, supra. Upon the hearing of sounds indicating the return of his wife, defendant went back into the kitchen. The visitor departed and shortly thereafter the mother of prosecutrix came to defendant's home, visited with defendant's wife for a short period and then left accompanied by the prosecutrix. On cross-examination the prosecutrix testified that defendant's wife and the visitor were out of the kitchen "maybe 15 or 20 minutes," the former returning once during this period to the kitchen. It was after the initial departure of defendant's wife from and prior to her temporary return to the kitchen that the offense occurred, the prosecutrix not being able to accurately gauge this exact period of time.

We find nothing inherently improbable or wholly untrustworthy in the child's attempted description of the position of the parties during the act, or in her recollection of the situation of the bathroom or its contents. Nor can it be said that the child's description at the preliminary examination, read into the record by defense counsel, served in any way to impeach her. We find nothing of a prejudicial nature in the trial court's handling and disposition of this particular matter. Moreover, it appears that later in the trial defense counsel was permitted to examine the witness fully, at which time the subject was completely covered. A child as young as the prosecutrix experiencing such an ordeal may not reasonably be expected to give a detailed and wholly unvarying description of the entire transaction and of the circumstances surrounding its occurrence. We find nothing in the record indicting wilful and deliberate falsification by the prosecutrix or suggesting that her story was fabricated or the product of a childish imagination. A cautionary instruction was given at the request of defendant.

We find in her mother's testimony much that is corroborative of the prosecutrix. Relative to count two, the mother testified that she had permitted the prosecutrix to go to the defendant's home on March 13, 1941, between 1:00 and 1:30 p.m.; that the child was visiting there for "30 or 40 minutes" before she (the mother) came to defendant's home; and that following a group visit she and defendant's wife were in the living room, away from prosecutrix and the defendant, for approximately "15 or 20 minutes." Thus it would appear that there was ample time for commission of the offense either before or after the arrival of the mother of prosecutrix.

The testimony of defendant and his wife to the effect that prosecutrix did not arrive at their home until "evening, just after dark" and that she came with her mother, and that no other woman called during the stay of prosecutrix, does not render the story of the prosecutrix inherently improbable. The same is also true of defendant's positive denial that he had mistreated the child in any way. At best, such testimony created only a conflict with that of the prosecutrix and her mother, which conflict was resolved by the jury against defendant. It is significant that the testimony of defendant and his wife tends to corroborate the prosecutrix at least as to the latter's presence in their home on the day in question and as to her being alone with defendant a portion of the time.

[2] There is no merit in defendant's contention that dismissal of the rape count, upon motion of the district attorney, operated to acquit him on count two charging violation of section 288, supra, based on the same act. The two offenses are separate and distinct and made up of different elements. The rape count was dismissed because the evidence failed to show penetration. The child's testimony was uncertain on the point, and the medical testimony showed a lack of penetration. It does not follow, however, that defendant's conduct with the prosecutrix at the time was not of a lewd and lascivious character within the meaning of section 288, supra. The contention is answered by section 954 of the Penal Code, which provides that where, as here, a defendant is charged with two or more different offenses connected together in their commission, "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." See, also, People v. Amick, 20 Cal.2d 247, 125 P.2d 25; People v. Stangler, 18 Cal.2d 688, 695, 696, 117 P.2d 321.

[3] Defendant next singles out two instructions and urges that they are inconsistent and prejudicial. When read as a whole the charge to the jury was neither misleading nor improper. One of the instructions complained of charged the jury in the language of section 288, supra, as to the intent with which the act must have been committed, while the other instruction charged the jury in the language of subdivision 1 of section 7 of the Penal Code as to the wilfulness with which the act must have been done. These instructions are not mutually exclusive but must be read together and along with other portions of the charge to the jury. People v. Gibson, 107 Cal.App. 76, 82, 289 P. 937. When so read, they fully and fairly advised the jury as to the necessity for proof of both the intention and wilfulness required by section 288, supra, and we find no inconsistency between them.

[4] Nor do we perceive wherein any prejudice could have resulted from the giving of the instruction relative to the time of the commission of the offense. The instruction was the usual instruction with regard to the statute of limitations. The information and the evidence are clear as to the specific time and place of the commission of the offense, and there was no defense of alibi as in the cases cited by defendant. Under the circumstances, the instruction could not have misled the jury. We find no other rulings or instructions that require discussion.

The judgment and order appealed from are affirmed.

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20 Cal.2d 431

ANDERSON v. ANDERSON.

L. A. 18117.

Supreme Court of California.

June 9, 1942.

Rehearing Denied July 6, 1942.

1. Appeal and error 🔑801(3)

If appellant had any grounds for setting aside or modifying engrossed bill of exceptions, application to that end should have been first made to trial court, and in event of such court's refusal to grant the relief sought, its action upon the application would have been subject to review by Supreme Court. Code Civ.Proc. § 473.

2. Appeal and error 🔑801(3)

Ordinarily, the Supreme Court will not undertake to determine, on a motion to dismiss an appeal, whether a party has so failed to comply with requirements of law in regard to settlement of a bill of exceptions that his pending proceeding for such settlement must ultimately fail, but will leave that question to be determined by trial judge, subject to review on appeal.

3. Appeal and error 🔑627(2)

Where engrossed bill of exceptions on appeal from judgment of partition was properly signed by trial judge and filed in trial court, but no printed transcript of record had been filed with clerk of Supreme Court within time provided by such court's rules, motion to dismiss appeal from judgment would be granted.

4. Appeal and error ⚿622

On an appeal from a judgment or order, appellant's time within which to file a printed transcript of record in Supreme Court does not commence to run until an engrossed bill of exceptions signed by trial judge is filed in trial court.

5. Appeal and error ⚿622

Where trial court settled a bill of exceptions to be used on appeal from order confirming sale of realty in partition proceedings and ordered respondent's attorney to engross the bill, but record on appeal contained no engrossed bill of exceptions signed by trial judge, appellant was not in default in filing transcript of record in Supreme Court, and hence motion to dismiss appeal from order would be denied.

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In Bank.

Appeals from Superior Court, Los Angeles County.

On rehearing of motion to dismiss appeal.

Motion to dismiss appeal from judgment of partition granted, and motion to dismiss appeal from order confirming sale of real property denied.

Prior opinion, 122 P.2d 561.

Marcus L. Roberts, of Los Angeles, for appellant.

Von Herzen & Woods, C. P. Von Herzen, and Geo. C. Woods, all of Los Angeles, for respondent.

CURTIS, Justice.

Motion to dismiss two appeals in the above-entitled action. One of such appeals is from a judgment in partition of real property, and the other is an appeal from an order of the trial court confirming sales of real property subsequently made after entry of said judgment in partition. The grounds upon which the motion was based were that no printed transcript of the record on either appeal had been filed in this court within the time provided by the rules of this court. On a former hearing of said motion we ordered both appeals dismissed. We granted a rehearing of said motion to dismiss upon a further showing as to the proceedings taken before the trial court in respect to the settlement of the bills of exceptions to be used on said appeals. On the rehearing the court suggested that the attorneys prepare and file with this court a stipulation showing the true condition of the record of the proceedings taken in the trial court in respect to the preparation of said bills of exceptions. In accordance with this suggestion a stipulation has been filed which purports to set forth certain matters bearing upon the questions involved herein in addition to those contained in the original record upon which our former decision was rendered. In addition to the above there has been filed in this matter the original proceeding before the trial court in the settlement of each of said bills of exceptions.

From the above record now before us it appears that the appellant duly served and filed a proposed bill of exceptions to be used on each of said appeals, and the respondent duly served and filed amendments to each of said proposed bills, and thereafter the two bills of exceptions with their respective amendments came on for hearing before the court for settlement. At said hearing the trial court settled each of said bills and ordered the attorney for respondent to engross the same. The attorney for respondent complied with this order and on August 19, 1941, the trial judge signed the engrossed bill of exceptions on the appeal from the judgment of partition, but for some unaccountable reason did not sign the engrossed bill on the appeal from the order confirming the sale of property and said engrossed bill of exceptions has never been signed.

The Appeal From the Judgment of Partition.

[1, 2] Appellant, by the affidavit of her attorney filed in this court at the hearing of said motion, states that there never had been any hearing set, notice given, or hearing held to settle said bill of exceptions on the appeal from the judgment of partition, and that in the absence of appellant and her attorney, and without notice to either of them, the trial court undertook to settle said bill of exceptions. It does not appear by said affidavit or otherwise that appellant had instituted any proceedings in the trial court under section 473

of the Code of Civil Procedure, or under any other provision of law, to set aside or vacate the order of the trial court settling said bill of exceptions, or had made any attempt in the trial court to correct, modify or amend said engrossed bill of exceptions. Had appellant any legal grounds to set aside or modify said engrossed bill of exceptions, application to that end should have been first made to the trial court, and in the event of the refusal of that court to grant the relief sought, its action upon said application would have been subject to review by this court. In Moultrie v. Tarpio, 147 Cal. 376 at page 378, 81 P. 1112, at page 1113, it is stated: "Ordinarily, this court would not undertake to determine, on a motion to dismiss an appeal, whether or not a party had so failed to comply with the requirements of the law in regard to the settlement of a bill of exceptions that his pending proceeding for such settlement must ultimately fail, but would leave that question to be determined by the trial judge, subject to review on appeal." That case is cited by this court in the case of Dernham v. Bagley, 151 Cal. 216, 218, 90 P. 543, where the language set out above is quoted and approved.

Moreover, counsel for appellant admits that on September 10th he learned that said engrossed bill had been signed and filed on August 19, 1941. He then had nineteen days in which to have the bill of exceptions printed and filed in this court if he intended to prosecute his appeal or institute a proceeding to have the bill of exceptions corrected if he did not consider the one signed by the judge to be a true and correct bill of exceptions. In fact, counsel for appellant knew as early as August 4, 1941, that counsel for respondent had presented an engrossed bill of exceptions to the trial judge, as he was served with a copy of such engrossed bill on that date. The record does not disclose any action on his part to have the engrossed bill corrected if it was not satisfactory to him or to prevent the trial judge from signing it.

[3] As the engrossed bill of exceptions on the appeal from the judgment of partition was properly signed by the trial judge and filed in the trial court, and no printed transcript of the record has been filed with the clerk of this court within the time provided by the rules of this court, the motion to dismiss the appeal from the judgment of partition on the grounds stated should be granted.

The Appeal From the Order Confirming Sale by Referee of Portion of Property Partitioned.

[4, 5] While the record appears to show that the court settled a bill of exceptions to be used on this appeal and ordered the attorney for the respondent to engross the same, which order was duly performed by said attorney, we find no such bill of exceptions signed by the trial judge in the record before us. As the appellant's time within which to file a printed transcript in this court, on an appeal from a judgment or order of the trial court, does not begin to run until such an engrossed bill of exceptions signed by the trial judge is filed in the trial court, appellant is not in default in filing said transcript in this court. The motion to dismiss the appeal from the order confirming the sale of real property is not well founded.

The motion to dismiss the appeal from the judgment of partition is granted. The motion to dismiss the appeal from the order confirming sale of real property is denied.

GIBSON, C.J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 424

MALMGREN v. McCOLGAN.

CASWELL v. SAME.

S. F. 16365.

Supreme Court of California.

June 9, 1942.

Rehearing Denied July 6, 1942.

1. Taxation ⟹104

The account from which estate made distribution to legatees did not establish its character as a payment of "corpus" or "income", as regards whether distribution was taxable to legatees. Gen.Laws 1937, Act 8494, §§ 8(c), 12(d) (3).

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus" and "Income".

2. Taxation ⟹104

Failure of estate in return of estate's income to deduct income as a distribution to legatees did not free legatees of tax thereon, if distribution was a proper payment of income to them. Gen.Laws 1937, Act 8494, §§ 8(c), 12(d) (3).

3. Taxation 🔑104

Generally, income of an estate is taxable to beneficiaries only if it is distributed or distributable to them in taxable year received by the estate. Gen.Laws 1937, Act 8494, § 12(d) (3).

4. Taxation 🔑104, 363½

Under statute authorizing exception in computing net income of estate for income properly paid to any legatee, heir, or beneficiary, but providing that amount so allowed as a deduction should be included in computing net income of legatee, heir or beneficiary, income, to come within provision of statute, must be received during administration of the estate, must be income of the estate for its taxable year, and must be paid or credited to the legatees properly, and during that taxable year. Gen.Laws 1937, Act 8494, § 12(d) (3).

5. Taxation 🔑363½

The "taxable year", within California Personal Income Tax Act, represents an accounting period of 12 months, and it is not reduced to a shorter period by circumstance that a taxpayer undergoes a change in status or ceases to exist or that income reported is for less than a 12 months' period.

See Words and Phrases, Permanent Edition, for all other definitions of "Taxable Year".

6. Taxation 🔑363½

Income admittedly received by estate in 1937 and properly distributed to legatees during such period was deductible by estate and taxable to legatees under State Personal Income Tax Act, even if administration of estate had terminated before distribution to legatees. Gen.Laws 1937, Act 8494, § 12(d) (3).

7. Taxation 🔑104, 363½

Where income realized by estate in 1937 was properly distributed to legatees during such taxable year as part of total assets, income retained its character as "income", notwithstanding that it was distributed as part of total assets, and, hence, was deductible by estate and taxable to legatees under State Personal Income Tax Act. Gen.Laws 1937, Act 8494, § 12(d) (3).

8. Taxation 🔑104, 219

Where income admittedly received by estate in 1937 was properly distributed to legatees during such year as part of total assets, that part of payments representing income was properly taxable to legatees as "income", as against contention that entire distribution constituted a legacy exempt under statute exempting from income tax value of property acquired by gift, bequest, devise or inheritance. Gen.Laws 1937, Act 8494, §§ 7(b) (3), 12(d) (3).

9. Taxation 🔑104

Income received by estate and properly distributed to legatees during taxable year was taxable to legatees as "income", regardless whether legatees were entitled to have income paid to them at time estate received it. Gen.Laws 1937, Act 8494, § 12 (d) (2, 3).

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In Bank.

Appeals from Superior Court, City and County of San Francisco; J. M. Golden, Judge.

Two actions by Harriet C. Malmgren against Charles J. McColgan, as franchise tax commissioner, etc., and by Daisy F. Caswell against same defendant, for refund of income taxes paid under protest. From judgments for plaintiffs on the pleadings, the defendant appeals.

Judgments reversed.

Earl Warren, Atty. Gen., and H. H. Linney, James J. Arditto, and Valentine Brookes, Deputies Atty. Gen., for appellant.

Joseph C. Meyerstein, of San Francisco, for respondents.

TRAYNOR, Justice.

George W. Caswell, a resident of San Francisco, died testate on August 22, 1935. His will directed the payment of certain specific bequests, confirmed the right of his wife to one half of the community property and left the balance of the estate to his daughter, Harriet C. Malmgren. Under the decree of final distribution, entered by the court on November 3, 1937, the payment of debts and charges, family allowance and legacies, was approved and the residue was distributed, one half to testator's daughter and one half to his wife. The executrix made a return pursuant to the California Personal Income Tax Act (Stats.1935, p.

1090, amended by Stats.1937, p. 1831, Stats. 1939, p. 2528, Stats.1941, pp. 471, 2121, 3220, Deering's Gen.Laws 1937 and Supp.1941, Act 8494) on behalf of the estate for each year of its administration. In 1937 she paid from the income account, estate and inheritance taxes, which are non-deductible under section 8 (c) of the act. She made a return setting forth all income received by the estate in 1937 and paid the tax computed on the full amount thereof without deduction. The commissioner returned the tax to the executrix and assessed a tax to testator's wife on one half the income and to testator's daughter on the other half. The taxes so assessed were paid under protest. The trial court overruled appellant's demurrers and granted respondent's motions for judgments on the pleadings. From these judgments this appeal was taken pursuant to a stipulation for consolidation.

[1-3] Respondents concede that the account from which the estate made the distribution does not establish its character as a payment of corpus or income. Burnet v. Whitehouse, 283 U.S. 148, 51 S.Ct. 374, 75 L.Ed. 916, 73 A.L.R. 1534; Helvering v. Butterworth, 290 U.S. 365, 54 S.Ct. 221, 78 L.Ed. 365; Letts v. Commissioner of Int. Rev., 9 Cir., 84 F.2d 760, 762; Sitterding v. Commissioner of Int. Rev., 4 Cir., 80 F.2d 939. It is clear also that the failure of the estate to deduct the income as a distribution to legatees does not free the legatees of tax thereon, if the distribution is a proper payment of income to them. Riker v. Commissioner of Int. Rev., 2 Cir., 42 F.2d 150; Little v. White, 1 Cir., 47 F.2d 512. Each year the net income of an estate becomes subject to a tax against either the estate or the beneficiaries. As a general rule it is taxable to the beneficiaries only if it is distributed or distributable to them in the taxable year received by the estate. The commissioner cannot, and did not attempt to tax to respondents income received by and taxed to the estate in a year prior to 1937. Commissioner of Int. Rev. v. Owens, 10 Cir., 78 F.2d 768; Haag v. Commissioner, 19 B.T.A. 982; Ball v. Commissioner, 27 B.T.A. 388. The sole question on these appeals, therefore, is whether under the California Personal Income Tax Act as amended in 1937, the income admittedly received by the estate in 1937 is taxable to the estate or to the wife and daughter.

[4] Everything in the estate was distributed, including the 1937 income. The commissioner contends that this income is taxable to the wife and daughter under paragraph (3) of section 12 (d) of the act providing: "In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir or beneficiary."

The foregoing provision makes four specifications governing deductibility of the income by the estate and its taxability to the legatees: (1) The income must be received during the administration of the estate; (2) it must be income of the estate for its taxable year; (3) it must be paid or credited to the legatees properly, and (4) during that taxable year.

[5, 6] The income in question meets these specifications. (1) It was received by the estate in 1937 during the administration and settlement of the estate. (2) The estate was on a calendar year basis and the income it received between January 1, 1937 and December 31, 1937, was income of the estate for that taxable year. (3) The approval of the probate court leaves no question that the distribution was properly made. Freuler v. Helvering, 291 U.S. 35, 54 S.Ct. 308, 78 L.Ed. 634. (4) Respondent concedes that the last taxable year of the estate was the entire calendar year 1937. The distribution of November 3, 1937, was therefore made during that taxable year even though the final account was allowed and the executrix ordered discharged at the same time. The taxable year represents an accounting period of twelve months. It is not reduced to a shorter period by the circumstance that a taxpayer undergoes a change in status or ceases to exist or that the income reported is for less than a twelve months' period. Bankers Trust Co. v. Bowers, 2 Cir., 295 F. 89, 31 A.L.R. 922; Strong v. United States, 62 Ct.Cl. 67; Louis Hymel Planting & Mfg. Co., v. Commissioner, 5 B.T.A. 910; Penn et al., Executors, v. Robertson, 4 Cir., 115 F.2d 167; Helvering v. Morgan's, Inc., 293 U.S. 121, 55 S.Ct. 60, 79 L.Ed. 232; Palomas Land &

Cattle Co. v. Commissioner of Int. Rev., 9 Cir., 91 F.2d 100; Commissioner of Int. Rev. v. General Machinery Corp., 6 Cir., 95 F.2d 759. In S. F. Durkheimer v. Commissioner, 41 B.T.A. 585, on which respondents rely, the board of tax appeals held the income taxable to the estate and not to the residuary legatee on the theory that the final distribution was not made before the completion of the administration of the estate. The board interpreted subdivision (c) of section 162 of the federal act, 26 U.S.C.A. Int.Rev.Code § 162(c), which corresponds to paragraph (3) of section 12 (d) of the state act, as having reference "only to cases where the income has been paid or properly credited to the legatee during the period of administration or settlement." This interpretation is erroneous. The statute refers to all income received during administration and properly paid *during the taxable year* of the estate. Even if the administration were assumed to terminate before the final distribution, the estate's taxable year runs until the end of the twelve months' accounting period. Income properly paid during that period that was received during the administration of the estate is deductible by the estate and taxable to the legatee under the plain language of the statute.

[7] There remains the question whether the income retained its character as income when it was distributed to the legatees as part of the total assets. Income of an estate is clearly income to the legatees when distributed separately from the corpus of the estate. When it is distributed along with the corpus nothing occurs to alter its character. In either case it is merely transferred, not transformed. Before its distribution it is identified as income even though it is allied with the corpus as a constituent of the entire estate. It does not lose its identity after distribution to the legatees for whose benefit it has been held when it is allied with the corpus in distribution. The right of a legatee to the corpus vests at the death of the testator and "residuary legatees who receive payments of funds composed both of original assets of the estate and of estate income, receive that portion represented by estate income as income derived from their own property." Weigel v. Commissioner of Int. Rev., 7 Cir., 96 F.2d 387, 389, 117 A.L.R. 366. In Weber v. Commissioner of Int. Rev., 2 Cir., 111 F. 2d 766, 768, profit from the sale of a farm devised to residuary legatees, with a power of sale conferred on the executors, was distributed to them as part of the proceeds, and was held properly paid to them and deductible by the estate under section 162 (c) of the Revenue Act of 1932, 26 U.S.C.A. Int.Rev.Code, § 162(c), corresponding with paragraph (3) of section 12 (d) of the state act. The court declared: "We cannot grasp the commissioner's argument that the profit on the sale 'was never payable to them as such but was paid to them in discharge of their legacies.' The profit was payable to them as profit, because it was part of the proceeds of sale of the farm. See Commissioner [of Int. Rev.] v. Stearns, 2 Cir., 65 F.2d 371. On the assumption that it was the estate which realized the profit, the case is squarely within section 162 (c)." See contra, Estate of Anderson v. Commissioner of Int. Rev., 9 Cir., 126 F.2d 46; cf. County National Bank & Trust Co. v. Helvering, 74 App.D.C. 142, 122 F.2d 29.

[8] Respondents contend, however, that the entire distribution constitutes a legacy no part of which can be regarded as income, and is therefore exempt under section 7 (b) (3) of the act providing: "The following items shall not be included in gross income and shall be exempt from taxation under this act: * * * (3) The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income)."

This contention is answered by the decision in Irwin v. Gavit, 268 U.S. 161, 45 S. Ct. 475, 69 L.Ed. 897, interpreting an identical provision in the federal income tax act of 1913 exempting bequests but taxing the income therefrom. A legatee who inherited the right to receive the income of a trust for fifteen years was held taxable on that income. The contention that the inherited income was his bequest yielded to the holding that all income of the estate arising after the death of the testator was taxable to someone and that Congress made it taxable to the recipient. In imposing the tax upon the beneficiary the income tax statutes of both the state and federal government thus distinguish between the estate and its income irrespective of whether the beneficiary may receive the income as a legacy. Under paragraph (3) of section 12 (d) of the state act, as in the corresponding federal provisions, the burden of taxation accompanies the income. The estate bears the burden of the tax when it holds the income, and transfers that burden to the legatee when it distributes the income.

[9] Respondents have advanced the theory that a legatee is not taxable on income received by an estate unless he is entitled to have it paid to him at the time the estate receives it. No such limitation, however, can be found in either the federal or state acts, nor could it be read into these acts without nullifying paragraph (3) of section 12 (d) of the state act as well as section 162 (c) of the Internal Revenue Code, 26 U.S.C.A.Int.Rev.Code, § 162(c). Actually paragraph (3) of section 12 (d) supplements the provision in paragraph (2) of that section that currently distributable income is taxable to the beneficiary. All income to which the beneficiary is entitled at the time of its receipt by the fiduciary falls into the category of income to be distributed currently, envisaged in paragraph (2). It does not follow, however, that only such income is taxable to the beneficiary. The taxability of income to the beneficiary is not precluded by paragraph (2) simply because the income does not fall within its scope. Paragraph (3) designates income as taxable to the beneficiary precisely because it does not fall within the scope of paragraph (2). Under paragraph (3) income that is distributable in the discretion of the fiduciary is deductible when distributed to the beneficiary and taxable to the latter even though he is not entitled to such income at the time of its receipt by the fiduciary. Similarly, the provision in paragraph (3) that income received by an estate and paid to a legatee is deductible by the estate and taxable to the legatee makes it clear that such income is not limited to that contemplated by paragraph (2).

Burnet v. Whitehouse, 283 U.S. 148, 51 S.Ct. 374, 75 L.Ed. 916, 73 A.L.R. 1534; Roebling v. Commissioner of Int. Rev., 3 Cir., 78 F.2d 444, and Spreckels v. Commissioner of Int. Rev., 9 Cir., 101 F.2d 721, on which respondents rely, are concerned with the meaning of currently distributable income in the federal income tax provisions corresponding to paragraph (2) of section 12 (d). They are not concerned with the provisions corresponding to paragraph (3) of that section encompassing the income of estates in administration and income that can be distributed at the discretion of the trustee. In any event the 1937 amendment to paragraph (2) of section 12 (d) renders the foregoing cases inapplicable even to that paragraph by providing, "* * * For the purpose of this paragraph amounts currently distributable to beneficiaries are distributable out of income of the estate or trust for the taxable year if there is income of the estate or trust for the taxable year out of which such distributions may be made and if, under the terms of the will or trust instrument, the distributions may be made out of such income, regardless of the fact that the will or trust instrument provides that the distributions may be made out of the corpus of the estate or trust. * * *" Stats.1937, p. 1844.

The judgments are reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ. concurred.

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52 Cal.App.2d 544

EXCHANGE NAT. BANK OF TULSA v. RANSOM et al.

Civ. 13448.

District Court of Appeal, Second District, Division 2, California.

June 8, 1942.

1. Costs 🔑3

The right to recover costs exists solely by virtue of statute.

2. Execution 🔑203

In proceeding involving ownership of property seized under execution where third-party claimant was adjudged to be owner of property aggregating $640 in value and judgment debtor adjudged owner of property worth $225, third-party claimant was the "prevailing party" within meaning of the statute allowing costs. Code Civ.Proc. §§ 689, 1032(a, c).

See Words and Phrases, Permanent Edition, for all other definitions of "Prevailing Party".

3. Execution 🔑203

A proceeding in which a third-party claimant asserted ownership in cashier's and traveler's checks seized pursuant to execution upon judgment was a "special proceeding" within meaning of statute allowing costs to the prevailing party. Code Civ. Proc. §§ 689, 1032(a, c).

4. Costs 🔑172

Generally attorney's fees are not recoverable except where expressly allowed by statute.

5. Execution 🔑203

Provisions of statute that property seized under execution shall be released upon filing of claim thereto by third party unless party in whose favor the writ runs files an undertaking to pay all damages, "costs and counsel fees" do not authorize court to allow counsel fees to a successful third-party claimant unless the undertaking itself expressly so provides. Code Civ.Proc. §§ 689, 1032(a, c).

See Words and Phrases, Permanent Edition, for all other definitions of "Costs and Counsel Fees".

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by Exchange National Bank of Tulsa against G. M. Ransom. Grace Carver Ransom filed a third-party claim, asserting title to property seized by sheriff pursuant to execution upon judgment recovered by plaintiff against defendant. The court determined that the third-party claimant was owner of all property seized except one check, and the third-party claimant appeals from portion of judgment ordering that each party pay its own costs.

Portion of judgment appealed from reversed and remanded with instructions.

Meserve, Mumper & Hughes and Lewis T. Gardiner, all of Los Angeles, for appellant.

Mathes & Sheppard, Wm. C. Mathes, and Gordon F. Hampton, all of Los Angeles, for respondent.

JESS E. STEPHENS, Justice pro tem.

This is an appeal from a portion of a judgment after hearing on a third party claim. The appeal is "from the particular portion of said judgment which orders and decrees that each party to said proceeding pay its own costs therein incurred."

Pursuant to writ of execution issued upon a judgment secured by respondent against G. M. Ransom, the sheriff levied upon and seized the contents of a safe deposit box consisting principally of a number of cashier's checks and American Express travelers' checks. Grace Carver Ransom filed a third party claim, asserting her title thereto, and demanded a hearing pursuant to Code of Civil Procedure, section 689. Following such hearing the trial court determined that all of said property was the sole and separate property of said Grace Carver Ransom except one cashier's check in the sum of $225, which latter was ordered delivered to the judgment creditor pursuant to the writ. The judgment further provided: "each party to pay its and their costs herein incurred."

Appellant (third party claimant) contends that, being the successful party in the proceeding, she is entitled to her costs as a matter of course, and that by virtue of section 689 of the Code of Civil Procedure she is entitled to counsel fees as well.

Section 689 of the Code of Civil Procedure provides a complete procedure for the filing of a third party claim if personal property is levied upon, for hearing in the court in which the action is pending or from which the writ issued for the purpose of determining title to the property in question, and for the type of judgment to be rendered, no findings being required. It further provides for immediate release of the property upon the filing of such claim unless the person in whose favor the writ runs files with the officer holding the property an undertaking in a sum equal to double the value of the property levied upon. In this connection the section provides that "Such undertaking shall be made in favor of and shall indemnify such third person against loss, liability, damages, costs and counsel fees, by reason of such seizing, taking, withholding, or sale of such property by such officer." The section contains no other reference to costs or counsel fees. We must, therefore, look to the general provision governing the allowance of costs, to wit, section 1032 of the Code of Civil Procedure. The portion of this section which it is necessary to consider herein provides as follows: "In the superior court, except as otherwise expressly provided, costs are allowed of course: (a) To plaintiff upon a judgment in his favor * * * in an action to recover the possession of personal property * * * in a special proceeding. * * * (c) In other actions than those mentioned in this section, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court * * *."

[1, 2] The right to recover costs exists solely by virtue of statute. In re Johnson's

Estate, 198 Cal. 469, 245 P. 1089; Sime v. Hunter, 55 Cal.App. 157, 159, 202 P. 967. Respondent contends that this was a "divided judgment" (appellant was successful in recovering twelve items of property aggregating $640 in value, and unsuccessful as to one item of the value of $225), and that therefore neither party can be said to be the prevailing party within the meaning of the statute. We do not agree with this contention. Appellant has a right to have every item of her personal property freed from seizure for another's debt. The person causing such seizure does so at his peril. If appellant successfully maintains that one article of her own property has been so seized she has prevailed. The fact that one or more articles were properly seized does not change the situation.

[3] Respondent next contends that this is not "an action to recover possession of personal property" but a proceeding to try title thereto. There may be some force to this argument, although it might be urged that the determination of title involves the right to possession in the absence of any special possessory right, such as a lien. However, we believe that at least so far as appellant is concerned this proceeding under section 689 of the Code of Civil Procedure is a special proceeding within the meaning of section 1032 of that code. Van Denburgh v. Goodfellow, 19 Cal.2d 217, 225, 120 P.2d 20; Misrach v. Liederman, 14 Cal.App.Supp.2d 757, 761, 58 P.2d 746; Peterson v. Groesbeck, 20 Cal.App.Supp.2d 753, 755, 64 P.2d 495. Appellant is therefore entitled to her costs as a matter of course.

[4, 5] As to the matter of counsel fees, however, a different situation is presented. Section 1021 of the Code of Civil Procedure provides as follows: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided." The general rule is that attorney's fees are not recoverable except where expressly allowed by statute. 7 Cal.Jur. 286. Nowhere in section 689 of the Code of Civil Procedure is there any provision concerning counsel fees except the portion hereinabove quoted, relating to the undertaking permitted to be filed by the judgment creditor following the filing of the third party claim. It does not specifically authorize the court in the instant proceeding to make any allowance for such fees. If any basis for the recovery of counsel fees exists it must be found in the undertaking itself. So far as the record before us discloses, the undertaking was never before the trial court, and of course it is not before us. Obviously a judgment predicated upon an undertaking could not be arrived at without such instrument being presented to such court in some manner.

The portion of the judgment appealed from is reversed and the cause is remanded to the trial court to allow appellant her proper costs; appellant to recover her costs on appeal.

MOORE, P. J., and McCOMB, J., concurred.

52 Cal.App.2d 530

CLELAND v. SUPERIOR COURT OF MENDOCINO COUNTY.

Civ. 6790.

District Court of Appeal, Third District, California.

June 6, 1942.

Hearing Denied Aug. 3, 1942.

1. Prohibition 🔑5(4)

The writ of prohibition is proper remedy where it appears that facts charged do not constitute criminal offense and that indictment is void, but that motion to quash indictment was denied and demurrer to indictment was overruled.

2. Prohibition 🔑3(4)

Where court is without or exceeds its jurisdiction in passing upon preliminary motion to quash indictment and demurrer, defendant's right of appeal from a possible adverse final judgment is not a "speedy or adequate remedy" and does not bar remedy of writ of prohibition.

See Words and Phrases, Permanent Edition, for all other definitions of "Speedy Or Adequate Remedy".

3. Counties 🔑102
Municipal corporations 🔑174
States 🔑81
Towns 🔑34

The term "officers", as used in statute making it an offense for officers to be interested in contracts, refers only to the duly appointed or elected public officers of a state, county, township, city or other subdivision of the state as distinguished from mere employees thereof, and the statute has no application to mere employees. Pen.Code, § 71; Pol.Code, § 920.

See Words and Phrases, Permanent Edition, for all other definitions of "Officer".

4. Counties 🔑61

Constitutional provision that the Legislature by general and uniform laws shall provide for election or appointment in the several counties of county officers is "mandatory" upon the Legislature, requiring it to provide for the election or appointment in the several counties by uniform laws of particular county officers and to prescribe their duties and to fix their terms of office. Const. art. 11, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

5. Constitutional law 🔑63(3)

The legislative power to provide for election or appointment of particular county officers and to prescribe their duties and fix their terms of office cannot be delegated to board of supervisors. Const. art. 11, § 5.

6. Paupers 🔑15

Superintendent of county farm and hospital was not a "county officer" but he was a mere "employee" of the board of supervisors and could not properly be charged with violating statute making it an offense for officer to violate law prohibiting officer from making or being interested in contracts. Pen.Code, § 71; Pol.Code, §§ 920, 4013; St. 1937, pp. 1016, 1097, §§ 203, 2400; Const. art. 4, § 25, subd. 28; art. 11, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "County Officer" and "Employee".

7. Paupers 🔑15
Prohibition 🔑5(4)

Where indictment charged superintendent of county farm and hospital with violation of statute making it an offense for officer to be interested in contract, the superior court was without jurisdiction to try the criminal charges and writ of prohibition was granted, since the statute was not applicable to the superintendent. Pen.Code, § 71; Pol.Code, §§ 920, 4013; St.1937, pp. 1016, 1097, §§ 203, 2400; Const. art. 4, § 25, subd. 28; art. 11, § 5.

Proceeding by H. O. Cleland against the Superior Court of Mendocino County for writ of prohibition.

Writ of prohibition granted, with directions.

Preston & Gibson and Thomas & Thomas, all of Ukiah, for petitioner.

James E. Busch, Dist. Atty., and George A. Faraday, Deputy Dist. Atty., both of Ukiah, for respondent.

PER CURIAM.

By means of a writ of prohibition the petitioner seeks to restrain the Superior Court of Mendocino County from proceeding to try him in a criminal action under an indictment charging him as an "officer," to wit, as superintendent of the Mendocino County Farm and Hospital, with being "interested in contracts" contrary to section 71 of the Penal Code.

It is contended, as a matter of law, that no such *office* exists, or was created; that the petitioner is a mere *employee*, as distinguished from a county officer; that the petitioner's alleged "interest in contracts" is not a criminal offense under section 71 of the Penal Code, or at all, for the reason that he is not an officer, and that the respondent is therefore without jurisdiction to try the case.

It is alleged that the petitioner, H. O. Cleland, was appointed September 12, 1932, by the board of supervisors of Mendocino County as "Superintendent of the Mendocino County Farm and Hospital," and that, by resolution of the board, he was then, "granted full charge in all matters that pertain to the conduct of the Mendocino County Farm and Hospital, and that * * * he is hereby granted and/or given charge and control of all employees of said Mendocino County Farm and Hospital, and that all powers and/or duties herein granted to the Superintendent * * * be, and they are revokable by the Board of Supervisors of the County of Mendocino, State of California, at any time."

It is further alleged that said employment was never terminated, and, upon the contrary, that he has continued to serve the board in that capacity as superintendent, to the present time; that on October 7, 1941, the grand jury of Mendocino County returned an indictment against him, consisting of thirty-one counts, separately charging him, as a *public officer*, to wit, as superintendent of the Mendocino County Farm and Hospital, with different felonies, under section 71 of the Penal Code, in that he was interested in the several specified contracts for the purchase of cattle, hogs and beef for use in and upon the Mendocino farm and hospital, and on account of the renting of certain machinery, from each of which transactions he unlawfully derived personal profits of from $40 to $150.

To each count of said indictment the defendant demurred on the ground that it fails to state a public offense against him as an officer, or at all, and that the court was therefore without jurisdiction to try the cause. A motion to dismiss the indictment for lack of jurisdiction was denied. The demurrer was overruled, and the defendant pleaded not guilty to each charge. Over the objection of the defendant the cause was set for trial. It is alleged that unless restrained from so doing the court will proceed to try said cause and will instruct the jury on said trial that the defendant, as superintendent of said county farm and hospital, served "as an officer," as contemplated by section 71 of the Penal Code. The petition asserts that he is without a speedy or adequate remedy in said matter.

The respondent filed in this court its demurrer to said petition for a writ of prohibition on the ground that the pleading fails to state a cause of action. At the same time it filed an answer which denies the material allegations of the petition, with the exception of the statements regarding the presenting of the indictment and the subsequent proceedings with relation thereto, which are admitted, including the affirmative acknowledgment that by overruling the demurrer and denying the motion to quash the indictment, the court "inferentially held that the petitioner is a county officer, and will so instruct the jury impanelled to try the case."

[1, 2] The writ of prohibition is a proper remedy under such circumstances as are presented on this proceeding, wherein it appears that the facts related do not constitute a criminal offense and that the indictment is therefore void, for the reason that the accused person is granted no right of appeal from either the order denying his motion to quash the indictment, or from the order overruling the demurrer thereto. His right of appeal from a possible final adverse judgment may be deemed to deny him a speedy or adequate remedy, where the court is without or it exceeds its jurisdiction in passing upon the preliminary motion to quash the indictment and the demurrer. Greenberg v. Superior Court for City and County of San Francisco, 19 Cal.2d 319, 121 P.2d 713.

The chief issue of this proceeding is whether the petitioner, as superintendent of the Mendocino County Farm and Hospital, in acquiring his alleged interest in the contracts for which he was indicted, acted in the capacity of an "officer" of Mendocino County, within contemplation of the language of section 71 of the Penal Code, or whether he is a mere employee of the board of supervisors and therefore exempt from prosecution for a criminal offense under that statute. Involved in that question is the further inquiry as to whether the board of supervisors had legal authority to appoint a "Superintendent of the Mendocino County Farm and Hospital." If no such legal or constitutional authority was delegated to the board, then it follows that the petitioner was not an officer of the county and could not lawfully be prosecuted for malfeasance of that alleged office.

[3] We are convinced the term "officers" as it is used in section 71 of the Penal Code refers only to the duly-appointed or elected public officers of a state, county, township, city or other subdivision of the state, as distinguished from mere employees thereof. This construction is confirmed by reference to section 920 of the Political Code, which similarly prohibits such specified officers from being "interested in any contract made by them *in their official capacity*." (Italics ours.) Section 71 of the Penal Code has no application to mere employees. It provides that: "Every officer or person prohibited by the laws of this state from making or being interested in contracts * * * who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the state prison not more than

five years, and is forever disqualified from holding any office in this state."

This penalty, including future disqualification from ever holding "any office in this state," indicates that the law is directed against the reprehensible crime of violating a public trust.

Our attention is directed to no law of this state, other than the two statutes above referred to, which prohibits an officer, or any other person from becoming interested in such contracts. We assume no other statute exists which prohibits any class of persons other than officers from being so interested in such contracts. Certainly neither of these statutes makes reference to employees or to any other class of persons than that of officers. If the Legislature had intended to render mere employees, as distinguished from officers, guilty of a felony for violation of those Code sections, it would have been very easy to have so stated. We must assume the Legislature did not so intend.

There is no doubt that under proper legislative and constitutional authority, boards of supervisors of the various counties may establish and maintain hospitals, almshouses, and county farms, and, under proper circumstances, may appoint the necessary physicians, officers and employees thereof. Section 203 of the Welfare and Institutions Code, St.1937, p. 1016 formerly section 4223 of the Political Code, provides that: "The board of supervisors in each county may establish and maintain a county hospital, prescribe rules for the government and management thereof, and appoint a county physician and other necessary officers and employees thereof, who shall hold office during the pleasure of the board."

Similarly, it is provided in section 2400 of the Welfare and Institutions Code, formerly section 4224 of the Political Code, in that regard: "The county boards of supervisors may establish almshouses and county farms, prescribe rules and regulations for their government and management, and appoint the necessary officers and employees thereof, who shall hold office during the pleasure of the board."

Section 4013 of the Political Code designates as "the officers of a county" seventeen classes by particular titles. Subdivision eighteen of that section then authorizes the appointment or election of "such other officers as may be provided by law." It follows that, to the seventeen named county officers there may also be added such other county officers, as distinguished from mere employees, as may be specifically created and provided for in accordance with constitutional and legislative authority, and not otherwise.

Article IV, section 25, subdivision 28, of the state Constitution prohibits the Legislature from passing "local or special laws. * * * Creating offices, or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts."

Article XI, section 5, of the Constitution provides that: *"The Legislature,* by general and uniform laws, *shall provide for the election or appointment, in the several counties,* of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, *and shall prescribe their duties and fix their terms of office.* * * * The boards of supervisors in the respective counties shall regulate the compensation of all officers in said counties other than boards of supervisors, district attorneys, auditors, and judges of municipal courts, and shall regulate the number, method of appointment, terms of office or employment, and compensation *of all deputies, assistants, and employees* of the counties." (Italics added.)

[4, 5] The preceding section of the Constitution has been held to be mandatory upon the Legislature, requiring it to provide for the election or appointment in the several counties, by uniform laws, of particular county officers and to "prescribe their duties and fix their terms of office." Welsh v. Bramlet, 98 Cal. 219, 33 P. 66. Likewise it has been held the Legislature may not delegate those powers to a board of supervisors. People v. Wheeler, 136 Cal. 652, 69 P. 435; City of Woodland v. Leech, 20 Cal.App. 15, 20, 127 P. 1040. The Wheeler case, previously cited, appears to be decisive of the very issue which is determinative of this proceeding. In that case the board of supervisors of Plumas County appointed J. S. Wheeler "County Physician" of that county pursuant to section 25, subdivision 5, of the act to establish a uniform system of county and township government. Stats.1897, pp. 452, 458. That statute purported to authorize boards of supervisors to procure

property, to "officer and maintain, hospitals and poorhouses," and to provide for the care and maintenance of the indigent sick and dependent poor of the county. For that purpose the statute then provided that the board of supervisors "shall also appoint some suitable graduate or graduates in medicine to attend to such indigent sick or dependent poor, and to the patients in such hospitals and poorhouses." The court held that the preceding subdivision of the statute was an unlawful delegation of the legislative authority to the board of supervisors, contrary to the inhibitions of article 11, section 5, of the Constitution; that the appointment of Mr. Wheeler as "County Physician" therefore did not constitute him a county officer, but on the contrary that he thereby became a mere employee of the board. The court said:

"The only question, therefore, in the case is whether the position to which the defendant was appointed is an office within the meaning of the term as used in the section of the Political Code cited.

"This question, we think, must be answered in the negative. * * * It is clear, therefore,—as also from the subordinate nature of their duties, and other circumstances,—that the physicians employed must be regarded as merely the servants or employés of the board. * * *

"There is nothing in the act now under consideration to indicate an intention on the part of the legislature to create, or rather to provide for the creation of, an indefinite number of offices; and the contrary is indicated by the failure of the act to designate as officers the physicians employed, *or to give them a distinctive name, or to fix their terms of office, or to prescribe their duties or compensations.*

"It may be added that, if the act could be thus construed, it would be clearly unconstitutional; for the effect of the act would then be to delegate to the board of supervisors the power to create an indefinite number of public offices, with varying duties and compensation; which cannot be regarded as within the constitutional powers of the legislature. 'The legislature cannot commit to the discretion of others the important function of creating public offices in unlimited or indefinite number.' Ford v. Board [of State Harbor Commissioners], 81 Cal. [19], 37, 22 P. 278; Farrell v. Board [of Trustees], 85 Cal. [408], 415, 24 P. 868. Still more obviously would this be the case if the supposed office be regarded as a county office, as, 'if an office at all,' it should be. (People v. Harrington, 63 Cal. [257], 260). For, with relation to county offices, it is the constitutional duty of the legislature, not only to provide for the election of the officers, but also to fix their terms of office, to prescribe their duties, and to regulate their salaries or compensation, and this duty could not be delegated to the board of supervisors or others." (Citing numerous authorities.) (Italics ours.)

[6] Based upon the foregoing authority and upon the constitutional inhibition against the Legislature delegating its authority to create county offices, except in the precise manner authorized by article XI, section 5, of the Constitution above quoted, we are satisfied the petitioner, H. O. Cleland, as superintendent of the farm and hospital, was not a *county officer* for the reasons that sections 203 and 2400 of the Welfare and Institutions Code authorize the boards to appoint no specifically designated officers except a county physician, and the Constitution prohibits the Legislature from delegating its power to "prescribe their duties and fix their terms of office." Contrary to the authority conferred by section 203, the board failed to appoint Cleland as county physician. He was appointed as "Superintendent" of the farm and hospital. No such *office* as superintendent is authorized by either of the sections of the Code upon which the respondent relies. Moreover, neither the Legislature nor the board fixed the term of office as required by the Constitution. He was merely appointed to serve as such superintendent at the will of the board. No term was fixed. His duties were not prescribed by the Legislature. These circumstances enforce the conclusion that the Legislature did not intend, by the enactment of the two Welfare and Institutions Code sections, to authorize a board of supervisors to create and appoint a superintendent of the farm and hospital as an additional county officer. On the contrary, it appears that those statutes merely provided for additional agents and employees of the board for the management of such institutions.

There is nothing in the late case of Ogle v. Eckel, 49 Cal.App.2d 599, 122 P.2d 67, 69, in conflict with what we have previously said regarding the lack of authority on the part of boards of supervisors to create county offices except in strict compliance with the provisions of article XI, section 5, of the Constitution. In the Ogle case, supra, the petitioner was duly appointed by the board of supervisors as "County Counsel" of the County of Orange, under the provisions of section 4041.12a of the Political Code, as added by St.1941, p. 2075, § 2. That statute specifically authorizes a board of supervisors in a county having a population in excess of 100,000 persons, to appoint a "County Counsel." It further provides, in accordance with article XI, section 5 of the Constitution, that the duties of the county counsel shall consist of all services which are performed by the district attorney in those counties, except those of a public prosecutor. The statute also definitely fixes the term of said county counsel at four years and until his successor is appointed and qualified. Thus it appears the statute which was involved in that case did not blindly delegate prohibited authority to boards of supervisors to appoint undesignated officers whose terms of office were not fixed and whose duties were not prescribed, in defiance of the clear mandate of the Constitution. The statute specifically named the office to be created. The term of office was definitely fixed and the duties are clearly prescribed. Under such circumstances the court properly said: "The office of county counsel, as here intended to be created and classified by the duties and functions to be performed, is a county office within the meaning of article IV, section 25, subdivision twenty-eighth" of the Constitution.

This Ogle case seems to give added force to what we have previously said regarding the delegated authority in the present case, in conflict with the mandate of article XI, section 5 of the Constitution, which forces us to conclude that H. O. Cleland was not appointed by the board as a county officer to the position of superintendent of the Mendocino County Farm and Hospital, but that, on the contrary, he is a mere employee of the board, and as such that the court is without jurisdiction to try him on the criminal charges contained in the indictment, for the reason that section 71 of the Penal Code has no application to such offenses committed by a mere employee.

[7] The court is without jurisdiction to try the cause under the circumstances of this case. The respondent's demurrer to the petition is overruled. The writ of prohibition is granted and the court is directed to sustain the defendant's motion to quash the indictment and to discharge him from custody.

52 Cal.App.2d 586

KING v. SIMONS BRICK CO.

Civ. 13533.

District Court of Appeal, Second District, Division 2, California.

June 9, 1942.

As Corrected June 18, 1942.

Hearing Denied Aug. 6, 1942.

1. Negligence ⇨39

The doctrine of "attractive nuisance" does not extend to a pool of water artificially created and maintained on the premises of defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Attractive Nuisance".

2. Negligence ⇨23(1), 39

Under the "attractive nuisance" doctrine, it is only where a dangerous trap on premises otherwise safe is concealed from view, or when an artificial device attractive to children is left exposed upon premises accessible, open, and unguarded, that the owner is liable for damages resulting by reason of injury to children who are attracted to the premises by such contrivances.

3. Negligence ⇨39

Property owner was not liable, under "attractive nuisance" doctrine, for death of child who was drowned in a body of opaque water in a clay pit dug by owner on its own property adjacent to a populous area, since the body of water did not constitute a "trap" or an artificial contrivance attractive to children.

See Words and Phrases, Permanent Edition, for all other definitions of "Trap".

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Action by Barney Dewey King against the Simons Brick Company to recover for the death of a 12-year-old boy who drowned in a pool situated on defendant's property. From a judgment sustaining a demurrer to the complaint, without leave to amend, plaintiff appeals.

Affirmed.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

Merrill L. Granger, of Santa Monica, for appellant.

Richard J. O. Culver and Felix H. McGinnis, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for determination in this case is whether, under the doctrine of attractive nuisance, the father of a twelve-year old boy who has been drowned in a body of opaque water in a clay pit dug by defendant on its own property adjacent to a populous area, may recover for the loss of his child who played in the pool.

In substance the facts alleged in the amended complaint are that the defendant, a brick and tile manufacturer in the city of Santa Monica, caused the soil and clay to be removed from a portion of its property, leaving a huge pit of about four acres in area; that within five years prior to the commencement of this action defendant deepened two acres of the pit to an average depth of 25 feet below the surface of the adjoining land and street levels; that defendant ceased its excavation on said property and abandoned the active conduct of its business more than five years prior to the filing of this action; that thereafter defendant permitted water to accumulate in the pit to such extent that it overflowed the higher acres of the pit and covered one-half acre of the "upper bottom surface" thereof from 2 to 18 inches in depth; that the surface of one-half acre of the pool so created has been at approximately the same distance below the street level as the remaining surface of the pit which was not covered by water; that the surface of the pit for a distance of several hundred feet along the water's edge, on August 4, 1941, the day on which Virgil King was drowned, had been slightly and gently sloping and appeared extremely shallow; that for several weeks prior thereto the water was cloudy and opaque and wholly prevented visual determination of its depth; that the water served no useful purpose and could have been removed at a nominal expense without impairing the value of the property; that for many weeks prior to August 4th the accumulated water constituted a lure and an attraction to the children of the neighborhood, who desired to wade and bathe therein; that by reason of the method of excavating the areas of the bottom of the pit the shallow areas of water descended precipitously to the lowest portions of the pit and constituted a deception and trap to the children playing in the shallow parts, who were unable to swim and who were unaware of the existence of the deeper waters; that plaintiff's son, Virgil, age 12, was one of such children; that the pit was located adjacent to a populous area in which several hundred children resided; that access to the pit was available to the children and to the deceased Virgil by numerous paths to the unsubmerged areas of the bottom of the pit; that on August 4, 1941, and for many months prior thereto, defendant negligently maintained the pit and its accumulated waters and neglected to post signs or warnings at or near the pit with reference to the depth of the water, and neglected to do anything reasonably designed and calculated to prevent entry of children into such waters, although it knew that the accumulated waters attracted the children and that any child entering the pit and bathing therein was in imminent danger of falling into the depths and drowning; that the deceased Virgil was twelve years of age and unable to swim; that he entered the pit for the purpose of bathing; that he had no knowledge of the deeper portions of the waters; that after he had waded for awhile in the pit from an unsubmerged projection of the land, in waters 18 inches deep, he plunged again into the waters at about the same point, only to reach instantly a depth of 18 feet, from which he was unable to swim, and was drowned, to plaintiff's damage in the sum of $10,000.

We are to determine whether the order sustained a general demurrer to the pleading without leave to amend was in accordance with law.

[1] A number of attempts have been made in the courts of this state to extend the doctrine of attractive nuisance to situations where life was lost in ponds or reservoirs maintained by the defendants in such cases. Commencing with the leading case of Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598, 56 Am.St.Rep. 106, and continuing to the present time, it has been consistently held that the doctrine of the turntable, lumber pile, or attractive

nuisance cases does not extend to a pool of water artificially created and maintained on the premises of a defendant. In the Peters case the question was squarely presented, where the defendant had allowed his lot to accumulate waters and a pool was created by reason of an embankment thrown up by the city of San Francisco on the lower side of the lot, which prevented the flow of surface waters during the rainy season. The condition continued for five years. The lot was not inclosed, nor was it visited by defendant. But he knew that children visited it. Young Peters was a bright boy living four or five blocks away, and was allowed by his father to run the streets at will. The boy was a trespasser, and defendant owed him no duty to keep the premises safe except that he could not maintain a trap or other concealed danger without warnings thereof to others. In Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993, the facts were very similar to those alleged in the case at bar. A general demurrer was sustained, judgment entered thereon was affirmed and a hearing was denied by the supreme court.

The most recent case is that of Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971, where the eleven year old son of plaintiff was attracted to a pool of water belonging to the city and was drowned as a direct consequence of a defective and dangerous condition existing in said pool of water, known to respondent and unknown to plaintiff's son, Daniel. The allegations of the Melendez complaint parallel accurately those alleged in the complaint at bar. That judgment was likewise affirmed.

Two authorities in particular are cited by appellant in support of his right to recover herein, to wit, Sanchez v. East Contra Costa Irrigation Co., 205 Cal. 515, 271 P. 1060, and Faylor v. Great Eastern Q. Mining Co., 45 Cal.App. 194, 187 P. 101. The distinguishing feature of the Sanchez case, where recovery was allowed, lies in the fact that after the child had fallen into an open irrigation ditch, whose water was muddy and of an average depth of three feet, he slipped into the opening of a tunnel which was concealed from view and wholly unguarded. This constituted a trap. While the child assumed the risk of the open, obvious danger of the canal, he did not assume the risk of a concealed and unguarded danger which brought the case within the doctrine of an attractive nuisance. In the Faylor case the owner was a mining company and maintained small cars 20 inches in width, which ran on tracks. Such mechanical device constituted an attractive nuisance; it lured the children to play within the tunnels, where the cars were easily pushed along the rails. From the inside of the tunnel to the crushing plant there was a slight fall. A stope had been driven through the floor of the tunnel some fourteen years prior to the drowning of the child. Planks had been laid over the stope. Prior to the accident a cave-in had occurred in the stope near the mouth of the old tunnel. At the time of the accident there were no rails in this tunnel. On entering it the boy ran a little car upon the track into the branch tunnel to the junction with the main tunnel and left it there. Instead of returning the way he entered he passed into the old tunnel and proceeded toward its mouth. His death was caused by falling through the stope. By reason of the attractive nuisance and the trap in the old tunnel the plaintiff was allowed to recover, notwithstanding the admonition by his father not to play within the tunnels or on the cars because of their danger.

[2, 3] The foregoing will serve to demonstrate that the doctrine of attractive nuisance has not been expanded by any decision in this state so as to include an unguarded pool of water concerning which it is "the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care." Peters v. Bowman, supra, 115 Cal. page 356, 47 P. page 599, 56 Am.St.Rep. 106. It is only in those cases where a dangerous trap on premises otherwise safe is concealed from view or when an artificial device, attractive to children, is left exposed and upon premises accessible, open and unguarded that the owner is liable for damages resulting by reason of injuries to children who are attracted to the premises by such contrivances.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

52 Cal.App.2d 487

HOWELL et al. v. DOWLING et al.

Civ. 6639.

District Court of Appeal, Third District, California.

June 5, 1942.

Rehearing Denied July 3, 1942.

Hearing Denied Aug. 3, 1942.

1. Bills and notes 🔑337

Generally, mere knowledge of facts sufficient to put a prudent man on inquiry, or mere suspicion of a defect, does not disqualify a purchaser of a note from becoming a "holder in due course" unless he is guilty of bad faith, but they may evidence "bad faith".

See Words and Phrases, Permanent Edition, for all other definitions of "Bad Faith" and "Holder in Due Course".

2. Bills and notes 🔑355

That a note is pledged as collateral security for an usurious loan does not of itself deprive pledgee of character of an "innocent holder", where the usury statute of the state does not render usurious loans void.

See Words and Phrases, Permanent Edition, for all other definitions of "Innocent Holder".

3. Bills and notes 🔑537(6)

Negligence in failing to make inquiry in face of suspicious circumstances does not establish "bad faith", as a matter of law, with respect to the purchase of a note.

4. Mortgages 🔑86(3), 270

In mortgagors' suit against pledgee of a second deed of trust and note secured thereby to have such instruments declared void and to quiet title to mortgaged land, wherein pledgee by cross-complaint brought in the beneficiary under a subsequently executed but allegedly prior deed of trust and sought to have such instrument subordinated to second deed of trust, evidence supported finding that mortgagors owned the land in fee subject only to lien of subsequently executed instrument, and that second deed of trust and note were void for fraud in their procurement, and that pledgee was not a holder in due course or otherwise of such instruments. Civ.Code, § 3137.

5. Deeds 🔑121

A conveyance of the right, title, and interest of grantor vests in grantee only what grantor himself could claim, and the grantee in such a deed takes only what grantor then had and subject to all defects and equities which could then have been asserted against grantor.

6. Limitation of actions 🔑167(1)

The pledgee of a deed of trust and note secured thereby could not exercise his former rights, if any, under pledge agreement where action on note was barred by limitations. Civ.Code, § 2911.

7. Pledges 🔑56(7)

Where a deed of trust and note secured thereby were procured by fraud, and instruments were pledged to a pledgee who was not a holder in due course, and action on note was barred by limitations, a purchaser at a sale of such instruments under pledge agreement could not become a "holder in due course" without notice of defect in instruments.

8. Mortgages 🔑131

Where granting words in a second deed of trust were "grant, bargain, sell, convey and confirm", and the instrument expressly conveyed after acquired title, such instrument, except for the fact that it was fraudulently procured, would have reattached to mortgaged land when it was reacquired by mortgagors after foreclosure of first deed of trust, regardless of running of statute of limitations, or even bankruptcy. Civ. Code, §§ 1106, 2930.

9. Bankruptcy 🔑418(1)
Limitation of actions 🔑165

Neither the statute of limitations nor bankruptcy completely extinguishes a debt, and they merely provide a defense against its enforcement.

10. Quieting title 🔑14

Where a privity of relation exists, a mortgagor cannot quiet title to mortgaged land without paying his debt, but such rule is based upon equitable principles, and reason for the rule ceases where mortgage is fraudulently procured.

11. Limitation of actions 🔑166

The lien of a mortgage is extinguished by running of the statute of limitations, but the power of sale in a deed of trust is not thereby lost.

12. Mortgages 🔑319(3)

Recitals of payment in deeds of reconveyance executed for earlier deeds of trust were not conclusive on issue whether secured debts were paid, and small differences in amount of loan under new deeds of trust did not establish "payment" rather than "renewal".

See Words and Phrases, Permanent Edition, for all other definitions of "Payment" and "Renewal".

13. Mortgages ⚷319(3)

Evidence warranted conclusion that primary purpose of refinancing carried out through the execution of deeds of reconveyance for earlier deeds of trust and the execution of new deeds of trust was the renewal of previously existing debts and not payment of such debts.

14. Mortgages ⚷181

Where holder of senior mortgage discharges it of record and contemporaneously takes a new mortgage, he is not, in absence of paramount equities, held to have subordinated his securities to an intervening lien, unless circumstances of transaction indicate this to have been his intention, or such intention on his part is shown by extrinsic evidence, and this is particularly true where senior mortgage is released in mistaken belief that new mortgage will be a first lien and where there is no showing of negligence of mortgagee, and under such doctrine the prior senior mortgage or deed of trust, rather than the later, is accorded priority.

15. Appeal and error ⚷882(3)

Where mortgagee failed to set up an earlier deed of trust to a mortgage company owned by mortgagee but chose to rely on mortgagee's latest deed of trust and had caused findings to be made and judgment to be entered declaring mortgagee's later security to be a valid existing first lien against mortgaged land, mortgagee could not on appeal change its position and seek to revive earlier recorded senior deed of trust by applying doctrine of "equitable subrogation".

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Subrogation".

16. Subrogation ⚷41(3)

Equity will enforce "subrogation" only when the action is brought within the time in which an action could have been brought to enforce the original obligation to which the right of subrogation is sought.

See Words and Phrases, Permanent Edition, for all other definitions of "Subrogation".

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Suit by Edward M. Howell and others against Gertrude M. Dowling and others to quiet title to land and to have a deed of trust and note secured thereby declared void, wherein defendants Gertrude M. Dowling and others filed a cross-complaint bringing in as a new party cross-defendant American Trust Company, a corporation. From a judgment for plaintiffs, defendants Gertrude M. Dowling and others appeal.

Affirmed.

Louis B. DeAvila, of Oakland, for appellants.

Silverstein & Silverstein, McKee, Tasheira & Wahrhaftig, and Ridley Stone, Jr., all of Oakland, for respondents.

PER CURIAM.

This is an appeal from a judgment in an action to quiet title originally brought by the owners of real property against the alleged beneficiary and substituted trustees under a deed of trust (defendants and appellants), for the purpose of having declared void the said deed of trust and the promissory note thereby secured. The defendants and appellants by answer and cross-complaint set forth the nature of their claim, asserting in themselves a first deed of trust with an express warranty of title on the property and bringing in as a new party the cross-defendant, and seeking to have the deed of trust of the cross-defendant subordinated to the deed of trust asserted by the defendant and appellant, George F. Dowling, hereinafter referred to as the Marshall-Dowling deed of trust. The other defendants and appellants are alleged substituted trustees under the Marshall-Dowling deed of trust.

The cross-defendant, American Trust Company, answered, claiming to be the beneficiary under a first deed of trust.

The trial court adjudged that plaintiffs were the owners in fee of the real property involved, subject only to the lien of the deed of trust of cross-defendant and respondent, American Trust Company, a corporation, and that the note and deed of trust to Marshall were void because of fraud in their procurement.

The essential facts are these:

Some time prior to October 11, 1926, respondents Edward M. Howell and Arlivia Howell, his wife (hereinafter referred to as the Howells) were the owners in fee of said real property, which was situated in the city of Oakland, California, and while such owners entered into a contract with one Marshall, a building contractor, to construct a house for them on said premises. Said building was erected, being completed on September 24, 1926.

On October 11, 1926, the Howells owned said property clear of liens and encumbrances and on said day they executed and delivered a note for $4,500 to M. Jacobson and a first deed of trust on said real property securing the same, with said M. Jacobson as beneficiary. On said date they executed and delivered a note for $2,900 to said E. Marshall, together with a second deed of trust securing the same, on said real property.

The note and deed of trust to E. Marshall were given in payment of the balance due upon the building contract and were procured upon the false and fraudulent representation by Marshall that he would pay for all labor and materials used upon said house and thereby protect the property against liens. This Marshall failed to do.

Thereafter Marshall arranged to borrow $1,500 upon said note and deed of trust from appellant George F. Dowling, who for thirty years had been engaged in business as a real estate broker, builder, speculator and financier of houses and sales. For said sum of $1,500 he signed a note for $1,600, with a collateral agreement thereto attached, as follows:

"And as collateral security for the payment of the above note, and interest, I have deposited with George F. Dowling the following property, to-wit:

"'1. Promissory note dated October 12, 1926, made by Edward M. Howell and Arlivia Howell to the order of E. Marshall, in the amount of $2900.00, payable in monthly installments of $33.25, and bearing interest at the rate of seven per cent per annum;

"'2. Deed of Trust dated October 12, 1926, made by Edward M. Howell and Arlivia Howell, his wife, to Alameda County Title Insurance Company, a corporation, Trustee conveying Lot No. 15 and the Northeasterly 24 feet of Lot. No. 14 in Block No. 1, Map of Auseon's Moss Tract, Brooklyn Twp., Alameda County, Calif., recorded under Recorder's Series No. ——, Official Records of Alameda County, California, and securing promissory note in the amount of $2900.00 mentioned under item 1 above;

"'3. Assignment of Note and Deed of Trust, dated October 22, 1926, made by E. Marshall to George F. dowling, assigning the note and the deed of trust mentioned under items 1 and 2 above; which assignment was recorded under Recorder's Series No. ——, Official Records of Alameda County, California.'

"And should the said note or any part thereof, or interest, remain unpaid after it should have been paid, according to the tenor of said note, I hereby irrevocably authorize said George F. Dowling, or his assigns, to sell the above described property, or any part thereof, at public or private sale, with or without previous notice to me of such sale, and from the proceeds thereof to pay the principal, interest, charges, and costs of sale, and the balance, if any, to pay to me, or my representatives, upon demand. In case of the fall in the market value of any of said securities, I promise to reduce the amount of said note, or to increase the security in proportion to such decrease of value, and in default of which this note shall be considered due under the above stipulation. On the payment of the above note, interest and charges according to the term thereof, the above described securities shall be returned to me.

"E. Marshall (Signed)"

On October 26, 1926, the Jacobson deed of trust, the Marshall-Dowling deed of trust and the Marshall-Dowling assignment hereinbefore mentioned, were recorded.

From November 27, 1926 to March 9, 1927, mechanics' and materialmen's liens in amounts aggregating $2,900 were filed against the property.

On December 31, 1928, a sale was held under the Jacobson deed of trust. The trustee's deed to M. Jacobson was recorded January 10, 1929.

On January 28, 1929, M. Jacobson conveyed said real property to his daughter, Betty Lane. Said deed was recorded on the same day.

On March 1, 1929, said Betty Lane and her husband executed a deed of trust in the sum of $2,900 with Mercantile Mortgage Company as beneficiary. Said deed of trust was recorded on March 29, 1929.

By deed dated July 11, 1930, delivered in June, 1934, and recorded on October 13, 1934, Betty Lane and her husband conveyed the property to the Howells. From the time the Howells originally acquired the property until the time of trial, the Howells continued in possession of the property.

There was recorded on May 23, 1935, a deed of reconveyance dated May 1, 1935, which stated that the $2,900 loan payable to the Mercantile Mortgage Company was fully paid and satisfied.

There was recorded on May 23, 1935, a new deed of trust dated May 1, 1935, in the sum of $2,350 executed by the Howells to Mercantile Mortgage Company.

There was recorded on December 18, 1936, an assignment of the last mentioned deed of trust to the American Trust Company.

The Mercantile Mortgage Company at that time was owned and controlled by the American Trust Company.

There was recorded on December 12, 1936, a deed of reconveyance dated November 26, 1936, which stated that the note and deed of trust to Mercantile Trust Company, dated May 1, 1936, had been fully paid and satisfied.

There was recorded on December 12, 1936, a new deed of trust dated November 24, 1936, for $2,500 executed by the Howells to the American Trust Company. This is the deed of trust which the trial court found to be a first lien and the only encumbrance against the real property in question.

The last two deeds of trust mentioned were given in the process of refinancing previous loans. Practically no money changed hands. On the first refinancing there was a shortage of $24.56 in the escrow money which the Howells made up, while on the second refinancing (done before the debt was due because the parties wanted to get the loan in condition to conform to the Federal Housing Administration requirements), an application had been made for an amount large enough to cover all expenses, and these being less than anticipated, a surplus of $136.02 was left, which was paid to the Howells.

The bank got no money out of either of the transactions and regardless of the recitals in the deeds of reconveyance the undisputed facts clearly indicate that these loans were both renewals of previously existing debts.

Appellants do not dispute the fraudulent procurement of the Marshall-Dowling note and deed of trust, but appellant George F. Dowling claims to be the holder thereof in due course to the extent of his pledgee's lien (citing Adolph Ramish, Inc. v. Woodruff, 2 Cal.2d 190, 40 P.2d 509, 96 A.L.R. 1146), and that as such he succeeded to the same free and clear of all defects and free from all defenses which might be urged against Marshall.

He further claims that when the Howells reacquired the property, the Marshall-Dowling deed of trust immediately revived and attached to the property, although the note was outlawed and the property had been previously sold under the Jacobson trust deed.

He further claims that the Marshall-Dowling deed of trust is now a first lien on the real property, having become such upon the reconveyance of the admittedly valid deed of trust given by Betty Lane to the Mercantile Mortgage Company, dated March 1, 1929, and the reconveyance of the deed of trust to the Mercantile Trust Company dated May 1, 1935.

The trial court found that the Marshall-Dowling note and deed of trust were fraudulent and void, that appellant George F. Dowling was not the holder (in due course or otherwise) of the Marshall-Dowling note and deed of trust. It held that he had sufficient notice of probable defects in the security to put him on notice to make further inquiry, which he failed to do.

In addition to the facts already stated herein, bearing upon this question, the evidence shows that although he had had many previous dealings with Marshall and believed him to be both honest and financially responsible, he could not but observe that Marshall was willing to pay usurious interest (three and one-third per cent per month) for a short time loan on the security. Dowling inspected the property on which was a freshly completed house, but made no inquiry as to the possible claims of mechanics or materialmen, nor did he obtain any search of title from a title company. He had bought several other second mortgages or deeds of trust outright from Marshall and this was the only one which he did not so buy but on which he merely loaned money at an usurious rate of interest with it as collateral security.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Civ.Code, § 3137.

[1] "Generally, mere knowledge of facts sufficient to put a prudent man on inquiry, or mere suspicion of a defect, does not disqualify a purchaser from becoming a holder in due course unless he is guilty of bad faith, but they may evidence bad faith." 10 C.J.S., Bills and Notes, § 324, p. 818.

[2] Nor does the fact that a note is pledged as collateral security for an usurious loan of itself "deprive the pledgee of the character of an innocent holder where the usury statute of the state does not render usurious loans void." 10 C.J.S., Bills and Notes, § 317, p. 809.

[3] "Negligence in failing to make inquiry in the face of suspicious circumstances, does not establish bad faith as a matter of law." Witty v. Clinch, 207 Cal. 779, 279 P. 797.

"It has * * * been held that the purchase of a note before maturity for a grossly inadequate price with knowledge, upon inquiry previously made, of the maker's solvency, but without inquiry as to the consideration of the note, is a circumstance to be considered in determining whether the purchase was made in good faith, and is of itself sufficient to arouse the suspicion of a prudent person and to put him upon inquiry as to the consideration." Witty v. Clinch, 207 Cal. 779, 279 P. 797, 798, citing Jordan v. Grover, 99 Cal. 194, 33 P. 889.

It is true that the case last cited involves a sale rather than a pledge but there is some analogy which the trial court had a right to consider along with the facts and circumstances in the instant case in determining whether or not appellant George F. Dowling was guilty of bad faith in lending money on the securities involved, where he had opportunity to observe the eagerness of Marshall to obtain a loan at an usurious rate of interest and where, with all his experience, he inspected the property and failed to make any inquiry as to the possibility of mechanics' or materialmen's liens nor any inquiry from the Howells as to the consideration.

[4] While the evidence on this question is not plenary, we cannot say that there is no substantial evidence to support the trial court's finding.

By the terms of the assignment there was transferred to Dowling all of Marshall's "right, title and interest" in and to the deed of trust and note.

[5] "It has been uniformly held that a conveyance of the right, title. and interest of the grantor vests in the purchaser only what the grantor himself could claim. * * * This construction is in accord with the obvious meaning of the language. The grantee in such a deed necessarily takes only what the grantor then had, and subject to all defects and equities which could then have been asserted against the grantor." Lombardi v. Sinanides, 71 Cal.App. 272, at page 276, 235 P. 455, 456.

There is other substantial evidence to support the court's determination that George F. Dowling is not the holder of the note nor the beneficiary under the deed of trust. The pledge agreement is in writing and clearly limits the rights of the pledgee, in case of default, "to sell the above described property (the note, deed of trust and assignment). No sale of the pledged property was ever held. Appellant George F. Dowling simply usurped absolute ownership of the note and assumed himself to be the beneficiary under the deed of trust, and caused a substitution of trustees to be made, and published notice of default, all without legal authority.

The pledge agreement was similar to a simple escrow. If the debt was not paid at maturity, the papers were to be sold; if it was paid, all papers were to be returned to the borrower. No other remedy was provided. There never was an unqualified delivery of the documents to Dowling.

The authorities relied upon by appellant George F. Dowling concern pledges of the usual type where the pledgee has the right to collect the debt and assume the usual incidents of ownership.

It is not possible to place this transaction in the usual category of pledges without completely impairing the obligation of the contract of pledge itself.

[6] It is now too late for appellant George F. Dowling to exercise his former rights, if any, under the pledge agreement. "A lien is extinguished by the lapse of the time within which, under the

provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." Civ.Code, § 2911.

[7] And even if this were not true, no purchaser at a sale of securities under the pledge agreement at this time could by any possibility become a holder in due course without notice of the defect in the securities. Thus appellant George F. Dowling now has no title to the securities and no interest which he can convey to any person which can create any title or interest adverse to respondents.

[8] There is no doubt that, except for the fact that the Marshall-Dowling deed of trust was fraudulently procured, it would have reattached to the property when it was reacquired by the Howells. The granting words in said instrument were "grant, bargain, sell, convey and confirm." It also expressly conveyed after acquired title.

"Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors." Civ.Code, § 1106; Jensen v. Duke, 71 Cal.App. 210, 234 P. 876.

"Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution." Civ.Code, § 2930.

And this would be true regardless of the running of the statute of limitations, or even bankruptcy. 25 Cal.Jur. 76; Flack v. Boland, 11 Cal.2d 103, 77 P.2d 1090; Grant v. Burr, 54 Cal. 298; Travelli v. Bowman, 150 Cal. 587, 89 P. 347; Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 20 P.2d 940; Sacramento Bank v. Murphy, 158 Cal. 390, 115 P. 232.

[9-10] Nor except for the aforesaid fraud, would the debt have been extinguished. Neither the statute of limitations nor bankruptcy completely extinguishes a debt. They merely provide a defense against its enforcement. Puckhaber v. Henry, 152 Cal. 419, 93 P. 114, 125 Am.St. Rep. 75, 14 Ann.Cas. 844; Barberi v. Rothchild, 7 Cal.2d 537, 61 P.2d 760.

"The rule in this state is that where a privity of relation exists the mortgagor cannot quiet title without paying his debt." Fontana Land Co. v. Laughlin, 199 Cal. 625, 250 P. 669, 675, 48 A.L.R. 1308.

This rule, however, is based upon equitable principles and the reason for the rule ceases where the mortgage (or deed of trust) is fraudulently procured.

And it is to be noted that there is no "privity of relation" between Dowling and any of the other parties to this action, for reasons previously stated herein.

[11] As to the issues here involved, no distinction can be made between a mortgage and a deed of trust, except that the lien of a mortgage is extinguished by the running of the statute of limitations, while the power of sale in a deed of trust is not thereby lost. Jensen v. Duke, supra; Barberi v. Rothchild, supra; Sacramento Bank v. Murphy, 158 Cal. 390, 115 P. 232.

Appellants claim that when reconveyances were executed for the earlier deeds of trust to the Mercantile Mortgage Company, the debts secured thereby were actually paid and that the new deeds of trust were not renewals of the old ones. He relies largely upon the recitals of payment in the deeds of reconveyance and the fact that the renewals were for slightly different amounts, upon different terms of payment and rates of interest.

[12] But the recitals in the deeds of reconveyance are not conclusive. McArthur v. Wellman, 20 Cal.App.2d 379, 66 P.2d 1226.

And small differences in the amount of the loan do not establish payment rather than renewal. Parker v. Tout, 207 Cal. 590, 279 P. 431.

The case of Dingman v. Randall, 13 Cal. 512, relied upon by appellant as authority on this question, is to be distinguished in that a substantial cash payment was made to the mortgagee, a former mortgagor was released and an additional new party executed the new mortgage.

[13] All of the evidence in this case aside from the recitals in the deeds of reconveyance indicates that the primary purpose of the refinancing was by way of renewal.

Appellants further claim that because of the pleadings of respondent American Trust Company and the form of the findings and judgment, said respondent has elected to stand upon the alleged priority of its latest deed of trust, that such priority cannot be maintained and that it cannot apply the doctrine of equitable subrogation to establish said deed of trust as a prior lien over the earlier recorded Marshall-Dowling deed of trust.

[14] There is a doctrine "closely akin to the doctrine of equitable subrogation" which has been stated as follows: Where the holder of the senior mortgage discharges it of record and contemporaneously takes a new mortgage, he is not, in the absence of paramount equities, held to have subordinated his securities to an intervening lien, unless the circumstances of the transaction indicate this to have been his intention, or such intention on his part is shown by extrinsic evidence. 98 A.L.R. 843.

This is particularly true where the senior mortgage is released in the mistaken belief that the new mortgage will be a first lien, and where there is no showing of negligence on the part of the mortgagee. Copp v. Millen, 11 Cal.2d 122, 77 P.2d 1093.

In the instant case as in the case last cited, the holder of the security had a search of the title made by a title company and, while the intervening lien was of record, the search failed to disclose it. The new deed of trust was also contemporaneously taken.

But under this doctrine, the prior senior mortgage or deed of trust, rather than the later, is accorded priority.

[15] And since respondent American Trust Company failed to set up the earlier deed of trust to the Mercantile Mortgage Company but chose to rely on its latest deed of trust, and has caused findings to be made and judgment to be entered, declaring its later security to be the valid existing first lien, it cannot now change its position and seek to revive the earlier recorded senior deed of trust by applying the doctrine of equitable subrogation. Jack v. Wong Shee, 33 Cal.App.2d 402, 92 P.2d 449.

[16] Furthermore, equity will enforce subrogation only when the action is brought within the time in which an action could have been brought to enforce the original obligation to which the right of subrogation is sought. 41 C.J. p. 583.

In the instant case the statute of limitations had run against the note secured by the earlier Mercantile Mortgage Company's deed of trust before the action was commenced.

There is some apparent conflict in the California decisions on these doctrines which, however, can be reconciled upon reading all of the cases and considering them together.

There are cases which establish priority of a later renewal mortgage or deed of trust over an earlier intervening lien. United States Bldg. & Loan Ass'n v. Salisbury, 217 Cal. 35, 17 P.2d 140; McArthur v. Wellman, 20 Cal.App.2d 379, 66 P.2d 1226; Schwartzler v. Lemas, 12 Cal.2d 54, 82 P.2d 419.

But in these reported cases there is no discussion of the question as to whether or not priority should be given to the later or the earlier lien, or anything to show that the distinction was brought to the attention of the court.

There are also cases where subrogation or priority was allowed where the statute of limitations had run on the original obligation. McArthur v. Wellman, supra; Schwartzler v. Lemas, supra.

But in the decisions in these cases there is nothing to show that the statute of limitations was raised as a defense.

And in every reported case in which the distinctions in the application of the so-called doctrine of equitable subrogation are discussed, or where the defense of the statute of limitations is raised, the holding has been in harmony with this decision. Shaffer v. McCloskey, 101 Cal. 576, 36 P. 196; Van Sandt v. Alvis, 109 Cal. 165, 41 P. 1014, 50 Am.St.Rep. 25; White v. Stevenson, 144 Cal. 104, 77 P. 828; Windt v. Covert, 152 Cal. 350, 93 P. 67; Simon Newman Co. v. Fink, 206 Cal. 143, 273 P. 565; Parker v. Tout, 207 Cal. 590, 279 P. 431; Fuller v. Harwell, 126 Cal. App. 654, 15 P.2d 562; United States Bldg. & Loan Ass'n v. Salisbury, 217 Cal. 35, 17 P.2d 140; Flack v. Boland, 11 Cal.2d 103, 77 P.2d 1090; Copp v. Millen, 11 Cal.2d 122, 77 P.2d 1093.

But regardless of the fact that we have held with appellant on these latter questions, the later deed of trust of the Mercantile Trust Company must be held to be a valid first lien because the Marshall-Dowling deed of trust was fraudulent and void, except in the hands of a holder in due course, and we have held that appellant Dowling was not a holder in due course or otherwise, except for the limited purpose arising out of his written pledge agreement, under which he now has no rights which he can assert against respondents.

Appellants claim that some of the findings of the trial court were erroneous. The questions raised under this claim have been discussed and determined previously herein.

The judgment is affirmed.

52 Cal.App.2d 595

PEOPLE v. BUCKENDORFF.

Cr. 3580.

District Court of Appeal, Second District, Division 2, California.

June 9, 1942.

Gaming 🔑98(1)

Evidence was sufficient to sustain conviction of registering a bet upon result of a horse race. Pen.Code, § 337a, subd. 4.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Frederick Buckendorff was convicted of registering a bet upon the result of a horse race in violation of statute, and he appeals.

Affirmed.

Harry Margid, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards and Lewis Drucker, Deputy Attys. Gen., for respondent.

MOORE, Presiding Justice.

Defendant was convicted by the court without a jury of registering a bet upon the result of a horse race. Pen.Code, § 337a, subd. 4. His appeal from the judgment is based upon the insufficiency of the evidence.

Having received a complaint that a party named Fred was operating as a bookmaker in a cafe on West First Street near Broadway, in Los Angeles, officers Miller and Boswell of the central vice squad of Los Angeles, through the front window, surveyed the interior of the eating place and observed defendant at the cash register writing on a large sheet of white paper, with a magazine and a scratch sheet lying open before him. Having made a number of entries on the white sheet after consulting the scratch sheet, defendant looked directly at officer Miller, concealed both sheets within the magazine and retreated to the rear of his establishment. The officers promptly entered and recovered the magazine and its contents, to find that the scratch sheet contained the names of horses scheduled that day for races on various tracks throughout the United States, the names and weights of the jockeys, the approximate post time, the state of the weather, the condition of the tracks, the length of the races, the post position of the horses and the approximate odds. The names of certain horses on the scratch sheet were enclosed with circles, indicating the winner, while the names of other horses were marked with the digits 2 and 3, representing that such horses had run second and third, respectively. Also, the white sheet, which proved to be a betting marker, contained names corresponding with those on the scratch sheet, with symbols after all entries showing that the bets had been recorded in the manner in which they are customarily recorded by the experienced bookmaker.

While the officers scanned the papers they had taken from the magazine, the telephone rang repeatedly. On Officer Miller's answering it the first two callers hung up on observing that Miller's voice did not sound like Fred's. When the third party called, without ceremony he announced his identity and stated: "I want one to win on Last Gold, a horse running in the sixth race at Tanforan; I left the money with your mother." Defendant's mother is proprietress of the cafe. As Miller repeated the message Boswell recorded it on the market. It was proved that "Last Gold" did participate in the sixth race at Tanforan on the very day of the arrest.

Defendant denied all knowledge of the betting marker and protested at the trial that the entries on it were not his own; but after that question had been submitted to a chirographical expert the issue was decided against him. Whether defendant registered the bet "for gain, hire, reward or gratuitously or otherwise" the facts recited by the officers were sufficient to prove that defendant registered a bet on a horse which participated in a race at Tanforan on the day the bet was recorded.

This case with respect to the nature of proof is similar to that of People v. Reifenstuhl, 37 Cal.App.2d 402, 99 P.2d 564, which is authority for the judgment. See also 16 C.J. 624; 22 C.J.S., Criminal Law, § 718; People v. Helt, 100 Cal.App. 279, 279 P. 1046; People v. Newland, 15 Cal.2d 678, 104 P.2d 778, and People v. Smith, 35 Cal.App.2d 73, 94 P.2d 633.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

VALLERA v. VALLERA et al. *

Civ. 13586.

District Court of Appeal, Second District, Division 2, California.

June 9, 1942.

Hearing Granted Aug. 6, 1942.

1. Equity ⇨65(1)

He who seeks equity must come with clean hands.

2. Marriage ⇨54

Where trial court found that plaintiff became the mother of two illegitimate children while consorting with a stranger to defendant and thereafter maintained meretricious relations with defendant knowing that defendant had a wife living, plaintiff was not entitled to enforce her claim to a share in alleged community property accumulated by defendant during the years of their relations.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Marian Vallera against Concezio Vallera for separate maintenance and a share of community property, wherein Lido Cappello was named as co-respondent. Plaintiff was denied maintenance, and it was adjudged that each party was entitled to a moiety of the accumulated property, and, from that portion of the judgment adverse to him, Concezio Vallera appeals.

Portion of judgment appealed from reversed.

See, also, Cal.App., 124 P.2d 863.

Zagon & Aaron, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Alleging desertion, extreme cruelty and adultery, plaintiff filed this action for separate maintenance and for her share of the community property, which she described and alleged to be of the value of $60,000. She set forth that she "entered into a marriage relation" with defendant on December 16, 1938, and that they "ever since have been and now are husband and wife"; that she is without funds to pay costs or to employ counsel. Defendant denied the allegations of the complaint and alleged that Mrs. Lido Vallera, named as co-respondent, is his lawful wife; that prior to his cohabitation with plaintiff, plaintiff was an unchaste woman and had given birth to two illegitimate children; that his relations with her were illicit and libidinous; that during the season of such cohabitation, defendant had a living wife, Ethel, which fact was known to plaintiff; and that he subsequently was divorced by Ethel in the state of Ohio in December, 1938.

The court found against plaintiff on all of her material declarations and, in accordance with the answer, determined that during the years of her cohabitation with defendant plaintiff knew that he was linked in lawful wedlock with Ethel Chippo, and that such status continued until December 15, 1938; that from May, 1936, to February, 1939, at Detroit, Michigan, plaintiff maintained meretricious relations with defendant, always knowing of his inability to contract a marriage with her; that neither by reason of such relations nor of any agreement was a common law marriage effected; that prior to May, 1936, plaintiff had become the mother of two children while consorting with a stranger to defendant. Upon such findings the court concluded and adjudged that the property earned and accumulated by plaintiff and defendant is held by them as tenants in common and that each is entitled to a moiety thereof; that defendant and Lido Cappello are legally husband and wife, and that plaintiff is not entitled to be maintained by defendant.

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* Subsequent opinion 134 P.2d 761.

[1, 2] The sole question for decision is whether a woman, who has thus, by further defilement of her own character, knowingly formed an illicit alliance with an unmoral and degraded wretch, may enforce her claim to a share in the acquets and gains of her paramour accumulated during the years of her debasement. The answer is not far to seek. It is embalmed in the quaint and classic maxim: "Who seeks equity must come with clean hands." Neither judge nor chancellor may grant her relief. In all of the cases cited by plaintiff in support of the judgment, it was determined that the wife was either de facto or putative. Macchi v. LaRocca, 54 Cal.App. 98, 201 P. 143; Coats v. Coats, 160 Cal. 671, 675, 118 P. 441, 36 L.R.A.,N.S., 844; Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386; Figoni v. Figoni, 211 Cal. 354, 295 P. 339; Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884; Santos v. Santos, 32 Cal.App.2d 62, 65, 89 P.2d 164; Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342; Fung Dai Kim Ah Leong v. Lau Ah Leong, 9 Cir., 27 F.2d 582. In each case the putative wife had gained her marital status in good faith, innocently believing that she was entering into a legal alliance or that she had complied with the necessary requirements of a lawful marriage. In each of such cases the attempt of the unfortunate woman had failed through no moral obliquity of her own but because of the lack of intelligence of both parties, or because of legal barriers against the union or because of the fraud of her de facto spouse in inducing her to embark with him upon the proposed marital venture. Plaintiff's case does not come within any category covered by the cited authorities.

But the decision of Flanagan v. Capital National Bank, 213 Cal. 664, 3 P.2d 307, is directly in point. There an adventuress, an experienced mistress, established a domestic hearthstone with the decedent Flanagan. She acted upon his proposal that "We will get along as good as any couple that is married," and thereafter they never discussed it. "* * * she viewed the relationship not as a marriage but as a satisfactory substitute for a marriage." (213 Cal. page 667, 3 P.2d page 308.) So also was Marian Vallera wise in the ways of the world. So also did she consider her tie to Concezio only a substitute for lawful wedlock. There is nothing in her conduct, from the moment she met her paramour to the day he deserted her, that entitled her to the aid of equity, except her unshaken loyalty and devotion to the two children she had borne. But that fact is not available to her as a basis for exacting profit from a bold and unlawful undertaking which she has chosen to denominate a marriage.

That portion of the judgment appealed from is reversed.

W. J. WOOD and McCOMB, JJ., concurred.

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52 Cal.App.2d 550

CLANTON v. CLANTON.

Civ. 13277.

District Court of Appeal, Second District, Division 3, California.

June 8, 1942.

1. Contracts ⇐266(1), 271

An action to cancel a contract on ground of fraud, mistake or other reason cannot be maintained unless plaintiff has rescinded contract and tendered back consideration received thereunder. Civ.Code, § 1691.

2. Pleading ⇐67, 193(4)

Complaint which shows on its face unreasonable delay in bringing suit is demurrable, and plaintiff must allege facts on which he relies to excuse his failure to act promptly.

3. Cancellation of Instruments ⇐37(2)
Contracts ⇐270(1)

Diligence in rescinding a contract is "mandatory" and is a "condition" of right to rescind, and, in action for rescission, complaint showing unreasonable delay is demurrable unless it states sufficient facts to show that, notwithstanding delay, there was diligence under the facts pleaded. Civ.Code, § 1691.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition" and "Mandatory".

4. Divorce ⇐252

Where divorce is granted, neither spouse is entitled as a matter of law to receive at least one-half of the community property. Civ.Code, § 146.

5. Husband and wife 🔑279(2)
Pleading 🔑8(7)

A husband's complaint praying for annulment of property settlement agreement with wife was defective in failing to allege any affirmative act of rescission or offer to restore rights surrendered by wife under agreement, notwithstanding allegation that, in any event, husband would be entitled to retain all that he had received under agreement, such allegation being a mere "conclusion". Civ.Code, §§ 146, 1691.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

6. Appeal and error 🔑910

Where question of delay in bringing suit for annulment of property settlement agreement between husband and wife was extensively argued on appeal, and plaintiff-appellant had not placed in record any pleadings antedating second amended cause of action, so that reviewing court was not advised as to time which elapsed between filing of first pleading which sought annulment and filing of second amended cause of action, reviewing court assumed that no essentially different state of facts would have been disclosed by a more complete record. Civ.Code, § 1691.

7. Husband and wife 🔑279(2)

Where husband had knowledge of wife's alleged fraudulent promises within a few weeks after property settlement agreement was made, and separation immediately took place as a consequence of wife's abusive conduct, but husband delayed for 22 months before filing cause of action for annulment of agreement, without alleging any excuse for delay, complaint was demurrable because of such delay. Civ.Code, § 1691.

◆

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Suit by Elmer M. Clanton against Bessie N. Clanton for divorce and for annulment of a property settlement agreement. From a judgment for defendant, plaintiff appeals.

Affirmed.

F. A. Knight, of Long Beach, for appellant.

Swaffield & Swaffield and Joseph E. Madden, all of Long Beach, for respondent.

SHINN, Justice.

In this case a demurrer was sustained to the second amended second cause of action of the complaint. Plaintiff declined to amend and judgment went for defendant. Plaintiff appeals.

In the briefs of counsel we are informed that the complaint originally contained two causes of action, the first for divorce on the ground of extreme cruelty, and the second for the annulment of a property settlement agreement for the alleged fraud of the defendant wife; also that plaintiff dismissed the first cause of action after a demurrer was sustained to the second amended second cause of action and prior to the entry of judgment in defendant's favor.

The record before us consists of a transcript and two supplemental transcripts certified by the county clerk but they do not contain a copy of the judgment roll nor any of the pleadings filed or orders made before the filing of the second amended second cause of action. No reason has been given for the failure to comply with the requirement of section 950 of the Code of Civil Procedure that a copy of the judgment roll be furnished as a part of the record on appeal. However, respondent has raised no objection and the case has been briefed with an apparent willingness upon the part of counsel that the questions presented should be decided on the record before us. This we have concluded to do for reasons which will be apparent, at the same time disavowing any intention of thereby establishing a precedent. If we had found ourselves confronted with difficulties due to the faulty record, some other course would have been necessary. H. & J. Mabury Co. v. Bryant, 1937, 8 Cal.2d 704, 706, 68 P.2d 359; Curran v. Giometti, 1937, 20 Cal.App.2d 405, 66 P.2d 1260; Johnson v. Johnson, 1933, 133 Cal.App. 151, 23 P.2d 780; Busing v. Pierson, 1940, 39 Cal.App.2d 241, 242, 102 P.2d 798.

In the second amended second cause of action it was alleged that the marriage of the parties took place on June 12, 1917, that a property settlement agreement was executed April 22, 1938, copy of the agreement being attached to the complaint and which, we may assume, without deciding, purported to be a full and complete settlement and division of all property between the parties, both community and separate, and a waiver of the right of support, inheritance, etc. The agreement listed twenty parcels of real property, many of them including groups of lots in different tracts, and also listed twenty items of personal property, including certain described oil leases and subleases. One item including stocks and bonds identified by name twenty-three corporations and the number of shares held in each; it listed one insurance policy on the life of the husband payable to the wife, and one promissory note for $700 made by the parties in favor of a bank. Under the agreement the husband received ten of the parcels of personal property, eight parcels of the real property, and a one-half interest in a ninth parcel of real property. The wife received ten of the parcels of personal property, eleven of the parcels of real property, and a one-half interest in one additional parcel. The properties so received were to be owned and held by the one receiving the same as his or her "sole, separate and individual property." The wife assumed the indebtedness of $700 to the bank and agreed to hold the husband harmless on account thereof and she released her interest as beneficiary under the insurance policy. Each of the parties released the other from any and all liabilities or obligations of maintenance or support and each waived and relinquished all right to inherit from the other and the right of administration upon and to receive any share of the estate of the other and any allowance therefrom. The agreement was carried into effect as to the property described therein by duly executed conveyances, presumably at or about the time of the execution of the agreement.

The charges of fraud were that the wife, to induce the husband to enter into the agreement, threatened to disgrace him in the community by publicly and falsely accusing him of having improper relations with another woman, unless he would execute the agreement, that she promised that she would live with him as a dutiful wife and would not publicly accuse him of having improper relations with any other woman if he would agree to the division of property. It was alleged that by reason thereof the husband consented to and did enter into the agreement. It was further alleged that defendant's promises were made without any intention of fulfilling them and that on May 16, 1938, she brought suit against a married woman living in the community, accusing her of alienating the affections of plaintiff and falsely accusing her and plaintiff of improper relations and that she caused notice of the filing of the suit to be published in most of the newspapers of Southern California; that she was guilty of almost daily abuse of the husband and finally made life so unpleasant for him that he was compelled to and did leave the home shortly after May 16, 1938. The sufficiency of the foregoing allegations to state actionable fraud is not questioned by counsel for defendant upon the appeal.

There were further allegations in the complaint to the effect that at the time of the property settlement defendant had acquired with community funds and had in her possession certain stocks and bonds, the amount and value of which were unknown to plaintiff; that she falsely represented that the stocks, bonds, and funds described in the agreement were all that she had in her possession or which belonged to the community, and that plaintiff believed her representations, whereas in truth, unknown to plaintiff, the defendant was possessed of many thousands of dollars worth of securities belonging to the community which she failed and refused to disclose to plaintiff. All of the allegations as to the ownership of additional securities by the community were made upon information and belief.

The complaint failed to allege that plaintiff had given notice of rescission or had offered to restore to defendant her rights and interests in the parcels of community property which had been conveyed to plaintiff as his separate property by the terms of and pursuant to the property settlement agreement. Because of these omissions it is contended by defendant that the complaint failed to state a good case for rescission and that the order sustaining the demurrer upon this ground should be sustained. It is contended by plaintiff that the case is not one calling for strict rescission and that the statutory provisions requiring one who seeks to rescind to act promptly and to restore that which he has received under the agreement have no application. We are of the opinion that the case is strictly one for rescission of the agreement. The fact that the contract was between husband and wife does not take it out of the general rules.

The complaint was defective in failing to allege any affirmative act of rescission or any offer to restore to defendant the rights which she surrendered under the agreement, prior to the institution of the action, and it was defective also in failing to allege a sufficient excuse for the long delay between plaintiff's discovery of the alleged fraud and the institution of the action. Section 1691 of the Civil Code imposes upon one who seeks to rescind the duty to act promptly and to make or offer restoration of what he has received under the contract. In Hite v. Mercantile Trust Co., 1909, 156 Cal. 765, 106 P. 102, and Estate of Sloan, 1918, 179 Cal. 393, 177 P. 150, it was held that the duty to make restoration is applicable to attempted rescission of contracts between husband and wife and that it is a condition of the right to maintain an action to rescind.

[1] It is not necessary in all cases that rescission be effected or that notice of the claim thereof be given or that the consideration for the contract be restored to the adverse party, prior to filing action, Meyer v. Haas, 1899, 126 Cal. 560, 563, 58 P. 1042; O'Meara v. Haiden, 1928, 204 Cal. 354, 363, 268 P. 334, 60 A.L.R. 1381. But, as said in the case last cited, at page 365, of 204 Cal., at page 338 of 268 P., "* * * when the purpose of the action is to cancel or set aside a contract on the ground of fraud, mistake, or other reason, then it is necessary for the plaintiff therein to rescind said contract and tender back the consideration received prior to the commencement of the action, or else he will be precluded from recovery * * *." If the plaintiff here had pleaded that the contract which he executed purported to affect and dispose of property which he did not know of and had not intended to be included therein, such allegations would tend to bring the case within the doctrine enunciated in Meyer v. Haas, supra. But the effect of such pleading would be rather to exclude the unknown property from the operation of the contract than to rescind such contract as to property or rights on which it was operative.

We do not assume or decide that the contract does or does not purport to make a division of property not specifically described therein or whether such property would be subject to division in the event of a divorce without a rescission of the contract. As to the property that is described, the action is for rescission under circumstances that called for restoration by plaintiff; the case as it stands is not one for divorce.

In McGue v. Rommel, 1906, 148 Cal. 539, at page 548, 83 P. 1000, at page 1003, it was held that even in those cases where an offer of restoration is excused rescission cannot be effected without the giving of "some notice to the other party of such determination to extinguish the contract." See, also, Brown v. Domestic Utilities Mfg. Co., 1916, 172 Cal. 733, 737, 159 P. 163.

[2, 3] A complaint which shows on its face unreasonable delay in bringing suit is vulnerable to demurrer upon that ground. Plaintiff must allege facts upon which he relies to excuse his failure to act promptly. Kleinclaus v. Dutard, 1905, 147 Cal. 245, 250, 81 P. 516; Superior California F. L. Co. v. Grossman, 1916, 32 Cal.App. 357, 361, 162 P. 1046; Garrity v. Miller, 1928, 204 Cal. 454, 268 P. 622. The rule applies with even greater force to rescission actions, in which diligence is mandatory and a condition of the right to rescind. If it appears that there has been inaction which, if unexcused, would amount in law to plaintiff's sleeping on his rights, the complaint must state sufficient facts to show that notwithstanding the elapse of time there was diligence under the facts pleaded.

There have been many cases in which delays for much shorter periods than a year have been held to be fatal to the right to rescind. J. I. Case T. M. Co. v. Copren Bros., 1919, 45 Cal.App. 159, 187 P. 772; Bailey v. Fox, 1889, 78 Cal. 389, 20 P. 868; Gamble v. Tripp, 1893, 99 Cal. 223, 33 P. 851; Marten v. Paul O. Burns Wine Co., 1893, 99 Cal. 355, 33 P. 1107; Sanders v. Magill, 1937, 9 Cal.2d 145, 155, 70 P.2d 159; Campbell v. Title Guarantee & Trust Co., 1932, 121 Cal.App. 374, 376, 9 P.2d 264. See, also, Toomey v. Toomey, 1939, 13 Cal. 2d 317, 89 P.2d 634.

These common rules, as applied to the allegations of the complaint, call for an affirmance of the judgment.

Appellant concedes that it is only in exceptional cases that failure to make or offer restoration will be excused but contends that his case is one falling within the exceptions. His contention is that he got less than 20 per cent of the community property under the agreement and that under section 146 of the Civil Code upon dissolution of the marriage he would have been entitled to at least one-half of the community property; that in any event he would have been entitled to retain all that he received under the agreement and therefore was under no duty to make restoration. California Farm & Fruit Co., etc., v. Schiappa-Pietra, 1907, 151 Cal. 732, 91 P. 593; Walsh v. Majors, 1935, 4 Cal.2d 384, 49 P.2d 598; Matteson v. Wagoner, 1905, 147 Cal. 739, 82 P. 436.

[4, 5] The rule is as appellant contends, but it does not fit his case. It is not true that either spouse is entitled as a matter of law to receive at least one-half of the community property. In case of divorce on the ground of extreme cruelty or adultery it is the duty of the court to consider all of the

facts of the case and the condition of the parties and, having those in mind, to exercise judicial discretion in apportioning the community property between them. Civ. Code, § 146. Even if it be assumed that in a complaint in an action such as this facts could be alleged showing an absolute right in plaintiff to retain in all events the property that he had received under an agreement, the complaint before us wholly fails to do so. The allegation that plaintiff in any event would be entitled to retain all that he has received is a mere conclusion, unsupported by any allegations of fact or any rule of law. No facts are alleged in the complaint which excuse plaintiff's failure to offer restoration before filing suit. And even if plaintiff had been excusable for such failure he would still have been under the duty to give notice to defendant of his intention to repudiate the contract.

[6] We next take up the question of plaintiff's failure to act promptly. It affirmatively appears that plaintiff had knowledge of defendant's alleged fraudulent promises within a few weeks after the agreement was made and that a separation took place about May 16, 1938, as a consequence of defendant's abusive conduct. Plaintiff's second amended second cause of action seeking rescission of the agreement was filed twenty-two months thereafter and contained no allegations tendering any excuse for the delay. As heretofore stated, no pleadings antedating the second amended second cause of action are before us and we therefore are not advised as to the length of time, if any, which elapsed between the filing of the first pleading which sought rescission and the filing of the second amended second cause of action. We must assume, however, that no essentially different state of facts would have been disclosed by a more complete record, since the question of delay has been extensively argued and plaintiff has not considered it important to supply any additional facts for the record.

[7] A brief consideration of the facts will suffice to show that plaintiff's neglect to act promptly is fatal to his right to rescind. Not even the slightest effort was made to excuse the delay. It is to be inferred that the separation of the parties was definite and permanent, since it was not alleged that there was any desire or effort on the part of either to effect a reconciliation. Defendant had released plaintiff from all obligation to contribute to her support and presumably had been supporting herself. It is to be assumed that defendant had been dealing with her share of the property as her own and that plaintiff had been doing likewise. During this long period of time each party had had the advantages and had suffered the disadvantages consequent upon their agreement. Had the complaint alleged that plaintiff withheld taking adverse action in an effort to effect a reconciliation with his wife or to reach an amicable adjustment of their differences, the trial court without doubt would have been indulgent in judging as to the sufficiency of facts alleged to excuse plaintiff's inaction, and had the trial court deemed the excuses sufficient we would not have had even a slight inclination to reach a different conclusion, but upon the complaint which had been amended twice we do not see how the court could have ruled otherwise than it did. In no case that we know of has it been held that unexcused inaction such as plaintiff was guilty of was consistent with the duty imposed by section 1691 of the Civil Code to act with reasonable diligence. This was the rule of courts of equity long before the adoption of the code. The elapse of time inevitably brings changed conditions with resulting advantages and disadvantages to the respective parties, and obstacles arise which make it difficult, if not impossible, to restore the parties to their former status, a desideratum of rescission which distinguishes it from other forms of relief. These considerations, which demand prompt action, were present in the instant case and no good reason has been shown why plaintiff's case should be treated as an exception to the general rule. The ruling on the demurrer was correct for the several reasons stated.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

52 Cal.App.2d 568

LACY MFG. CO. v. GOLD CROWN MINING CO., Limited.

Civ. 13452.

District Court of Appeal, Second District, Division 2, California.

June 9, 1942.

1. Damages 🔑23

Recoverable damages for breach of contract are only those which are reasonably in contemplation of parties at time of entering into agreement.

2. Damages 🔑159(4)

In action for balance due upon a contract for moving of defendant's mining mill and equipment, where defendant's cross-complaint seeking damages for delay alleged that the moving was not done within time stipulated, but contained nothing to indicate what profits would have been made if moving had been completed within stipulated time, evidence in support of cross-complaint was properly excluded, since in view of fact that defendant's business was being established at a new location it could not be assumed that anticipated profits would have been realized.

3. Pleading 🔑236(6)

Where defendant's cross-complaint in action for balance due upon a contract sought recovery of damages for delay in completion of contract, but contained nothing showing that any definite damage had been sustained because of the delay, court exercised a sound discretion in refusing defendant's request to amend.

4. Account stated 🔑19(3)

Evidence showing that plaintiff sent invoices and statements of account showing balance due by defendant on contract, to which no objection was made by defendant, that subsequently monthly invoices for accrued interest on unpaid account were sent to defendant without objection being made, that numerous payments were made by defendant, accompanied by statements that efforts were being made to procure additional money and that on certain occasions defendant's president specifically stated items of the account as rendered were correct, established creation of an "account stated".

See Words and Phrases, Permanent Edition, for all other definitions of "Account Stated".

5. Account stated 🔑1

An "account stated" is a writing which exhibits indebtedness due from one party to the other which, if assented to either expressly or impliedly, becomes a new contract.

6. Account stated 🔑20(1)

The question of what constitutes a reasonable time which should elapse from time of service of account on debtor in order to create an "account stated", in absence of a positive declaration of acquiescence, is one of law for court.

7. Account stated 🔑4

Where plaintiff kept books in conduct of its business, its preparation of a statement of its account with defendant, the delivery of such statement and defendant's agreement that statement was correct furnished essentials to complete an "account stated."

8. Contracts 🔑238(2)

Where written contract provided for moving of a thickener for a stipulated charge, additional provision that charge was based on estimate of weight therein stated indicated intention to allow additional compensation for any material excess in weight of thickener, and hence agreement to pay an additional amount because thickener weighed more than estimated was an independent contract, and in no way altered written contract in violation of codal provision requiring written contracts to be altered by a writing. Civ.Code, § 1698.

9. Evidence 🔑441(1)

Parol evidence was admissible to prove a parol agreement which did not alter prior written contract, but which constituted an independent collateral contract.

10. Evidence 🔑448

Parol evidence which is entirely consistent with, and in no way changes or contradicts, written contract is admissible.

11. Contracts 🔑245(2)

The rule that a writing supersedes all contemporaneous oral negotiations is inapplicable to an independent contract arising out of matters provided for in written agreement.

12. Evidence 🔑445(8)

Although written contract specified charge to be made for moving thickener, there was no illegal alteration of written contract by subsequent oral agreement to pay an additional amount for extras, where the work had been performed and accepted by defendant before promises to pay the excess charges were made. Civ.Code, § 1698.

13. Account stated 🔑5

The defendant's acceptance of account rendered containing separate items created an "account stated" as to each separate item to which no objection was made.

14. Account stated 🔑6(1)

An objection to one item of account constitutes an admission of the rest to which no objection is made.

15. Interest 🔑18(3)

Where defendant made no objection to statement of account containing all basic and extra charges, the account bore interest from that date, and fact that an objection was subsequently made and retracted, and that a cross-complaint was filed in subsequent action to recover balance due, furnished no basis for defendant's claim that plaintiff's demand was unliquidated, and could bear no interest. Civ.Code, § 3287.

16. Interest 🔑18(3)

An account stated bears interest from its date. Civ.Code, § 3287.

17. Interest 🔑19(2)

Where amount of a claim under a contract is certain and liquidated, or is ascertainable or is reduced by reason of existence of an unliquidated offset or counterclaim thereto, interest must be allowed on the balance found to be due from time it became due. Civ.Code, § 3287.

18. Interest 🔑19(2)

The fact that a dispute exists between contracting parties as to charges for extras does not render the claim unascertainable by calculation so as to enable debtor to avoid liability for interest, since debtor can avoid that liability by tendering amount actually due. Civ.Code, § 3287.

19. Evidence 🔑471(9)

In action involving question of whether an account had been stated between the parties, question asked plaintiff's secretary as to why he asked on a certain date that account be confirmed was improper as calling for a "conclusion".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

20. Appeal and error 🔑1050(1)

In action involving question of whether an account had been stated between the parties, error in asking question of plaintiff's secretary as to why he asked on certain date that account be confirmed was not prejudicial, where facts developed showed that, because of discrepancy between plaintiff's and defendant's books, secretary wished his amount confirmed by defendant, so that at any meeting of defendant's creditors plaintiff would have advantage of total amount of its claim. Const. art. 6, § 4½.

21. Appeal and error 🔑1170(7)
Evidence 🔑498½

The matter of permitting question calling for the conclusion of the witness rests largely in discretion of trial judge, whose ruling will not be upset unless clearly prejudicial. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by the Lacy Manufacturing Company against the Gold Crown Mining Company, Limited, to recover the balance due upon a contract, and for extra labor performed and materials used in dismantling, removal and reconstruction of a mining mill and equipment, wherein the defendant filed a cross-complaint for damages resulting from alleged delay in the completion of the contract. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Lester V. Peterman, of Twenty Nine Palms, for appellant.

James P. Fitzpatrick, of Los Angeles, and Clyde F. Murphy, of North Hollywood, for respondent.

MOORE, Presiding Justice.

Plaintiff instituted this action to recover the balance due upon a contract and for extra labor performed and materials used in the dismantling, removal, and reconstruction of a mining mill and equipment for defendant which operated certain mining properties in San Bernardino county. The controversy revolves primarily about the extra charges.

In early September, 1938, the officers of the two corporations negotiated with a view to contracting for the removal of defendant's milling plant from location K to a new location some six miles distant, hereafter referred to as location Y. The removal could be made only over a desert road not exceeding 18 feet in width through hills and woodlands. The mass of the equipment to be removed to Y is as follows:

A Hardinge Ball Mill, weight about 30,000 pounds,

1-280 horsepower Fairbanks and Diesel engine, weight about 32,175 pounds,

1-Dorr Classifier, weight about 4,500 pounds,

1-Dorr Thickener.

The Thickener was the important item in the list of articles to be removed. The reason for the omission of its weight from the above list will appear as we proceed. It is a cylindrical-shaped unit, 30 feet in diameter and 30 feet in height. Its exterior was a steel shell 5/16 of an inch in thickness in its lower 10 feet and 1/4 of an inch thick in its upper 20 feet. Within the shell is a large tank near the top, below which are four steel trays horizontally placed across the entire width of the interior. Through the center of the tank and trays extends a vertical revolving shaft to which are attached rakes which stir the material to a thick consistency as it descends through the tank and several trays. In order to move and reconstruct the Thickener, it was necessary to dismantle it by cutting the shell and trays with an acetylene torch into sections, removing the rakes from the vertical shaft and by withdrawing the shaft itself. After transporting the mill from location K to location Y, it was necessary to bottom the tank upon new foundations; to reassemble the rakes to their accustomed places on the shaft and to re-establish the tank, trays, and shell by welding them into their original forms.

To effect such removal and reconstruction, defendant procured plans and specifications to be prepared by the Southwest Engineering Company, of which blue prints were made, one set of which was delivered to plaintiff in the early part of September, 1938, with a request for a bid for removal and reconstruction of the plant. A modified bid was submitted in writing by plaintiff September 30. It was accepted by defendant on the 10th day of October. The total basic amount of the contract was $9,587 plus the amount of sales taxes on parts supplied. The work to be done, as described in the contract, consisted of 15 items. Inasmuch as the controversy involves only items 14 and 15, those parts of the contract, not in issue, are omitted.

The substance of the agreement was that plaintiff should furnish the items "as specifically outlined below and in full accordance with the Southwest Engineering Company's drawings referred to; all equipment to be delivered to plant site in the Dale District, near 29 Palms, California."

Each item, after describing the materials to be furnished and the labor to be performed in removal and reconstruction, closes with the price and the amount of the sales tax. Items 14 and 15 as they appear in the contract are as follows:

Item 14: Moving of one Dorr 5-compartment Thickener 30′0″ diameter x 30′0″ high, from the old mill site to new mill site including: removal of stirring apparatus, beam supports and all piping immediately supported by tank. Cut down of tank and trays in sections permitting hauling over normal road widths. Hauling of all of above to new mill site. Reassembly of tank, trays, apparatus and above-mentioned piping on foundations to be prepared by Purchaser. Leveling and adjustment that may be required to put tank back into its present operating condition. Price: complete, as listed above. $2,800.00. No California Sales Tax on this item.

Note: This figure is based on an estimated total weight of 42½ tons. We agree, upon reassembling this unit, to make a slight change in location of over-flow box and tray center overflows, and to substitute new shoes to be furnished by purchaser, with the understanding that this work does not involve the furnishing of any new material and that the changes will not interfere with the normal procedure of our work.

Item 15: Moving from present foundations at the old mill site to foundations to be prepared by purchaser at new mill site:

1-Diesel Engine, weighing approx. 32,175 pounds

1-Hardinge 6x22 Ball Mill, with or without liners weighing not over 30,000 pounds

1-Classifier, 20′ long x 4′ wide, weighing approx. 4,500 pounds

Price: For complete handling of three units	$ 340.00
Total Price: For 15 items	9,587.00
Total California Sales Tax	143.63

Other covenants of the writing are: that plaintiff agrees "to complete delivery and installation of all items as listed above within 30 working days from date of contract";

Terms:

"On the first day of each calendar month, sixty-five per cent (65%) of the price of all materials shipped and of all labor expended during the preceding month shall be invoiced for payment within 10 days after date of invoice. Balance of contract price shall be invoiced for payment forty-five (45) days after completion of contract."

Upon the trial two factual conflicts developed: (1) whether defendant exhibited the blue print showing the changes to be made in the Thickener before the execution of the contract; (2) whether the contract price for item 14 was reduced by plaintiff from its original bid of $3,200 to the sum of $2,800 by reason of statements made by the president of defendant to the effect that the Thickener did not weigh 61 tons but only weighed 42½ tons. The fabrication of the items was commenced by plaintiff immediately upon the execution of the contract by reason of untreated ore in its bins at location K. Defendant agreed to commence the removal on the 10th day of November. On the later date workmen appeared at location K and began the work of dismantling. Because of a water shortage the operations were closed down for some days. On the 21st day of January defendant accepted the plant as reconstructed at Y. Other facts material to the controversy will appear in the recitals that follow but suffice it to say here that, after service of a statement of the full amount due only the sum of $6,361.80 was paid prior to the impasse that subsequently developed because of which plaintiff instituted this action.

Its complaint contained four counts, namely: (1) for the balance due on the basic charges in the sum of $3,368.83; (2) for the value of the extra services performed and materials furnished in the sum of $1,048.92; (3) for interest on the unpaid balances in the sum of $608.30; (4) upon an account stated in the sum of $5,026.05.

At the trial the court found the facts as contended by plaintiff and entered judgment thereon in its favor in the sum of $5,281.82.

A number of grounds for reversal are assigned by defendant, each of which will be discussed in its turn.

[1-3] (1) Defendant assigns as prejudicial error the action of the court in rejecting evidence in support of the cross-complaint. The cross-complaint undertook to state a cause of action for damages resulting from the alleged delay in the completion of the contract. Its claim is that it required 102 working days whereas the contract provided that the job should be done in 30 working days and that during the extra 72 days it was unable to operate its mine and mill to its damage in the sum of $4,200. While the contract provides for the delivery and installation of the plan within 30 working days, other provisions of the contract show that the parties contemplated that the entire work would require months for its completion. The payments to be made by defendant were to be made on the first day of each calendar month and were to include 65 per cent of the price of all materials used and all labor employed during the preceding month and that defendants should be invoiced for payment forty-five days after the completion of the contract. In view of such terms, the trial court properly found that it was within the contemplation of both parties that the moving of the equipment and changes to be made were not to be restricted to 30 working days. That period was not specified as the time within which all the work contemplated by the parties was to be completed. But aside from the difficulties encountered by reason of the terms of the contract itself, there is not a sufficient showing of certain and immediate damage suffered; no factual statement of any ore blocked out; not even a statement that the structure below the surface of the earth was gold-producing or that any amount of ore could be mined and reduced within a specified time; no statement of the cost of mining and milling or of royalties to be paid. In short there is nothing to indicate the profits available to defendant during the 72 days in question. In the absence of these and allegations of the costs of labor, of the depreciation of the milling plant, of the cost of power and water; of royalties to be paid; of the amount of ore that could be mined and milled during the period in question, there was nothing in the cross complaint to aid the court in trying the question of profits lost. Recoverable damages for any breach are only those which were reasonably in the contemplation of the parties at the time of entering into the agreement. Johnson v. Levy, 3 Cal.App.

591, 86 P. 810; California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, 221 P. 345, 32 A.L.R. 114.

Moreover, the mining business of defendant had not been established at the new location; nothing was known of any of the items necessary to make adequate proof. Loss of profits resulting to a new business is too uncertain to constitute the basis for computation of damages resulting by reason of a breach of contract. The profits of such an adventure existed only in the fond dreams of the adventurer and not in figures entered upon the books of record kept by an established business. In the absence of provable data, taken from the operations of a business in the past, it cannot be assumed that anticipated profits will be realized. California Press Mfg. Co. v. Stafford Packing Co., supra. The order of the court excluding evidence under the cross complaint was justified on the basis of the contents of that pleading. The court exercised a sound discretion in refusing the defendant's request to amend.

[4] (2) It is contended that the evidence is not sufficient to support the finding of an account stated. The evidence received upon that score contains no inherent improbability. It is found in the testimony of responsible witnesses who testified on behalf of both plaintiff and defendant. On February 21, 1939, Mr. Schindler, president of plaintiff, made up 39 invoices covering both basic charges and extra charges and delivered them at the office of Mr. Novell, the president of defendant. Three days later Novell stated to Schindler that the invoices were "all right." Such invoices were never again discussed although the men met many times thereafter. Neither was there ever repudiation of any charge made in any invoice. On the 10th of March plaintiff forwarded a statement of the account for the sum of $10,606.37 for all charges then unpaid, including all extras. On March 21, defendant forwarded to plaintiff a check in the sum of $1,859.10 for specific items mentioned in the statement of March 10th. The letter accompanying that check contained no objections to any items mentioned in the statement, but on the contrary it stated that the defendant was then arranging for additional money for plaintiff. On the 18th of April, 1939, plaintiff forwarded a new statement demanding $8,341.16 and in the accompanying letter reproved defendant for its delays in meeting its payments. No written reply was made to that demand. In both statements of March 10 and April 18, all charges for extra labor and materials were included in the total amount claimed to be due. No objections in writing were made to the statement of April 18th. On May 31, 1939, defendant forwarded its check for $355.90, accompanied by a letter in which Mr. Novell stated that he was still unable to raise additional money and that as quick "as I put it over, I will forward it to you." On the same day plaintiff forwarded to defendant its invoice for interest in the sum of $136.70 on the unpaid balance of the account from March 7th. Thereafter at the end of each of fourteen successive months plaintiff forwarded invoices for the accrued interest on the unpaid account for the preceding 30-day period. Notwithstanding its receipt of such invoice and the numerous letters from defendant to plaintiff, not a lisp was uttered or a syllable written in protest or objection to any balance demanded or to any item included in the account. Thereafter, on August 9, 1939, defendant by letter offered to pay $1,000 per week to plaintiff "until your account is liquidated in full" and agreed to increase the interest rate from 6 per cent theretofore charged to 7 per cent. Six days later defendant forwarded its check in the sum of $250 with a promise to make up the "difference." One week later defendant asked the privilege of discharging its debt by paying $1,000 every other week. Still only one week later defendant wrote that it was trying to bring its agreement up to date on the next Wednesday. By November 14th the account had, by the few payments made, been reduced to the sum of $6,042.68, which included all charges, both basic and extra as well as interest.

From the time of the delivery of the 39 invoices to defendant, February 21 to December 30, 1939, 10 months and 9 days elapsed. From the time of the first statement indicating the amount of the contract due on March 10, 1939, to December 30th, a period of 9 months and 20 days elapsed. Silence of a debtor for either period during which he received constant reminders of the amount of his indebtedness was sufficient to create an account stated.

If other proof were required it is found in the care which was exercised by defendant in the deliberations preliminary to the contract and which is evidenced by all of the correspondence of defendant in forwarding checks and excusing delays. The exercise of such care is convincing proof that the defendant would have protested vehemently had it been dissatisfied with any charge which it might have deemed to be unjust. Thus, by the lapse of time and the constant reminder of its debt, the defendant, by its own conduct towards the invoices, statements and letters from plaintiff, and by its payments to plaintiff prior to November 14, 1939, acknowledged that an account had become stated. On December 30, 1939, when an inquiry was made concerning a discrepancy between the books of defendant and those of plaintiff, was the first occasion on which Mr. Novell stated that he would not pay the sum of $1,410.91.

But aside from the acquiescence of defendant, the account was established by its positive acceptance. Secretary Stevenson testified that on May 3, 1940, Novell stated that the items of the account as rendered and of the invoices and statements were correct. The trial court believed the testimony of Messrs. Stevenson and Schindler, as indicated by findings V and VI, that on February 19, 1940, and again on May 3, 1940, defendant retracted its objections of December 30 to the item of $1,410.91 of the account and agreed on both occasions that the item of $1,410.91 was just, reasonable and proper. To emphasize the importance of the agreement of defendant on May 3, 1940, that the account was correct, three additional statements of accrued interest were sent to defendant after December 30, 1939, to none of which was objection made.

[5] An account stated is a writing which exhibits the indebtedness due from one party to the other which, if assented to, either expressly or impliedly, becomes a new contract. Wright v. Strobeck, 139 Cal.App. 552, 34 P.2d 781; Mayberry v. Cook, 121 Cal. 588, 54 P. 95; Hendy v. March, 75 Cal. 566, 17 P. 702.

[6, 7] As to what is a reasonable time which should elapse from the time of the service of the account on the debtor in order to create an account stated, in the absence of a positive declaration of acquiescence, is one of law for the court. It has been held that a delay of six months in repudiating the agreement is as a matter of law unreasonable and that because of it, acquiescence will be presumed and that an account stated is thereby created. Cusick v. Boyne, 1 Cal.App. 643, 82 P. 985; Hendy v. March, supra; Standard Oil Co. v. Van Etten, 107 U.S. 325, 1 S.Ct. 178, 27 L.Ed. 319. The plaintiff having kept books in the conduct of its business, the preparation of a statement of its account with defendant, its delivery of such statement and the agreement that the statement was correct, furnish all of the essentials to complete an account stated.

[8-12] (3) Defendant contends that inasmuch as the contract for transporting and reconstructing the plant was in writing, it cannot be altered by an oral statement of the account as in violation of section 1698 of the Civil Code. There was no attempt to vary the terms of the contract. Item 14 obligated plaintiff to move and reconstruct the Thickener at Y for $2,800. The very presence in item 14 of the note to the effect that the price fixed in the agreement was based upon an estimated total weight of forty-two and one-half tons indicates that it was the intention of the parties that extra compensation should be allowed for any material excess in the weight of the Thickener. After the completion of the contract the agreement to pay an additional $400 on account of the extra 20 tons in the Thickener was an independent, collateral contract and in no way alters or varies the written contract of the parties. Parol evidence is properly admissible to prove such parol agreement. 2 Nichols Applied Evidence, vol. 2, p. 1263, par. 67; Mackin v. Darrow Music Co., 69 Okl. 1, 169 P. 497. It is a well understood concurrent rule that where parol evidence is entirely consistent with and in no way changes or contradicts the written contract, it should be admitted. Greathouse v. Daleno, 57 Cal.App. 187, 206 P. 1019. The rule that a writing supersedes all contemporaneous oral negotiations has no application to an independent contract arising out of matters provided for in the written agreement. Cotton v. Riverside Cement Co., 29 Cal.App.2d 588, 592, 85 P.2d 136; Lindsay v. Mack, 5 Cal.App.2d 491, 43 P.2d 350. The extra work performed by plaintiff was not a "slight change." It required a substantial outlay of labor and material. In all 207 hours of extra work were required for the removal and reconstruction of an additional 20 tons of weight of the cylindrical plant. There was nothing in the testimony making proof of the extras furnished contradictory of any provision of the primary contract. The oral agreements of the parties on February 21, 1939, and on May 3, 1940, were consistent with all provisions of the written agreement. Moreover, at the times of the promises of defendant to make the payment of the sums charged for extras, the work had been performed and accepted

by defendant. This fact alone disposes of the parol evidence rule which, itself, provides for parol proof of an executed oral agreement. Civ.Code, § 1698; Klein Norton Co. v. Cohen, 107 Cal.App. 325, 290 P. 613; Pearsall v. Henry, 153 Cal. 314, 95 P. 154, 159.

[13, 14] (4) Defendant contends that, in view of the fact that the account contained separate items, there can be no account stated on each separate item. The law is to the contrary. Excepting such items as the debtor may designate to be objectionable to him, all others are admitted to be correct, and the account becomes stated as to them. Tuggle v. Minor, 76 Cal. 96, 18 P. 131. If one item is objected to, it is an admission of the rest to which no objection is made. Terry v. Sickles, 13 Cal. 427.

[15] (5) Defendant contends that inasmuch as it held a counterclaim against plaintiff, the latter's demand is deemed unliquidated and can therefore bear no interest. It is claimed that before payment was due under the contract the amount became in dispute. But when the 39 invoices were presented to defendant on February 21, 1939, 14 days before payment was due, the president of defendant stated that all the charges were right. Also, when on the 10th of March, 1939, a statement containing all basic and extra charges was received by defendant, no objection was made. In fact the only dissent to the account ever uttered at any time was that of December 30, 1939, which was retracted on May 3, 1940. The complaint in this action was not filed until September 13, 1940. We find no record of any claim of an off-set until the filing of the cross-complaint October 11, 1940.

[16-18] An account stated bears interest from its date. De La Cuesta v. Montgomery, 144 Cal. 115, 77 P. 887; Fee v. McPhee Co., 31 Cal.App. 295, 160 P. 397. In view of the fact that no objection was made to the account as delivered on March 10, 1939, it bears interest from that date. Civ. Code, § 3287. Where the amount of a claim under a contract is certain and liquidated, or is ascertainable or is reduced by reason of the existence of an unliquidated offset or counterclaim thereto, interest must be allowed on the balance found to be due from the time it became due. McCowen v. Pew, 18 Cal.App. 482, 123 P. 354; Hansen v. Covell, 218 Cal. 622, 24 P.2d 772, 89 A.L.R. 670. The fact that a dispute exists between contracting parties as to charges for extras used in performing the contract does not have the effect of rendering the claim unascertainable by calculation. The debtor can avoid his liability to pay interest by tendering the amount actually due. Kammerer v. Marino, 76 Cal.App. 635, 245 P. 432.

[19-21] (6) Defendant assigns as error the following question asked the secretary of plaintiff while on the stand: "Now Mr. Stevenson, why did you ask that the account be confirmed on April 19, 1940?" The basis of the objection to this question was that it called for a conclusion. The question was improper. Powley v. Swensen, 146 Cal. 471, 477, 80 P. 722. It called for the present thoughts of the witness which, in non-expert matters, is not evidence. But the answer was not prejudicial. The significance of the question is made clear by the effort of defendant to establish the inference that an account had not yet been stated by the parties prior to the dates of the letters written April 19, June 21, July 5 and July 26, 1940, in which plaintiff asked for a confirmation of the account. The account having become stated sometime prior to April, 1940, in propounding the question counsel sought to have the witness explain those letters which ostensibly were contrary to the fact established by its proof of an account stated. The facts actually developed were that having learned that the balance of the account as it appeared on the ledger of defendant differed from the balance as shown on plaintiff's books, Mr. Schindler wished his amount confirmed by defendant so that, at any meeting of defendant's creditors, plaintiff would have the advantage of the total amount of its claim. Therefore since the explanation given by the witness in answer to the question was material and relevant evidence no prejudice could have been suffered by defendant. It is the rule that to permit or refuse to permit such questions rests largely in the discretion of the trial judge, whose ruling will not be upset unless it clearly appears that prejudice has been suffered by the complaining party. 10 Cal. Jur. 957. Since no prejudice was suffered it would be improper to reverse the judgment on that account. Art. VI, § 4½ Const.

In view of the fact that plaintiff established an account stated it is unnecessary to discuss the other assignments relating to the claims of defendant (1) that the contract was not performed promptly and efficiently; (2) that there was not substantial proof of the excess tonnage of the plant; (3) that fraud of defendant was not alleged; and (4) that evidence to explain the contract was inadmissible. None of these assignments is meritorious but our reasons for so holding require no expression in view of the account stated.

Judgment affirmed.

McCOMB, J., concurred.

W. J. WOOD, Justice (concurring).

I concur in the judgment. I think that the question asked of the witness Stevenson, set forth in the foregoing opinion, was not improper. Hirshfeld v. Dana, 193 Cal. 142, 166, 223 P. 451.

52 Cal.App.2d 517

OAKLAND CALIFORNIA TOWEL CO., Inc., v. SIVILS.

Civ. 11836.

District Court of Appeal, First District.
Division 1, California.
June 6, 1942.

Hearing Denied Aug. 3, 1942.

1. Damages 🔑117

In action for breach of contract, ordinarily the measure of damages is the amount which will compensate the party aggrieved for the detriment proximately caused by the breach. Civ.Code, §§ 1512, 3300.

2. Damages 🔑40(2)

Unless speculative or conjectural, loss of profits is a basis for damages for breach of contract.

3. Damages 🔑117

In measuring damages for breach of contract, the prospective profits should be diminished by charges composing an essential element in the cost of manufacture or of service contracted for.

4. Damages 🔑117

Under rule that in computing damages for breach of contract the prospective profits should be diminished by charges composing an essential element in the cost of manufacture or of the service contracted for, essential elements in such cost do not include remote costs, overhead or otherwise, but are confined to expenditures that would necessarily have been made in the performance of the contract.

5. Damages 🔑117

In measuring damages for breach of contract, the only matter of concern is the detriment suffered or the benefit lost as a result of the breach.

6. Damages 🔑208(1)

Whether a particular charge is an essential element and therefore to be considered in fixing damages for breach of contract, or whether it is not affected as a consequence of the nonperformance of the contract, are "questions of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

7. Damages 🔑190

In action for breach of contract for linen supply service which plaintiff had agreed to furnish, evidence supported finding that charges which defendant claimed should be deducted in determining damages were fixed charges in no way affected by the nonperformance of the contract, and therefore such charges were not deductible from the amount of damages otherwise established. Civ.Code, §§ 1512, 3300.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action for breach of contract by Oakland California Towel Company, Inc., against James E. Sivils. Judgment for plaintiff, and defendant appeals.

Affirmed.

Pierre A. Fontaine, of Oakland, for appellant.

Melville C. McDonough, of Oakland, for respondent.

WARD, Justice.

Appeal by defendant from a judgment in favor of plaintiff corporation for $873.78, together with attorney's fees and costs, in an action for damages arising from defendant's alleged breach of a contract between the parties for linen supply service.

On September 23, 1937, the parties hereto entered into a contract by which respondent agreed to furnish, for a period of three years, such linen supplies as appellant would require in his chiropractic business. Subsequently the contract was modified by the establishment of a guaranteed weekly minimum of service for the sum of $14.47 a week. On February 16, 1938, appellant prevented further performance of the contract on respondent's part. Had the contract been performed according to its terms there would have accrued to the respondent during the period yet to run the sum of $1,953.45. After new trial granted on the issue of damages alone, the court found that respondent would have incurred expenses in the performance of the contract during said period in a sum of $1,079.67, and that therefore the amount of damage sustained was only the difference between these sums, viz., $873.78.

It is appellant's contention that the amount of damages awarded is excessive for the reason that respondent suffered "no loss or damage by reason of said breach, and if any such loss or damage should be found, the same is negligible."

He further contends that the trial court did not take into consideration as an offset all items of cost that would be necessarily incurred by respondent in furnishing the service; that not only the direct, but indirect, costs, such as overhead, should have been considered. Respondent on the other hand urges that overhead or fixed costs were not affected by the performance or non-performance of the contract.

The terms "fixed costs," "overhead," "direct overhead," "indirect overhead," "indirect miscellaneous overhead," "profits," "loss," "detriment," "benefit," etc., are words that may be defined technically, or according to their popular sense, the latter involving a consideration of the subject matter and manner of use. The definition of a word adopted in one judicial decision may not be applicable in a case involving different facts or subject matter. The use of a certain word in a statute, contract or pleading may be clear and certain and subject to plain definition, yet the same word employed under different circumstances may be incorrect or ambiguous if its meaning be restricted to that particular definition. This observation as it relates to the question involved on this appeal, namely, measure of damages, may be considered an answer to the numerous citations involving words, terms and phrases.

[1, 2] If the performance of an obligation be prevented by one party thereto, the other party is entitled to all the benefits which he would have obtained had it been performed by both parties. Civ.Code, § 1512. Ordinarily in an action such as the present, the measure of damages is the amount which will compensate the party aggrieved for the detriment proximately caused by the breach. Civ.Code, § 3300; Carrier v. Piggly Wiggly of San Francisco, 11 Cal.App.2d 180, 53 P.2d 400; Sobelman v. Maier, 203 Cal. 1, 262 P. 1087; Hitchcock Military Academy v. Myers, 76 Cal. App. 473, 245 P. 219; Ahlers v. Smiley, 163 Cal. 200, 124 P. 827; Winans v. Sierra Lumber Co., 66 Cal. 61, 4 P. 952. Restatement of the Law of Contracts, sections 329-335, unless speculative or conjectural loss of profits is a basis for damages. Kenyon v. Western Union Tel. Co., 100 Cal. 454, 35 P. 75; McGregor v. Wright, 117 Cal.App. 186, 3 P.2d 624; Brunvold v. Johnson, 36 Cal.App.2d 226, 97 P.2d 489; Hollywood Laundry Cleaning & P. Co. v. Hollywood L. Service, 217 Cal. 131, 17 P.2d 712. In the present case the evidence shows that the damages are reasonably ascertainable.

[3-5] Whatever confusion may appear from the use of the terms heretofore referred to, as applied to the facts of a particular case, the true rule seems to be that the prospective profits should be diminished by charges composing an essential element in the cost of manufacture, or, as in this case, of service. Essential elements in such cost do not include remote costs, overhead or otherwise, but are confined to expenditures that would necessarily have been made in the performance of the contract. The only matter of concern is the detriment suffered or benefit lost as the result of the breach. If the fixed expenses neither increased nor decreased as a consequence of the nonperformance of the contract, there would be no loss or benefit arising from that factor.

[6, 7] Whether a particular charge is an essential element and therefore to be considered, or whether it is not affected as a consequence of the nonperformance of the contract, are questions of fact. The evidence amply supports the findings that the charges here challenged were fixed charges in no way affected by the nonperformance and were therefore not deductible from the amount of damages otherwise established.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

52 Cal.App.2d 564

FRASER v. STELLINGER et al.

Civ. 12067.

District Court of Appeal, First District, Division 2, California.

June 9, 1942.

Hearing Denied Aug. 6, 1942.

1. Automobiles ⟹245(82)

Whether bicyclist who was struck by defendants' truck traveling in the same direction on so-called slow lane of four lane highway was contributorily negligent was for the jury under the evidence.

2. Automobiles ⟹246(39)

Where each party to bicyclist's action for injuries sustained when struck by truck contended that accident was caused by the other's negligence, case was tried on that theory, and jury was fully instructed on rules of law applicable, refusal to give requested instruction on sudden emergency because truck driver had bicyclist in view for 1,000 feet as shown by his own testimony was not erroneous.

3. Automobiles ⟹246(57)

In bicyclist's action for injuries sustained when struck by truck, where each party contended that accident was caused by the other's negligence and case was tried on that theory, refusal to give requested instruction on unavoidable and inevitable accident was not erroneous.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action for personal injuries by Donald Fraser against Preston Stellinger and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

F. E. Hoffmann, of San Mateo, and Daniel J. O'Brien, Jr., of San Francisco, for appellants.

Norman S. Menifee, of Redwood City, for respondent.

STURTEVANT, Justice.

The defendants in the above entitled action have appealed from a judgment awarding damages to the plaintiff for injuries sustained in an automobile collision.

At about five o'clock in the afternoon of the 24th day of September, 1940, plaintiff was riding and operating a bicycle in a general northerly direction on the Bayshore Highway about one mile north of Redwood City. The highway in that neighborhood is broad. It is divided into four lanes. A double white stripe is marked down the middle. Each side is divided into two lanes that are separated by a single white stripe. Each lane is 10 feet wide. The lanes adjacent to the middle are known as the fast lanes and the outside ones are known as the slow lanes. The plaintiff was propelling his bicycle along the shoulder on the east side of the highway. He testified that he was traveling along a line approximately 2 feet from the easterly border of the highway. He also testified he did not turn off the shoulder. The defendant Preston Stellinger was driving a 5-ton motor truck in the same direction. He approached from the south and was traveling north to his home in San Francisco. As he proceeded north he testified that he was traveling in about the middle of the slow lane. At the time of the accident he was traveling in his judgment 35 to 40 miles per hour. As he drove north he saw the plaintiff riding the bicycle about 1,000 feet ahead. Stellinger continued to drive forward and when about 50 feet behind the plaintiff he sounded the electric horn on his truck. The plaintiff did not indicate that he heard the horn. He testified that he did not hear it. He also testified he was hit from the rear. Stellinger continued forward and when he was 2, 3, 4, or 5 feet to the rear of the bicycle he testified the plaintiff swerved the bicycle across the path of the truck. Stellinger testified that when he saw the movement he swerved his truck toward the middle line of the highway but his right fender hit the side of the bicycle obliquely. Both the plaintiff and the defendant Stellinger testified that the north end of the easterly lanes were unoccupied at the time and neither saw any vehicle ahead nor any vehicle approaching from the rear. No other witnesses saw the accident at the time of the impact. The collision occurred in such a manner and with such force that the bicycle on which the plaintiff was riding was knocked to the right a distance of about 20 feet. The plaintiff was thrown north and to the right and landed in the field on the east side of the highway. When picked up he was 15 to 20 feet east of the highway and about 50 feet north of the bicycle. William Thayer was driving an automobile in the slow lane on the western side of the highway. Another automobile was traveling in the same direction and about two lengths ahead of him. As they continued down the highway Thayer was observing the movements of the automobile immediately ahead of him. He continued forward until he was nearly opposite the truck being driven by the defendant Stellinger when he glanced to the left and, as he testified, he saw Fraser's body flying through the air. At about the same time Stellinger's truck had so swerved to the left that it was traveling toward the automobile being operated by Thayer. The latter stopped his car. Stellinger slowed down his truck and came to a stop at a point about 200 feet north of the place where the collision had occurred.

Two doctors, who later attended the plaintiff and set his broken leg, testified that the break was caused by a blow from the rear.

[1] The defendants contend that the plaintiff was guilty of contributory negligence as a matter of law. That contention rests primarily on the further contention that such fact is shown by certain physical facts testified to by the witnesses. Immediately after the accident Mr. Wallace, a traffic officer, arrived from the north. At about the same time Mr. Thayer had stopped his car. Both went to the place of the collision. They saw tire marks on the surface of the highway. Mr. Thayer testified the tire marks commenced in the middle of the slow lane and swerved abruptly toward the middle of the highway. They extended a distance twice the length of the truck. Mr. Wallace testified that the marks commenced about 3 feet from the east line of the highway. Broken glass lay in the highway about 2 feet north of the tire marks. Pointing to that testimony the defendants contend that the impact occurred in the slow lane. They further contend that the plaintiff could not have been riding on the shoulder at the time of the impact. We think they claim too much. There are other physical facts that also must be considered. The same witnesses testified that the plaintiff's body lay in the field about 15 feet east of the highway; that the bicycle also lay in the field 15 or 20 feet east of the highway and about 50 feet south of plaintiff's body. Mr. Thayer testified the bicycle was laying alongside of the pavement at about the same point where the tire marks were on the pavement and the body was 50 feet north and about 50 feet east of the highway—it might not have been that far. It was off the highway and on ahead. Mr. Wallace testified that the bicycle was "absolutely opposite" the marks in the highway. It is sufficient to remark that all of these physical facts are confusing and that it may not be said as a matter of law that the testimony of the plaintiff was impossible, nor may it be said that the physical facts necessarily corroborate the testimony given by the defendant Stellinger. It follows that it may not be said as a matter of law that the plaintiff was guilty of contributory negligence.

[2] The defendants copied an instruction on sudden emergency from Church v. Payne, 36 Cal.App.2d 382, 385, 97 P.2d 819, and requested that it be given. The trial court refused the request "because the driver (Stellinger) had had the rider in view for 1000 feet as shown by his own testimony." The ruling was not erroneous. Dougherty v. Ellingson, 97 Cal.App. 87, 96, 275 P. 456. Furthermore the case was tried by the parties each claiming the accident was caused by the negligence of the other. The jury was fully instructed on the rules of law applicable to the respective theories of the alleged negligence of the defendant and the contributory negligence of the plaintiff. We cannot see how the defendants could have been prejudiced by the ruling complained of.

[3] The defendants also copied the fifth instruction in Church v. Payne, supra, and asked that it be given. That instruction is on the subject of unavoidable and inevitable accident. The trial court refused to give it. That ruling the defendants also assign as error. However we find no error in the ruling. That issue was not presented by either the pleadings or the evidence. The case was tried on the theory of each party, supported by his evidence, that the collision was caused entirely by the other's negligence. Groat v. Walkup Drayage & W. Co., 14 Cal.App. 2d 350, 355, 58 P.2d 200.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

52 Cal.App.2d 591

BORBA v. TOSTE et al.

Civ. 13654.

District Court of Appeal, Second District.
Division 2, California.

June 9, 1942.

As corrected June 18, 1942.

1. Venue ⚷52(1)

The determination of a motion for change of venue upon ground of convenience of witnesses rests largely in trial court's discretion.

2. Appeal and error ⚷965

Trial court's exercise of discretion regarding changing venue for convenience of witnesses will not be disturbed except for an abuse of such discretion.

3. Venue ⚷52(1)

Generally, the convenience of a litigant will not be considered on a motion for transfer of place of trial for convenience of witnesses, but where a party is in such a state as to render it impracticable for him to be transported to a distant forum for purpose of giving his testimony and where his testimony is an important part of his proof, consideration of his convenience is in furtherance of justice.

4. Venue ⚷81

In action for cancellation of deed based on defendants' alleged fraud in taking advantage of plaintiff's blindness and infirmities, granting of plaintiff's motion for change of venue back to county where plaintiff originally brought action, after cause had been transferred on defendants' motion to county of their residence, on ground of convenience of witnesses, was not an abuse of discretion, in view of facts shown in affidavits.

◆

Appeal from Superior Court, Los Angeles County; Geo. A. Dockweiler, Judge.

Action by Joso Rocha Borba against Francisco Vaz Toste and another for cancellation of a deed. From an order granting plaintiff's motion for a change of venue, the defendants appeal.

Affirmed.

Lewis D. Collings, of Los Angeles, for appellants.

Thomas F. Lopez, of Fresno, for respondent.

MOORE, Presiding Justice.

The question for decision in this case is whether there was an abuse of discretion by the trial court in ordering the place of trial to be changed from Los Angeles to Tulare County upon the ground of convenience of the witnesses of plaintiff.

[1, 2] It is conceded by defendants that the determination of a motion for change of venue upon the ground of convenience of witnesses rests largely in the sound discretion of the court and that its order will not be disturbed except for an abuse of such discretion (citing Pascoe v. Baker, 158 Cal. 232, 110 P. 815; Scott v. Stuart, 190 Cal. 526, 527, 213 P. 947; Wrin v. Ohlandt, 213 Cal. 158, 159, 1 P.2d 991).

However their contention on this appeal is that, notwithstanding their showing that the convenience of the witnesses would be secured and the ends of justice would be promoted by a denial of plaintiff's motion, yet there is absolutely no showing to the contrary by plaintiff. First-Trust Joint Stock Land Bank v. Meredith, 16 Cal.App.2d 504, 60 P.2d 1023, 62 P.2d 369. In other words, they insist that there is no conflict in the evidence contained in the affidavits nor is there a denial of the effect of such evidence that the plaintiff voluntarily entered into the transaction which he seeks to have cancelled; that he was fully advised with reference thereto; that he thoroughly understood the significance of his act; and that defendants have expended on plaintiff's behalf sums greatly in excess of the value of the property transferred by deed from him to defendants.

By the complaint and by plaintiff's affidavit supporting his motion, it appears that plaintiff owns 22 acres of land in the Island of Terceira, Azores, of the value of $2,200; that taking advantage of his blindness and infirmities defendants visited him and induced him to leave the Old People's Home at Visalia June 14, 1937, to live with them at Los Angeles for the purpose of defrauding him of his island acres; that while residing with defendants in August, 1937, defendants prevailed upon plaintiff to make a deed conveying to them his land by requesting him to execute a writing which they stated was an application for him to enter the County Hospital of Los Angeles County. It is undisputed that on or about March 8, 1938, defendants returned plaintiff to the Old People's Home at Visalia but did not reconvey his property and did not pay the sums of money which they promised him before removing him from the Home, or the sums they promised to pay plaintiff at the time they returned plaintiff to the Home. Such sums are declared in counts two and three.

The cause having been transferred from Tulare County, the venue of its origin to the superior court of Los Angeles County on the unopposed motion of defendants on the ground of residence, thereafter in August, 1941, plaintiff presented his motion for a transfer of the cause from Los Angeles to Tulare on the ground of the convenience of witnesses. By plaintiff's affidavit supporting his motion for transfer to Tulare County, it is established that plaintiff is impecunious, weak and blind; that he is confined to the Old People's Home; that the condition of plaintiff is such that an attendance upon a trial in Los Angeles County would work a great hardship upon plaintiff and might be dangerous to his health and life; that he has no funds to transport himself from Tulare County and no funds to pay the travelling expenses of his witnesses; that witnesses Bettincourt, Mendez, Borba, Pereira, Cotta, Johnson and Burney reside in Tulare County, more than 100 miles from Los Angeles County and cannot be required by subpoena to attend court there.

The affidavits presented on behalf of defendants set forth that Messrs. Danielson and Stout reside in Los Angeles; that they were witnesses to the execution of the deed in question; that defendants are financially unable to attend court in Tulare County or to convey their witnesses thither or to take their depositions or to employ counsel there; that the witnesses Danielson and Stout who reside in Los Angeles County are the only witnesses to the execution of the deed except plaintiff and defendants; that the last named witnesses are the only strangers to the transaction who can give proof of the agreement of the parties at the time. Because of the claim that only their witnesses know of the occurrences at the time of the delivery of the deed, defendants assert that there is no showing sufficient to overcome their proof that the convenience of witnesses and the ends of justice will be served by retaining the place of trial at Los Angeles on the ground of convenience of witnesses. Wrin v. Ohlandt, supra.

[3] The affidavits on behalf of both parties consume many pages in outlining factual matters to be offered in proof of the issues created by the pleadings. While the nature of the transaction, the relationship and conduct of the parties are of interest in enabling us to determine whether the witnesses named in the affidavits are material and necessary as a part of the proof to be offered, at the same time, our primary concern is whether the court was unreasonable in making an order transferring the case to Tulare County. In view of the allegations of the complaint, the testimony of the plaintiff is indispensable in the chain of his proof. While the general rule is that the convenience of a litigant will not be considered on a motion for a transfer of the place of trial Wrin v. Ohlandt, supra, yet where a party is in such a state as to render it impracticable for him to be transported to a distant forum for the purpose of giving his testimony and where his testimony is an important part of his proof, it appears to be in furtherance of justice to consider his convenience also. Moreover the testimony of the witnesses Burney and Johnson, employees of the Old People's Home, is material proof for plaintiff.

[4] While defendant Francisco avers his inability to travel to Visalia to attend sessions of court, it appears from the record and from reasonable inferences therefrom that he is comparatively a young man free from disease; that he once visited Visalia to convey plaintiff thence to Los Angeles and that some eight months later he reconveyed plaintiff back to the Old People's Home. Also it appears that the records of the Old People's Home will be material evidence in the case and can be offered only through the agency of witness Burney. From such facts and inferences, we cannot say that the trial court abused its discretion in granting the motion to change the place of trial. While it is true that Messrs. Danielson and Stout are the only witnesses aside from the parties themselves to the delivery of the deed, yet at the same time, in view of the nature of the action and of the allegation that defendants visited the Old People's Home some two months before the deed was executed and induced plaintiff to come to live with them in their home, the testimony of the officials of the Home at Visalia might prove to be the important evidence in the trial. Where fraud is made the basis of an action to recover his total wealth by a party who is physically in-

competent to aid himself, it would not be promotive of justice to deprive him or his witnesses of attendance at the forum where the issues he has raised are to be tried. Especially is this true where the venue he seeks for his convenience is the county of his residence, the place where his witnesses reside and wherein the first and last acts in his narrative occurred.

Order affirmed.

W. J. WOOD and McCOMB, JJ., concur.

52 Cal.App.2d 539

NEDERVELD et al. v. BOHLANDER TRUCKING CO. et al.

Civ. 13455.

District Court of Appeal, Second District, Division 1, California.

June 8, 1942.

1. Negligence 🔑136(26)

What amount of vigilance was requisite to constitute due care is ordinarily for jury to determine under circumstances of particular case.

2. Negligence 🔑136(8)

When it is uncontroverted that injured person took no precautions for his own safety, his contributory negligence is question for court.

3. Negligence 🔑136(9)

Where inferences from evidence as to degree of vigilance required of person suing for injuries sustained are honestly debatable, his contributory negligence is fact question for jury.

4. Automobiles 🔑245(67)

Whether driver of automobile, colliding with truck backing out of service station, looked in direction from which truck was approaching, prudently selected point from which observation was made, should have seen truck within distance of 60 feet, and observed due vigilance continuously, *held* for jury as disputable fact questions on which reasonable minds might legitimately debate and honestly reach different conclusions from evidence.

5. Appeal and error 🔑1002

The jury's finding, under all circumstances in evidence, on disputable fact question, as to which reasonable minds might legitimately debate and honestly reach different conclusions, is conclusive on appeal.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Leendert Nederveld and others against the Bohlander Trucking Company, Jacob Bohlander, and others, for personal injuries and property damage. Judgment for plaintiffs, and defendants Jacob Bohlander and others appeal.

Affirmed.

Donald E. Ruppé, C. W. Bowers, and Joseph L. Fainer, all of Los Angeles, for appellants.

Albert E. Wheatcroft, of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal by defendants from a judgment entered pursuant to a verdict of the jury awarding damages to plaintiffs for injuries to person and property arising out of a collision between plaintiffs' automobile and defendants' truck.

Appellants' sole contention upon this appeal is that respondent Leendert Nederveld "was negligent as a matter of law in driving his automobile on the highway and not looking in the direction he was proceeding."

The accident occurred in the late afternoon of August 21, 1940, at the intersection of Cerritos Avenue and Lakewood Boulevard in the county of Los Angeles. According to a copy of the map used during the trial delineating the situs of the collision, Cerritos Avenue runs due north and south; Lakewood Boulevard runs northeasterly and southwesterly, forming a so-called "flatiron" corner upon which a service station is located.

Lakewood Boulevard is about 70 feet in width and is divided into four lanes, two of which consist of asphalt shoulders and the other two are made of concrete.

Appellant Willey, an employee of defendant trucking company, driving a semi-trailer and truck loaded with flat steel was on his way to make a delivery to the Vultee Aircraft plant in the immediate vicinity, and stopped at the service station to get some water. Because he was unable to find a place to turn the truck on Cerritos Avenue, he backed the truck out of the station at a slow rate of speed onto Cerritos around the flatiron corner toward Lakewood. He straightened out and drove to the middle of Cerritos at which point his truck was pointed due east and west. He then continued to back his truck until the rear end stood squarely upon the asphalt shoulder on the east side of Lakewood Boulevard.

In the meanwhile, respondent Leendert Nederveld was driving his Chevrolet automobile northerly on Lakewood Boulevard in the middle of the concrete lane adjacent to the asphalt shoulder on the east or right side of the boulevard at a speed of approximately 25 to 30 miles per hour. His wife, respondent Gertrude Nederveld, was seated beside him to his right, and his granddaughter was seated in the rear of the car. Said respondent testified through an interpreter of the Dutch language that when he was within four or five car lengths south of Cerritos Avenue "I looked (to see) if nothing came out of the street (Cerritos) and then I went ahead"; that he saw no cars moving on Cerritos and when he reached the intersection "the truck backed into my car * * * the car capsized, turned over"; that the right side of his car came in contact with the back of the truck. Upon cross-examination, said witness testified:

"Q. Now, Mr. Nederveld, you testified that this (truck) backed out and hit your car. You never saw that (truck) back out and hit your car, did you? A. No, sir.

"Q. As a matter of fact from this point N1 (five car lengths south of the corner) up to this point N2 (point of impact) you never saw any car whatsoever, did you? A. No, sir.

"Q. And were you looking? A. Yes, sir.

"Q. And was there anything to obscure your view from this point N1 to this point N2? A. No, sir.

"Q. You had a clear, open and unobstructed highway from this point N1 to N2, is that right? A. Yes, sir.

"Q. And it was broad daylight, wasn't it? A. Oh, yes. * * *

"Q. And the first thing you knew is that your car came into collision with something in the road, isn't that right? A. Yes, sir. * * *

"Q. And you are sure it was in that second lane of traffic, is that right? A. Yes, sir. * * * My car was in the middle of the lane. * * *

"Q. And you were driving the car, were you? A. Yes, sir.

"Q. Where was your wife seated, Mr. Nederveld? A. On the right side.

"Q. What was she doing? A. She was knitting * * * a sweater. * * *

"Q. How do you know she was doing that? A. She started to do it when I started to go away from home.

"Q. And then you never looked at her again after that? A. No. * * *

"Q. Now after you looked to your right when you were at N1, did you keep on looking to your right there all the time as you proceeded from N1 to N2? A. Yes, sir.

"Q. As you were looking to your right from that point N1 to N2, did you shift your head at any time to look any other place? A. No, sir.

"Q. Then as I understand it, you kept looking to your right all the time? * * * A. Yes.

"Q. And you were still looking to your right when the accident happened, is that right? A. I couldn't say that because the accident happened so quick, it was just bang!

"Q. Well, that may be so, that the accident happened quick, because it doesn't take long to travel 65 or 100 feet, but what I am trying to say is, were you still looking to your right at the time the accident happened? A. I couldn't say that.

"Q. You don't know where you were looking, is that right? A. At the moment of the accident, no.

"Q. But up to that point you were looking to your right, is that right? A. Oh, yes."

Apparently, because of the proximity of the aircraft plant, cars were parked solidly on both sides of Cerritos Avenue at an angle from the curb, as well as on the service station grounds and along the east side of Lakewood Boulevard abutting the service station, all of these being to the right of respondent as he approached the intersection.

The witness Coates, assistant manager of the service station, observed the truck back out of the service station and testified it had stopped on Lakewood three or four seconds before the accident happened. He further testified that he also observed the Chevrolet traveling north on Lakewood Boulevard at a speed of from 35 to 40 miles per hour; that he saw the driver of the automobile and "it looked as if he was looking down in his wife's lap."

It was variously testified that from 3 or 4 to 60 seconds elapsed between the time appellant Willey stopped backing his truck and the moment of impact.

Appellant Willey testified he could see 150 feet south on Lakewood as he backed out of the service station, and that when he reached Lakewood he saw respondents' automobile coming north on Lakewood toward Cerritos at a distance of about 200 feet; that he then continued backing the truck 5 or 10 feet before he stopped; that about half a minute elapsed between the time he stopped and the moment of impact. However, when put to a test on the witness stand as to the actual time which elapsed, the trial court estimated that it was about 5 seconds.

Appellants' negligence is not questioned, the only point, as heretofore stated, is that respondent Leendert Nederveld was negligent as a matter of law in continuing to look to the right for a matter of four or five car lengths as he approached the intersection.

An examination of the record, including the map of the situs of the collision, discloses a situation which required a driver to look to his right as he traveled northerly on Lakewood Boulevard approaching its intersection with Cerritos Avenue. Cerritos does not cross Lakewood, but intersects it at an angle forming the above mentioned flatiron, upon and around which many automobiles were parked. Therefore, it would be only natural for a reasonably prudent person to anticipate that potential danger lurked to his right at the point in question rather than to his left, where the boulevard ran straight and free of intersecting streets or other obstructions.

It was necessary for respondent Leendert Nederveld to testify with the help of an interpreter, which is always difficult. Nevertheless, respondent testified upon cross-examination that when he was four or five car lengths from Cerritos he looked but saw no traffic on Lakewood; that he then looked to his right, which was toward Cerritos and the service station with the cars parked in and around it; and that he continued to look to his right until the point of impact, but did not observe appellants' truck.

[1] In Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 780, 89 P. 1109, 1111, the court said: "Manifestly it is impossible for one driving a vehicle along a street to look in both directions at once, and it should ordinarily be left to the jury to determine, under the circumstances of each particular case, what amount of vigilance was requisite in order to constitute due care."

[2-5] In Lavin v. Fereira, 10 Cal.App.2d 710, 712, 52 P.2d 518, 519, it was pertinently stated with respect to the question of contributory negligence: "When a person takes no precautions at all for his own safety and is injured, and this conclusion is uncontroverted, contributory negligence is a question to be decided by the court. White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086; Stephens v. Kaufmann, 137 Cal. App. 328, 331, 30 P.2d 536. If evidence is introduced relative to the degree of requisite vigilance, and the inferences therefrom are honestly debatable, it becomes a question of fact for the jury to determine. Gore v. Market Street Ry. Co. [4 Cal.2d 154], 48 P.2d 2; Salomon v. Meyer, 1 Cal. 2d 11, 15, 32 P.2d 631; Anderson v. Market Street R. Co., 116 Cal.[App.] 282, 285, 2 P.2d 529. In the instant case whether respondent looked in the direction from which appellant was approaching, whether the point from which observation was made was prudently selected, whether respondent should have seen appellant's car within a distance of 60 feet, whether respondent should have looked north and south, or north alone, and whether due vigilance was observed continuously, were disputable questions of fact upon which reasonable minds might legitimately debate and honestly reach different conclusions. The question was properly submitted to the jury, and its finding under all the circumstances of the case is conclusive upon appeal."

This rule is particularly applicable to the facts presented by the instant litigation, especially in view of the fact that respondent Leendert Nederveld could not be expected to anticipate that a truck would be backed from a side street out upon the highway on which he was traveling and which appeared to him to be free of traffic or other obstruction.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concurred.

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52 Cal.App.2d 520

In re COLE'S ESTATE.

COLLINS v. COLE et al.

Civ. 13561.

District Court of Appeal, Second District, Division 1, California.

June 6, 1942.

Rehearing Denied June 29, 1942.

Hearing Denied Aug. 4, 1942.

1. Banks and banking 🔑49(5)
Limitation of actions 🔑58(5)

The codal provision that an action on stockholders' liability must be brought within three years after creation of liability, applies to suits to enforce bank stockholders' liability originating under the laws of other jurisdictions, and the statute commences to run when the assessment is levied, though the cause of action does not accrue until a short time afterwards. Code Civ.Proc. § 359.

2. Limitation of actions 🔑2(1)

The barring of a claim by the statute of limitations is a "procedural matter" governed by the law of the forum regardless of where the cause of action arose.

See Words and Phrases, Permanent Edition, for all other definitions of "Procedural Matter".

3. Limitation of actions 🔑148(2)

Where documents relied upon as an acknowledgment by deceased of his liability to pay bank stockholders' liability originating under law of Michigan were written after the obligation to pay was barred by the statute of limitations of California, the documents must be sufficient to constitute a new promise even though such new promise be merely implied therefrom. Code Civ. Proc. §§ 359, 360.

4. Limitation of actions 🔑151(2)

Where statute of limitations has run against original claim and new promise is relied upon, any action must be brought upon the new promise and not upon the old debt. Code Civ.Proc. § 360.

5. Limitation of actions 🔑146(1)

Codal provisions requiring written acknowledgment of debt or promise to remove bar of statute of limitations have for their object the establishment of a rule not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved. Code Civ.Proc. § 360.

6. Evidence 🔑448

Extrinsic evidence is admissible to make certain the reference in a written acknowledgment or promise to pay a debt barred by the statute of limitations. Code Civ.Proc. § 360.

7. Limitation of actions 🔑148(3)

A bank stockholder's letter stating that it was hard to raise money to pay for mistakes of others, that writer had been busy in order to take care of such indebtedness, that writer could start payments on stock liability and a payment of $1,000, constituted an "acknowledgment" of indebtedness barred by statute of limitations sufficient to toll running thereof. Code Civ.Proc. §§ 359, 360.

See Words and Phrases, Permanent Edition, for all other definitions of "Acknowledgment".

8. Appeal and error 🔑1078(1)

Where no mention was made by appellant in his briefs with respect to appeal from order denying leave to file an amendment to claim, appellant "abandoned" such appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

◆

Appeal from Superior Court, Los Angeles County; Frederick W. Lake, Judge.

Proceeding in the matter of the estate of Thomas F. Cole, deceased, wherein G. Sherman Collins, as receiver, etc., filed claim against the estate of which Fred L. Cole was executor, and wherein Union Investment Company contested such claim. From an order disallowing and rejecting the claim, and from an order denying a motion of claimant for leave to file an amendment to claim, the claimant appeals.

Order disallowing and rejecting the claim reversed with directions to overrule objections thereto, to reinstate and allow claim and order it paid in course of administration, and appeal from order denying motion for leave to file amendment, dismissed.

O'Melveny & Myers and Jackson W. Chance, all of Los Angeles, for appellant.

Morin, Newell, Brown & Hamill, of Pasadena, and Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for respondents.

YORK, Presiding Justice.

Thomas F. Cole in his lifetime owned fifty shares of capital stock of the Negaunee State Bank of Michigan having a par value of $100 per share. On November 17, 1932, said bank went into liquidation and on February 6, 1933 an assessment of 100 per cent was levied on all outstanding stock. On June 12, 1933, appellant was appointed receiver for the said bank in liquidation. On December 19, 1938, said Thomas F. Cole paid $1,000 on account of the $5,000 assessment levied against his stock, and in July of 1939 he died. Thereafter, proceedings in probate were commenced in the estate of said Thomas F. Cole in the County of Los Angeles, and on January 30, 1940, there was filed in said estate appellant receiver's verified claim setting up the assessment liability of $5,000 less the credit of $1,000 paid on account thereof, plus interest at 5 per cent per annum from February 6, 1933 (the date the assessment was levied), or a total of $5,654.02. This claim was approved by the executors of said estate on December 11, 1939, and by one of the Probate Commissioners of the Superior Court of Los Angeles County on the day it was filed, to wit: January 30, 1940.

Accompanying said creditor's claim and filed on the same day were affidavits of appellant receiver, attached to one of which was a copy of a letter written to him by decedent, Thomas F. Cole, on June 8, 1937, and to the other affidavit copies of two letters were attached which had been written to appellant by decedent's son, Fred L. Cole, under dates of September 23 and December 19, 1938. Appellant deposed therein that said last-named letters "are in fact and were intended to be the unconditional promise of the said Thomas F. Cole to assume and pay his obligation as aforesaid on said assessment."

On November 7, 1940, the first account current in the Estate of Thomas F. Cole was filed, showing the allowance and approval of appellant's claim. On January 11, 1941, respondent Union Investment Company, a creditor of said estate, filed its written objections to the said claim on the ground it was barred by the statute of limitations and that the superior court had no jurisdiction under section 708 of the Probate Code to allow or approve the same.

On January 31, 1941, said objecting creditor also filed its notice of motion to vacate the order approving the allowance of said claim, basing said motion on the same reasons set forth in its objections to the first account current.

Upon trial on the objections and the motion, the trial court on August 23, 1941, sustained the objections, disallowed and disapproved appellant's claim, and rejected the same on its merits, and ordered the motion "off calendar" but without prejudice.

This appeal is prosecuted from such order disallowing and rejecting the said claim and adjudging that appellant receiver take nothing by reason thereof, and also from the order denying motion of receiver for leave to file an amendment to said claim.

It is contended that the letters, heretofore referred to, which passed between appellant and decedent, and between appellant and decedent's son, together with the check for $1,000 in partial payment of the assessment "constituted an acknowledgment by and on behalf of the decedent sufficient to take the case out of the Statute of Limitations, and that the estate is precluded from asserting otherwise by virtue of the course of negotiations between appellant and decedent."

Excerpts from the letters so relied upon by appellant follow:

Letter written by decedent to appellant on June 8, 1937:

"My dear Mr. Collins: Referring to the matter of payments on account of stock assessment of the Negaunee State Bank: You realize it is mighty hard to have to raise money to pay for the mistakes of others; yet this is the situation. Relative to payments, I beg to state that I have been exceedingly busy, and not only using every effort, but every Dollar I could command, to make more valuable, the Gold Properties I am developing, in order to take care of indebtedness such as this. I am thankful to be able to say at this time, that I believe I can start payments on the stock liability of the Negaunee State Bank; but I want your assurance in this matter, as to just what this amount of money which I am supposed to owe, amounts to. I feel, under the circumstances, I should not be charged with any Interest; and if you can arrange this, I shall begin paying on this supposed liability, by sending you $500.00 to apply in payment on the whole amount, and will send you, from time to time, additional sums, until the amount is liquidated."

Letter from appellant to decedent, dated September 19, 1938:

"Assessment. As you were notified in my letter of Aug. 17th, we have heard absolutely nothing from you since June 8, 1937 regarding the above matter. My counsel has advised me that the Statute of Limitations will shortly run and that it will be necessary to start suit. This, therefore, is to notify you that unless some satisfactory arrangements are made within the ensuing ten days, the claim will be forwarded to Pasadena attorneys with instructions to reduce to judgment."

Reply to above by decedent's son, Fred L. Cole, on September 23, 1938:

"My dear Mr. Collins: My father, Mr. T. F. Cole, has undergone a minor operation, and he is laid up in bed. He has been working hard to consummate a deal on his home here, which will enable him to put matters in your bank in good shape, and with special reference to assessment mentioned in your letter of September 19th, he asks that you hold matters in abeyance. In regard to the statute of limitations running, he will sign the necessary waivers of the Statute of Limitations to hold matters in shape. Hoping to hear that you will with-hold legal action. * * *"

Appellant's reply to above letter addressed to decedent's son, Fred L. Cole, under date of September 29, 1938:

"Adverting to your letter of the 23rd, as acknowledged in mine of the 26th regarding the matter of Assessment. My attorney has now advised me that in his opinion a mere waiver of the Statute of Limitations would not be satisfactory. He suggests that Mr. Cole give a note for the amount due."

Letter of appellant to decedent's son dated December 12, 1938:

"I presume you have just about returned to California from the East and hence will probably be in position to advise me as to what action I can expect in relation to the matter of the assessment.

"In September, you will recall, I wrote you calling particular attention to the fact that the Statute of Limitations will shortly run and that it will be necessary for us to take action prior to that time. I trust that you have found your father sufficiently recovered so that it will be possible for you to discuss the matter with him, as was agreed in your letter of October 4th.

"Of course, you understand that I am acting under the direction of the Circuit Court and that this matter must positively be disposed of well in advance of the date that the Statute of Limitations will commence to run; consequently, I am hopeful that it will be possible for you to write me definitely within the next few days."

One week thereafter decedent drew the following check:

"T. F. Cole No. 2485 Pasadena, California, Dec. 19, 1938

Pay to the order of G. Sherman Collins, Receiver, Negaunee State Bank $1000.00 Exactly One Thousand Dollars Dollars Oak Knoll Branch, Security First-National Bank of Los Angeles Lake & Colorado Pasadena T. F. COLE"

$\frac{90\text{-}1231}{12}$

The letter transmitting the above check for $1,000 reads as follows:

"Thomas Frederick Cole
1230 South Oakland Avenue,
Pasadena, California
December 19th, 1938

"Stock Assessment Negaunee State Bank, Negaunee, Michigan.

"My dear Mr. Collins: I have your letter of December 12th, which I find on my return here from the East—regarding Negaunee State Bank affairs.

"As we have stated from time to time, Mr. T. F. Cole plans to take care of this item whenever funds are available. I am sending you herewith, Mr. T. F. Cole's check in the sum of $1,000.00 to apply in part payment of the assessment levied on the stock of Negaunee State Bank. Mr. T. F. Cole will make further payments from time to time, as circumstances will permit. * * * Very truly yours, Fred L. Cole.

"To: M. G. Sherman Collins,
"Receiver, Negaunee State Bank,
"Negaunee, Michigan."

The court found, among other things, that appellant's claim "was barred by the Statute of Limitations of the State of California, and particularly by section 359 of the Code of Civil Procedure at a date not later than February 6, 1936"; and that the superior court "had no right, power, authority or jurisdiction to in any manner approve or allow said claim or any part thereof."

It should be noted at this point that while an action on stockholders' liability must be brought in this state "within three years after * * * the liability was created" (§ 359, Code Civ.Proc.), such action is not barred in the State of Michigan until the expiration of six years. Consequently, the part payment upon the debt was made and the correspondence (which it is claimed tolled the running of the statute in California) passed between the parties *long after* the claim was barred in this state, to wit: February 6, 1936, *but before* it was barred by the Michigan statute, i. e., February 6, 1939. However, at the time the claim was filed in the probate proceedings on January 30, 1940, an action arising thereon was barred in both states.

Further, in each of the letters written in the fall of 1938, heretofore referred to, reference was made to the statute of limitations—presumably the Michigan statute—and in his letter of September 19, 1938, addressed to decedent, appellant threatened to forward the claim to Pasadena attorneys with instructions to reduce it to judgment, apparently not realizing that an action on the claim was at that time barred in California.

[1, 2] In the case of Richardson v. Craig, 11 Cal.2d 131, 134, 138, 77 P.2d 1077, 1078, it was held that section 359 of the Code of Civil Procedure applies "to suits to enforce bank stockholders' liability originating under the laws of other jurisdictions. * * * and under its provisions the statute commences to run when the liability is *created* * * * that it [the liability] was created when the assessment was *levied,* though the cause of action did not accrue until a short time afterward." Citing Johnson v. Greene, D. C., 14 F.Supp. 945. (Italics ours.)

"It is a principle of conflict of laws recognized in California that the barring of a claim by the statute of limitations is a procedural matter governed by the law of the forum, regardless of where the cause of action arose. McElmoyle v. Cohen, 38 U.S. 312, 13 Pet. 312, 10 L.Ed. 177; Townsend v. Jemison, 50 U.S. 407, 9 How. 407, 13 L.Ed. 194; Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139; Miller v. Lane, 160 Cal. 90, 116 P. 58." Biewend v. Biewend, 17 Cal.2d 108, 114, 109 P.2d 701, 705, 132 A.L.R. 1264. (Italics ours.)

[3, 4] Since it appears that the documents, relied upon by appellant as an acknowledgment by decedent of his liability to pay the assessment, were written after the obligation to pay the same was barred by the statute of limitations of this state, they must be sufficient to constitute a new promise, even though such new promise be merely implied therefrom. Vassere v. Joerger, 10 Cal.2d 689, 693, 76 P.2d 656. And any action brought must be upon the new promise and not upon the old debt. 16 Cal.Jur. 595, 596, § 192.

As heretofore stated, when appellant filed his claim in the Estate of Thomas F. Cole, he also filed affidavits attached to which were copies of the letters relied upon as the "unconditional promise of the said Thomas F. Cole to assume and pay his obligation as aforesaid on said assessment," which apparently was an attempt to comply with the rule of law above enunciated.

[5,6] The provisions of section 360 of the Code of Civil Procedure that no acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of the statute of limitations "unless the same is contained in some writing, signed by the party to be charged thereby," as was stated in Lehman v. Newcomer, 118 Cal.App. 145, 147, 4 P.2d 994: "have for their object, and effect, the establishment of 'a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved.' Ferguson v. Fonner (1927) 87 Cal.App. 590, 262 P. 337, 338; Barron v. Kennedy (1861) 17 Cal. 574. * * * Extrinsic evidence to make certain the reference in such a writing, is proper. Searles v. Gonzalez (1923) 191 Cal. 426, 216 P. 1003, 28 A.L.R. 78;

Shirley v. Shirley (1927) 83 Cal.App. 386, 256 P. 823."

In commenting upon said section in the case of Foristiere v. Alonge, 98 Cal.App. 563, 566, 277 P. 367, 368, the court said: "and in construing said section it was held in Southern Pacific Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145, that 'the distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same; from such an acknowledgment the law implies a promise to pay. Code Civ.Proc., sec. 360; McCormick v. Brown, 36 Cal. 180, 184, 185 (95 Am.Dec. 170); Biddel v. Brizzolara, 56 Cal. 374; Tuggle v. Minor, 76 Cal. 96 (18 P. 131); Wood on Limitations, §§ 68, 85.'"

In the case of Searles v. Gonzalez, 191 Cal. 426, 429, 430, 431, 216 P. 1003, 1004, 28 A.L.R. 78, in which checks accompanied by notices of installments due on a promissory note were relied upon as tolling the statute of limitations, it was said: "The checks, by themselves, do not meet the requirements of section 360 [of the Code of Civil Procedure]. Clunin v. First Fed. Trust Co. [189 Cal. 248], 207 P. 1009, 1011. * * * Two pertinent facts in the Clunin case differentiate it from the case at bar. There the checks were separated from the stubs to which they were originally attached, and on which appear the memoranda of the purpose for which they were executed; and they were not accompanied by any letter or other writing. The notations on the stubs were not in any manner communicated to the holder of the note. None of the checks was for the exact amount of interest due, but *all included sums for other purposes.* * * * A memorandum or promise, binding under the statute of frauds, may be gathered from several writings between the parties with reference to the subject-matter and so connected with each other that they may fairly be said to constitute one paper relating to the contract. * * * If one of a series of papers which appear to have some relation to the same matter is signed by the party to be charged, this is enough, as all the papers are to be considered together as forming one contract or memorandum. There is no doubt, also, that parol evidence is admissible to identify any paper referred to." (Emphasis added.)

At the trial herein, Fred L. Cole, decedent's son and executor of his estate, testified as follows with respect to the check for $1,000 and the letter transmitting it to appellant:

"My father had been confined pretty much to his bed since October 1st, but in December he was allowed to move about a little bit and on December 19th, after the usual visit by the doctor early in the morning he took a partial bath about 10:00 o'clock in the morning and after 10:30 came downstairs. He came into the room which served as our office and took his check book and wrote that morning five different checks, and made an entry of two deposits in the bank. I had left the room, as I recollect, and then he called me back in and he handed me these five checks and told me to distribute them to the parties, and said, 'Send Mr. Collins' check'. * * * And then he left the office and I attended to the dictation, and he went on back upstairs and went to bed. And the nurse's report of that day showed that after he ate his lunch he slept all the rest of the afternoon. Q. And you then dictated the letter that day, being the letter of December 19th, 1938, and had it mailed with the check that has been received in evidence? A. Yes, sir." Said witness was then asked: "Q. Is there any other claim of indebtedness, or has there been any other claim of indebtedness say since the first of January, 1936, claimed to be owing by G. Sherman Collins, the Receiver of the Negaunee State Bank, upon your father, T. F. Cole, prior to his death, other than this claim based upon the liability of the 50 shares of stock in that bank? * * * A. Yes, that was the only claim."

[7] The letter of decedent to appellant written on June 8, 1937: "Referring to the matter of payments on account of stock assessment of the Negaunee State Bank: You realize it is mighty hard to have to raise money to pay for the mistakes of others; yet this is the situation. Relative to payments, I have been very busy * * * in order to take care of indebtedness such as this. I am thankful to be able to say at this time that I believe I can start payments on the stock liability of the Negaunee State Bank, but I want your assurances in this matter as to just what this amount of money which

I am supposed to owe, amounts to"; together with the check for $1,000 drawn and signed by decedent in favor of G. Sherman Collins, Receiver, Negaunee State Bank, and transmitted in a letter written by decedent's son, which identified the check as "part payment of the assessment levied on the stock of the Negaunee State Bank," constituted an unequivocal acknowledgment of an existing indebtedness without any intimation on the part of the decedent to refuse payment thereof, and was sufficient to toll the running of the statute of limitations.

[8] No mention is made by appellant in his briefs with respect to his appeal from the order denying his motion for leave to file an amendment to his claim, consequently, he is deemed to have abandoned the same.

The order disallowing and rejecting appellant receiver's claim is reversed, and the trial court is directed to overrule the objections made thereto, to reinstate and allow said claim and order it paid in the course of administration of above entitled estate. The appeal from the order denying motion for leave to file an amendment to said claim is dismissed.

DORAN and WHITE, JJ., concurred.

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52 Cal.App.2d 558

STRICKLIN v. ROSEMEYER et al.

Civ. 11807.

District Court of Appeal, First District, Division 2, California.

June 9, 1942.

Rehearing Denied July 9, 1942.

Hearing Denied Aug. 6, 1942.

1. Trial 🔑241

In motorist's action for injuries sustained when he was struck by trolley bus when alighting from left door of parked automobile, instruction, that violation of ordinance making it unlawful to be in road at place other than safety zone or crosswalk would be negligence as matter of law, was error, in view of invalidity of ordinance.

2. Trial 🔑194(17)

In motorist's action for injuries sustained when he was struck by trolley bus while alighting from left door of parked automobile, refusal to give instruction that alighting from left door was not of itself negligence and that standard of care required of motorist was the care an ordinary person of ordinary prudence would use under all the circumstances, and that motorist had right to alight from left door if he used ordinary care in so doing, was error, as against contention that instruction charged the jury on a question of fact.

3. Street railroads 🔑117(24)

Alighting from left door of automobile into street is not of itself "negligence", but is negligence if a person of ordinary prudence under all the circumstances then existing would not have done so.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

4. Trial 🔑253(4)

In motorist's action for injuries sustained when he was struck by trolley bus while alighting from left door of parked automobile, proposed instruction that motorist had right to alight from left door if he used ordinary care in so doing did not erroneously ignore plaintiff's possible negligence before beginning to alight.

5. Appeal and error 🔑1064(1), 1067

Error in giving and refusing to give instructions was prejudicial where jurors, after they retired, returned and sought further instructions on the same subject matter, and their vote in arriving at their verdict was close.

6. Street railroads 🔑117(24)

A motorist opening left door of automobile just far enough to get his feet on running board and leaning his head and shoulders out just far enough to look back for traffic approaching from his rear, including trolley bus which struck him almost immediately when he was in such position, was not contributorily negligent as a matter of law, so as to preclude recovery for his injuries from operators of trolley bus.

7. Street railroads 🔑118(8)

In action for injuries sustained by motorist who was struck by trolley bus while alighting from left door of parked automobile, instruction that trolley bus has the better right to that part of highway where it must necessarily be operated, and to which others must yield when necessary, was error.

◆

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Charles D. Stricklin against James C. Rosemeyer and others for injuries sustained when the plaintiff was struck by trolley bus operated by the defendants. From a judgment for the defendants, the plaintiff appeals.

Reversed.

For prior opinion, see, Cal.App., 123 P.2d 151.

Maurice C. Ryan, of San Francisco, for appellant.

Cyril Appel and Ivores R. Dains, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

Plaintiff received personal injuries as a result of being struck by a trolley bus operated by defendants. From a judgment for defendants entered pursuant to the verdict of a jury plaintiff prosecutes this appeal. The testimony was in sharp conflict as to the manner in which the collision resulting in plaintiff's injuries occurred. Plaintiff had parked his automobile in front of his home on the southerly side of Eighteenth Street in San Francisco between Douglass and Eureka Streets. While he was alighting from the left door of his automobile into the street the trolley bus which was proceeding easterly on Eighteenth Street struck him and his automobile.

The testimony most favorable to plaintiff was that the operator of the trolley bus was looking down making change for a passenger with the front doors of the trolley bus open and extending beyond the side of the bus and that the open doors first struck the rear of plaintiff's parked automobile and then grazed along its side striking plaintiff. Plaintiff had looked in his rear view mirror and seen no vehicle approaching, had looked out the left window of his automobile and likewise seen no vehicle. He then partly opened the left door, put one or both feet on the running board, leaned his head and shoulders out of the car to look for approaching traffic from the rear, saw the doors of the trolley bus almost instantly strike the rear of his automobile and a moment later was struck himself. It is undisputed that plaintiff had earlier, while making a U-turn at Douglass Street, seen the trolley bus and knew that it was proceeding generally in his direction on Eighteenth Street.

According to the evidence most favorable to defendants the trolley bus was passing plaintiff's parked car with a clearance of at least eighteen inches when plaintiff suddenly threw open the left door of his automobile, which when fully opened extended 22½ inches beyond the side of his automobile, and the front corner post of the trolley bus almost instantly struck the extended door.

The evidence was substantial to support either set of facts, and if plaintiff and his witnesses were believed by the jury a verdict in his favor would have found ample support in the evidence.

Defendants introduced into evidence a portion of section 20 of article III of the Traffic Code of the City and County of San Francisco reading as follows: "It shall be unlawful for any person to be in any roadway other than a safety zone or cross-walk; provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian."

The court instructed the jury that: "It is the law that a violation of a statute or ordinance constitutes negligence as a matter of law."

Appellant among his instructions originally proposed included the following which the court refused to give: "The plaintiff Charles Stricklin, is not to be charged with negligence merely because he alighted by the northerly door of his automobile. I instruct you that the standard of care required of the plaintiff in this action is ordinary care as will later be defined. It is the care an ordinary person of ordinary prudence would use under all the circumstances of the situation, and if you find that the plaintiff did use ordinary care in alighting from his automobile, I instruct you that the plaintiff had a right to alight therefrom by the northerly door."

After the jurors had retired to deliberate they returned to the court room seeking further instructions at which time the record shows the following colloquy:

"Juror John M. Nelson: I would like to ask one question: Is it against the law to walk out of the left side of the automobile?

"The Court: Well, I have given you all the instructions on that point that I feel apply to this case. I have given you instructions defining negligence and contributory negligence and I don't want to add anything further to what has been said on that."

Thereupon at the request of another juror the general instructions on contributory negligence were read to the jury and the jury retired. The case was not only close on the evidence but apparently close in the minds of the jurors since the verdict finally returned was shown upon the polling of the jury to have been reached by a vote of 9 to 3.

The question asked by the juror Nelson demonstrates that the members of the jury were concerned with the legal effect, if any, of the quoted section of the Traffic Code upon the conduct of the plaintiff in alighting from his car by the left door.

[1] The questions thus presented are controlled by Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482. Under the authority of that decision section 20, article III of the San Francisco Traffic Code is invalid, and it was error to instruct the jury that a violation of its provisions would be negligence as a matter of law.

[2, 3] It was likewise error to refuse to give plaintiff's proposed instruction above quoted. Respondents' counsel argue that the instruction as proposed would have charged the jury on a question of fact. We cannot agree with this argument. Read as a whole the proposed instruction is a clear and correct statement of the law. It is not the law in California that a person is to be charged with negligence merely because he alights from the left door of an automobile into the street. Lewis v. Memmler, 140 Cal.App. 364, 35 P.2d 406. The test is whether in so doing he was or was not exercising ordinary care in view of all the existing facts. It was for the jury to determine whether a person of ordinary prudence situated as plaintiff was and knowing what he knew would have acted as he did. If plaintiff should be held guilty of negligence it would not be merely because he alighted by the left door, but because under all the circumstances then existing a person of ordinary prudence would not have done so. If in view of all the circumstances a person of ordinary prudence would have alighted by the left door and in the manner that plaintiff did then plaintiff had a right so to alight. This was the effect of the instruction proposed.

[4] It is further urged that the proposed instruction ignores plaintiff's possible negligence before beginning to alight. The criticism is hypertechnical. "If you find that plaintiff did use ordinary care in alighting" would obviously include the observations that he made or did not make and the precautions that he took or did not take before beginning to alight. If he did not make the precedent observations that a man of ordinary prudence would have made, or take the precedent precautions that a man of ordinary prudence would have taken, then he did not use ordinary care in alighting from the automobile.

[5] That the plaintiff was prejudiced by the errors discussed is obvious from the question of the juror Nelson above quoted and the closeness of the jurors' votes in arriving at their verdict.

[6] It is clear that the jury might have found under the evidence that the plaintiff was not guilty of contributory negligence. Taking the view of the evidence most favorable to plaintiff the jury could have found that plaintiff opened the door of his automobile just far enough to get his feet on the running board and leaned his head and shoulders out just far enough to look back for traffic approaching from his rear, including the trolley coach which struck him almost immediately while he was in that position. Such conduct obviously would not constitute contributory negligence as a matter of law. Murphy v. St. Claire Brewing Co., 41 Cal.App.2d 535, 539, 107 P.2d 273.

The court gave the following instruction: "A trolley coach cannot go upon the street or highway except upon that part or portion of the street or highway where the trolleys attached to the coach can remain in contact with the overhead wires supplying the electric energy necessary to operate the coach, and hence it has the better right to that space or part of the highway where it must necessarily be operated, to which others must yield when necessary."

[7] The operator of the trolley bus testified that it could be driven beyond the center of the street. It stopped within three feet of the curb to take on passengers at Douglass Street. It is thus clear that on the side of the street on which it had a legal right to operate it was as mobile laterally as any ordinary vehicle. The in-

struction is based upon a rule of law applicable to street railway cars which can only operate upon fixed tracks and gives a better right to the space covered by the tracks for that reason. 23 Cal.Jur. p. 866. It can have no application to a vehicle which can be driven at any point from the curb to the middle of the street.

For the reasons given herein the judgment appealed from is reversed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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52 Cal.App.2d 581

PEABODY v. BARHAM et al.

Civ. 13481.

District Court of Appeal, Second District, Division 2, California.

June 9, 1942.

Hearing Denied Aug. 6, 1942.

1. Libel and slander 🔑6(1)

A publication is "libelous per se" when on its face and without the aid of innuendo it exposes a person to hatred, contempt, ridicule, or obloquy, or causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. Civ. Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Libelous Per Se".

2. Libel and slander 🔑19

Whether language used is "libelous per se" must be determined from the language itself, and no resort may be had to any declaration as to the meaning of the words or as to the intention of their author, and they must be construed apart from allegations of innuendo and inducement. Civ.Code, § 45.

3. Libel and slander 🔑19

In determining whether a publication is "libelous per se" its language must be given the natural and popular construction of the average reader. Civ.Code, § 45.

4. Libel and slander 🔑7(18)

The statement that named individual's divorcing wife was also his aunt was not "libelous per se", since statement did not necessarily mean that she was his consanguineal aunt, but might have meant that she was merely his affinitative aunt. Civ. Code, § 45.

5. Criminal law 🔑308

It is presumed that a person is innocent of crime and that the law has been obeyed.

6. Libel and slander 🔑19

Where offending language is susceptible of an innocent interpretation or has more than one meaning, it is not "actionable per se", and it will not be given a libelous character unless such is its plain and obvious import. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Actionable Per Se".

7. Libel and slander 🔑123(2)

It is the exclusive function of the court to determine whether a publication is a libel per se.

8. Libel and slander 🔑123(2)

Where publication is not libelous per se because language used has a covert meaning, it is for the jury to declare the true import of words used.

9. Libel and slander 🔑86(2)

Where alleged libelous words can be reasonably construed as not libelous, the plaintiff must plead by innuendo the libelous intent of the author.

10. Libel and slander 🔑81

In pleading ambiguous language into an actionable libel, the plaintiff must plead an "inducement," that is, circumstances which would indicate that words were understood in a defamatory sense showing that situation or opinion of readers was such that they derived a defamatory meaning from them. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Inducement".

11. Libel and slander 🔑89(1, 2)

Where language used is not libelous per se, the plaintiff must allege special damages by reason of meaning gained from publication by specifically designated parties affected by publication with items of losses suffered, and such names and losses must be alleged with particularity. Civ.Code, § 45.

12. Libel and slander 🔑89(2)

Where special damages allegedly resulting from libel are claimed to have resulted

from estrangement of friends or in hatred, contempt, or obloquy of contemporaries, names of persons affected must be set forth in the complaint together with value of losses suffered. Civ.Code, § 45.

13. Pleading ⚷18

Affirmative pleadings must give adversary party such notice of matters to be proved as will enable him to prepare to meet them at the trial.

14. Libel and slander ⚷89(2)

In libel action, where alleged libelous publication was not libelous per se, allegations that plaintiff had been injured in her good name, fame, and reputation and had suffered damage amounting to $50,000, that plaintiff was well known and had always conducted herself with propriety, constituted an insufficient allegation of special damages. Civ.Code, § 45.

◆

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge pro tem.

Action by Eddie Maude Peabody against Frank F. Barham and others to recover damages for libel. From a judgment of nonsuit, the plaintiff appeals.

Judgment affirmed.

Hearing denied; CARTER, J., dissenting.

Stanton & Stanton and J. Marion Wright, all of Los Angeles, for appellant.

Flint & MacKay, Edward L. Compton and Donald W. Hamblin, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit. The complaint charged that the defendants wrongfully defamed plaintiff and brought her into contempt and ridicule by publishing in the columns of a widely circulated daily the following statement: "Eddie Peabody's divorcing wife, ten years his senior, is also his aunt." The innuendo which follows the alleged libelous words sets forth that the article referred to plaintiff's husband, Edwin Ellsworth Peabody; that by the phrase "divorcing wife" defendants intended to designate plaintiff and that by the expression "Eddie Peabody's divorcing wife * * * also his aunt" defendants intended to imply that plaintiff and her husband contracted an incestuous marriage; that the article was so understood by its readers; and that such marriage was contrary to law and therefore void. Nonsuit was granted after plaintiff had introduced her evidence.

In support of the judgment defendants submit that: (1) The publication was not libelous per se because it was susceptible of an innocent interpretation; (2) that if the language is not libelous per se no cause of action is stated because no special damages are pleaded; (3) that the court properly excluded the evidence offered in proof of special damages.

[1-3] (1) A publication is libelous per se when on its face and without the aid of innuendo, it exposes a person to hatred, contempt, ridicule or obloquy or causes him to be shunned or avoided or which has a tendency to injure him in his occupation. Civ. Code, § 45. Whether the language used is libelous per se must be determined from the language itself. Mortensen v. Los Angeles Examiner, 112 Cal. App. 194, 296 P. 927. In order to determine whether it is libelous per se no resort may be had to any declaration as to the meaning of the words or as to the intention of their author; it must be construed apart from allegations of innuendo and inducement. Holway v. World Publishing Co., 171 Okl. 306, 44 P.2d 881; Kassowitz v. Sentinel Co., 226 Wis. 468, 277 N.W. 177; Ellsworth v. Martindale-Hubbell Law Directory, 66 N.D. 578, 268 N.W. 400, 408; Tulsa Tribune Co. v. Kight, 174 Okl. 359, 50 P.2d 350; Grand v. Dreyfus, 122 Cal. 58, 54 P. 389; Noral v. Hearst Publications, Inc., 40 Cal.App.2d 348, 104 P.2d 860. Also in determining whether a publication is libelous per se, its language must be given the natural and popular construction of the average reader. Western Broadcast Co. v. Times-Mirror Co., 14 Cal. App.2d 120, 124, 57 P.2d 977.

[4, 5] The offensive imputations of the article complained of by plaintiff is found in the phrases "Eddie Peabody's divorcing wife * * * is also his aunt." In order to constitute these words a libel, it is necessary so to construe their meaning as to make plaintiff and her husband guilty of a crime, to wit, an incestuous marriage. To do so would require the reader to assume that the words used could have no implication other than that plaintiff was the consanguineal aunt of her husband. Also it would require the denial of the strongest of disputable presumptions that a person is innocent of crime and that the

law has been obeyed. 10 Cal.Jur. § 74, p. 762.

[6, 7] When offending language is susceptible of an innocent interpretation it is not actionable per se. Neither will language be given a libelous character unless such is its plain and obvious import. Dillard v. Shattuck, 36 N.M. 202, 11 P.2d 543, 546. Neither is it actionable per se if the offending language has more than one meaning. Ruble v. Kirkwood, 125 Or. 316, 266 P. 252; Manley v. Harer, 73 Mont. 253, 235 P. 757, 759. The publication that plaintiff was the aunt of her husband is not essentially libelous for the reason that one's aunt may be consanguineal or affinitative. Certainly it is not a crime nor the breach of any sacred custom for a man to marry the widow of his consanguineal uncle. Such occurrences are not unknown in highly respectable circles. It is the exclusive function of the court to determine whether the publication is a libel per se. Mortensen v. Los Angeles Examiner, supra; Dauphiny v. Buhne, 153 Cal. 757, 764, 96 P. 880, 126 Am.St.Rep. 136.

In the instant case if the offending language on its face could have meant that plaintiff was her husband's aunt by her former marriage, then it could not have been libelous per se.

[8-11] (2) Where the publication is not libelous per se because the language used has a covert meaning, it is for the jury, under proper pleadings and instructions, to declare the true import of the words used. Hearne v. De Young, 119 Cal. 670, 680, 52 P. 150, 499. If the words used can be by reasonable interpretation construed to be free of libelous significance, then in order to ascribe to them such character, it is necessary for plaintiff to plead by innuendo the libelous intent of the author. Bates v. Campbell, 213 Cal. 438, 2 P.2d 383. In order to plead such ambiguous language into an actionable libel, however, it is incumbent upon the plaintiff also to plead an inducement, that is to say, circumstances which would indicate that the words were understood in a defamatory sense showing that the situation or opinion of the readers was such that they derived a defamatory meaning from them. 12 So.Cal. Law Rev. 225, 239-242. But in addition to an allegation of the inducement it is also necessary for plaintiff to allege special damages by reason of the meaning gained from the publication by specifically designated parties affected by the publication with the items of losses suffered in each instance. Such names and such losses must be alleged with particularity. Sweeney & Co. v. Brown, 249 Ky. 116, 60 S.W.2d 381, 384; Note, 86 A.L.R. 848; 17 R.C.L. 391.

[12, 13] Where the detriment suffered by plaintiff is alleged to have resulted from the estrangement of friends or in the hatred, contempt or obloquy of contemporaries, then the names of such persons so affected must be set forth in the complaint, together with the value of the losses suffered. It is a rule of ancient origin that affirmative pleadings must give the adversary party such notice of the matters to be proved as will enable him to prepare to meet them at the trial. Such matters not having been included in the complaint in the instant case, it fails to meet the requirements of the law.

[14] The only reference in the complaint to damage is the allegation of general damage which declares that by reason of the publication of the "defamatory article * * * plaintiff has been by it injured in her good name, fame and reputation and has suffered damage thereby in the sum of $50,000." The only other language by which plaintiff attempted to allege facts appertaining to injuries which she might have suffered is found in the following language: "that plaintiff herein has for twelve years last past been in close contact with the public throughout the state of California and neighboring states, wherein the newspaper of said defendant Hearst Publications, Incorporated, is distributed and throughout the United States; that in her said career she has acquired a wide acquaintanceship; that plaintiff has always conducted herself with propriety * * *." These allegations utterly fail to meet the requirements for alleging special damages.

There is nothing in the complaint from which it may be fairly inferred that plaintiff suffered injury as a natural and proximate consequence of the publication complained of. Townshend on Slander and Libel, 3d Ed., §§ 146, 148. The absence of such allegation and of the allegation of special damages renders plaintiff's complaint utterly inadequate to warrant an inquiry into the results of the publication.

In view of our conclusions with reference to the insufficiency of the pleading, it will be unnecessary to discuss the rulings of the court in excluding the testimony sought to be adduced in proof of special damages.

Judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

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52 Cal.App.2d 665

O'MEARA v. DeLAMATER et al.

Civ. 2833.

District Court of Appeal, Fourth District, California.

June 10, 1942.

1. Limitation of actions 🔑112, 179(1)

The Moratorium Act extends the period of the limitation statute whether or not an application for relief is made before the time when the limitation statute would otherwise run, and hence filing of an action to foreclose a mortgage during the extended time is sufficient and it is unnecessary to plead the act as a condition to reliance thereon. Code Civ.Proc. § 337, subd. 1; St.1937, p. 460; St.1939, p. 1045.

2. Mortgages 🔑268, 269

Where mortgage which executrix sought to foreclose had been assigned by mortgagee to mortgagor which still owned legal title to the mortgaged premises, the assignment "merged" the equitable and legal title and "extinguished" the mortgage, and hence the mortgage could not be foreclosed and its subsequent assignment to executrix' testator could not revive the mortgage.

See Words and Phrases, Permanent Edition, for all other definitions of "Extinguish" and "Merge".

3. Mortgages 🔑15

While an additional promise of a debtor to pay money cannot be treated as collateral security for his own debt, a debtor may secure his second note by a mortgage on property and such mortgage may be treated as collateral to the principal debt.

4. Pleading 🔑343

In executrix' action to foreclose mortgage assigned to testator as collateral security by mortgagor holding legal title after assignment by mortgagee to mortgagor, where complaint neither alleged facts entitling executrix to rely upon and foreclose the extinguished mortgage nor attempted to set forth a cause of action upon the principal debt, further proof was necessary to show that executrix was entitled to judgment and hence complaint was insufficient to justify judgment upon the pleadings for executrix.

5. Appeal and error 🔑103, 870(5)

Orders granting plaintiff's motion for judgment on the pleadings and denying defendant's motion for summary judgment were not appealable but were reviewable on appeal from the judgment.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Nora O'Meara, as executrix of the estate of Frank J. Monahan, deceased, against George E. DeLamater and others on a note and to foreclose a mortgage. From a judgment of foreclosure and from an order granting plaintiff's motion for judgment on the pleadings, and from an order denying defendant's motion for a similar judgment, defendants appeal.

Appeal from orders dismissed. Judgment reversed.

Monroe & McInnis, of San Diego, for appellants.

Green & Morrison and Vern B. Thomas, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment foreclosing a mortgage, from an order granting the plaintiff's motion for judgment on the pleadings, and from an order denying the defendants' motion for a similar judgment.

The complaint alleges that on September 8, 1930, the Southern California Home Building Company, which will be referred to as the building company, executed and delivered to Clarence D. DeLamater and George E. DeLamater a mortgage securing its note for $3,000, payable in five years. A copy of this note is set forth in the complaint and a copy of this mortgage, which was duly recorded, is attached thereto. It is then alleged that on August 15, 1932, the two DeLamaters assigned this note and mortgage back to the building company, the assignment being recorded, and that on January 23, 1933, the building company assigned this note and mortgage to Frank J.

Monahan, the plaintiff's testator. A copy of this assignment, which was recorded, is attached to the complaint and contains a statement that the assignment is made "as collateral" for a note of $1,500. It is then alleged "that a balance of $1,500 of the original principal amount of said note and mortgage," with certain interest, remains unpaid and the prayer is for judgment on said note and for foreclosure of the mortgage in the usual manner.

The defendants answered, alleging that the note and mortgage referred to in the complaint were assigned by the building company to Monahan as collateral for another note for $1,500 which was then executed by the building company and delivered to Monahan. The answers also set up the defense that the note and mortgage described in the complaint are barred by the statute of limitations under section 337, subdivision 1, Code of Civil Procedure.

The plaintiff moved for judgment on the ground that no defense to the action had been set forth in the answers. In support of this motion she filed an affidavit in which she admitted that the note and mortgage sued upon were assigned to Frank J. Monahan as collateral security for a note for $1,500, given to Monahan by the building company, dated January 23, 1933, payable three years after date. From a copy of this note, which is set forth in this affidavit, it appears that this note contains the statement "this note secured by mortgage on Lot 22, Block 11, Normal Heights," which is the same property mentioned in the mortgage sued upon, but it nowhere appears that the mortgage sued upon is the one to which this note refers. The defendants also moved for summary judgment on the pleadings. The two motions were heard together, the plaintiff's being granted and the defendants' denied, and this appeal followed.

[1] The appellants base their contention that they were entitled to a judgment on the pleadings upon the fact that the statute of limitations had run on the $3,000 note sued upon and that the mortgage incidental to it could not be foreclosed as more than four years had elapsed since the maturity date of the note, and upon the further fact that the complaint contained no reference to the Moratorium Act, as enacted in 1937, St.1937, p. 460, or in 1939, St.1939, p. 1045, and contained no allegation with respect to any application on the part of the respondent claiming the benefits of the Moratorium Act. It clearly appears that both the note sued upon and the other note mentioned in the affidavit were barred by the statute of limitations at the time this action was brought unless respondent was entitled to the benefits of the Moratorium Act. The question here presented is whether the respondent lost the benefits of the Moratorium Act by failing to plead that act or to allege in her complaint that she had made application for its benefits. The appellant's contentions in this regard cannot be sustained. It is now settled that the provisions of the Moratorium Act serve to extend the period of the statute of limitations whether or not an application for relief is made before the time when the statute would otherwise run. Harris v. Fitting, 9 Cal.2d 117, 69 P.2d 833; Bakersfield, etc., Co. v. J. K. McAlpine, etc., Co., 26 Cal.App.2d 444, 79 P.2d 410. Moreover, since the effect of the Moratorium Act is to extend the period during which an action may be brought, the filing of an action during the extended time is sufficient, and it is unnecessary to plead the act as a condition to reliance thereon.

[2] On the other hand, it does not follow that the respondent was entitled to a judgment on the pleadings. The action was brought upon the original note given by the building company to the DeLamaters and to foreclose the mortgage given as security therefor. The action sought a sale of certain land through the lien afforded by that mortgage. It appears, however, that the mortgage which is thus relied upon, together with the note it secured, had been assigned by the DeLamaters back to the building company which had given the mortgage and which, so far as here appears, still owned the legal title to the property. Insofar as disclosed by the pleadings or by the record before us, this assignment back to the maker of the note and mortgage merged the equitable title with the legal title and extinguished the mortgage. Dodds v. Spring, 174 Cal. 412, 163 P. 351. It follows that the mortgage could not then be foreclosed and its subsequent assignment to a third party could not revive it. It is true that, under certain circumstances, a court of equity may treat such a mortgage as still subsisting (Craig v. Gomes, 47 Cal.App. 728, 190 P. 1060), but no circumstances justifying such an exception are here alleged. It may also have been possible to set forth a cause of action upon the new note, with appropriate facts justifying

a holding that there was an equitable mortgage securing that note and awarding foreclosure thereof. Title Ins., etc., Co. v. California Dev. Co., 171 Cal. 173, 152 P. 542. But no such facts or circumstances are here alleged.

[3, 4] While an additional promise of a debtor to pay money cannot be treated as collateral security for his own debt (Anglo-California T. Co. v. Oakland Rys., 193 Cal. 451, 225 P. 452), a debtor may secure his second note by a mortgage on property, in which event the mortgage may be treated as collateral to the principal debt. In the instant case the debtor seems to have merely transferred to Monahan a non-existent mortgage, and the complaint neither alleges facts entitling the respondent to rely upon and to foreclose the extinguished mortgage nor attempts to set forth a cause of action upon the principal debt. Further explanation or proof was necessary to show that the respondent was entitled to judgment. We conclude that, under the circumstances here appearing, the allegations of the complaint were not sufficient as they stood to justify a summary judgment in her favor upon the pleadings.

[5] The two orders appealed from are not appealable orders, although they may be reviewed on the appeal from the judgment. The appeal from the respective orders is dismissed, and the judgment is reversed.

MARKS and GRIFFIN, JJ., concurred.

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52 Cal.App.2d 547

BRADBURY v. BRADBURY.

Civ. 13576.

District Court of Appeal, Second District, Division 2, California.

June 8, 1942.

1. Appeal and error ⚷1011(1)

Trial court's finding on conflicting evidence that former husband had agreed to sell certain community property and remit one-half of the proceeds to former wife, that such agreement was made after wife had informed husband that she intended to divorce him, and that agreement was not conditioned upon wife's obtaining a divorce and that agreement did not have as its object the dissolution of the marriage relation, could not be disturbed on appeal.

2. Trusts ⚷110

In action by former wife for decree that former husband holds certain community property in trust for the parties, findings in favor of wife were sustained by the evidence.

◆

Appeal from Superior Court, Los Angeles County; Rex Hardy, Judge Assigned.

Action by Audrey Bradbury against Victor A. Bradbury for a decree that defendant holds certain property in trust for plaintiff and defendant in equal interests. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Thomas W. Clarke, of North Hollywood, and Earl D. Killion, of Los Angeles, for appellant.

Blau & Silbert, Louis C. Blau, and Bernard M. Silbert, all of Hollywood, for respondent.

JESS E. STEPHENS, Justice pro tem.

Plaintiff and defendant were married on July 6, 1926. Marital troubles having arisen between them, plaintiff announced to defendant in May, 1939, after some twelve years of married life and strife, that she had decided to leave California and establish her residence in another state, and that she would there secure a divorce from him. At the same time she exhibited to defendant her bus ticket, which she had already purchased pursuant to her expressed intention. Upon the following day defendant presented to plaintiff and requested her to sign a deed conveying to him the home place, which they had acquired since their marriage by their joint efforts and which was held by them in joint tenancy. He stated that by this transfer to him he would be enabled to and would sell the property in her absence and transmit one-half of the proceeds to her. She had confidence in his integrity in spite of their marital inharmony, and, relying thereon and upon the truth of his representations and his good faith in carrying out his agreement to sell the property and transmit one-half the proceeds to her, executed the deed and he placed it of record. Thereafter she went to the State of Idaho, where she obtained employment and established her residence and thereafter secured a decree of divorce from defendant. In this decree no mention is made of the property. She subsequently returned to California and demanded that defendant either sell the real property and divide the proceeds as agreed or reconvey to her the one-half interest therein. He refused to do either and she thereupon brought this action, reciting the facts substantially as above related, and prayed for a decree declaring that defendant holds said property in trust for plaintiff and defendant in equal interests. The complaint also alleges the existence of certain additional community property, consisting of a small amount of household furniture and an equity in an automobile, and seeks similar relief as to it.

Defendant denies the alleged agreement and alleges that the parties had entered into an oral agreement pursuant to which plaintiff executed the above deed and also surrendered to him all of her right, title and interest in their community and joint tenancy property, and waived all claims against him for alimony or support, and that the consideration therefor was that plaintiff would leave the jurisdiction of the State of California and obtain an uncontested divorce from him in another state. He argues that such an agreement is contra bonos mores and will not be enforced by the courts, and that equity should refrain from extending relief to the parties to such an agreement.

[1] While it is true that the courts will not countenance a contract "having for its object the dissolution of the marriage contract, or facilitating that result" (Howard v. Adams, 16 Cal.2d 253, 256, 105 P.2d 971, 973, 130 A.L.R. 1003), we need not here enter into any discussion of that principle. The trial court, upon conflicting evidence, found the facts to be as alleged in plaintiff's complaint, and specifically found that the agreement between the parties with respect to the division of the property was entered into after plaintiff had informed defendant that she was through with him and was going to divorce him, and that said agreement was not conditioned upon her obtaining a divorce; "nor did said agreement have as its object the dissolution of the marriage relationship existing between the parties nor did said agreement facilitate or induce the procuring of a divorce by the plaintiff." Under such conditions it is thoroughly established that the decision of the trial court may not be disturbed on appeal.

[2] There is no basis for the claim that the findings are without support in the evidence. Plaintiff's testimony fully covers every fact found, except the finding that the agreement for disposal and division of the property included the personal property described in the complaint. However, the evidence shows without question that this is community property, and it therefore was properly disposed of in the decree. Consequently no injury results from such finding.

There is no merit in appellant's contention that error was committed in the denial of his motion for new trial.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.

SCUDDER FOOD PRODUCTS, Inc., v. GINSBERG et al.

Civ. 11989.

District Court of Appeal, First District, Division 2, California.

June 9, 1942.

Rehearing Denied July 9, 1942.

Hearing Granted Aug. 6, 1942.

1. Trade-marks and trade-names and unfair competition ⇨68(1)

Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, so long as the methods employed do not involve wrongful conduct such as fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or procurement of violation of contractual relations.

2. Trade-marks and trade-names and unfair competition ⇨92

In action to restrain unfair dealing, a complaint alleging that plaintiff's products were put in packages with distinctive characteristics and designs and that defendant imitated such packages and containers with intent to deceive, was demurrable where the attached exhibits showed merely a similarity in respect of features common to the public and did not show deception from similarity of some feature of defendant's packages to a distinctive or peculiar feature of plaintiff's.

3. Trade-marks and trade-names and unfair competition ⚷92

In action to restrain unfair dealing, a complaint alleging that peanut butter labels on plaintiff's products had been imitated by defendant with intent to deceive was demurrable where the attached exhibits revealed a difference so pronounced that any one of ordinary eyesight and ability to read could not be misled.

4. Trade-marks and trade-names and unfair competition ⚷3(4, 5)

Words or phrases which have been in common use, and which indicate the character, kind, quality and composition of the thing, may not be appropriated by any one to his exclusive use.

5. Trade-marks and trade-names and unfair competition ⚷70(1)

Generally, no trader can adopt a trademark so resembling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled.

6. Trade-marks and trade-names and unfair competition ⚷92

In action to restrain unfair dealing, a complaint alleging that plaintiff and defendant each put up the same size package of potato chips, that defendant printed in large red figures "25¢" on each package and instructed its dealers to sell the same for 15 cents and that such acts were done for the purpose of defrauding the public and plaintiff in particular, was demurrable since the alleged acts were not unlawful.

7. Trade-marks and trade-names and unfair competition ⚷92

In action to restrain unfair dealing, a complaint which was demurrable because the acts alleged to have been done by defendant were not unlawful, does not state a cause of action merely because it further alleged that defendant acted with a bad motive, since an act lawful in itself is not converted by a bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Scudder Food Products, Incorporated, against Max I. Ginsberg and others to restrain defendants from alleged unfair trade dealing. From a judgment sustaining demurrer to complaint, plaintiff appeals.

Affirmed.

W. I. Gilbert, Jr., of Los Angeles, for appellant.

Sherman & Sherman and W. B. Thomas, all of Los Angeles, for respondents.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendants to obtain an injunction restraining the defendants from unfair trade dealing. Its complaint contained five separate counts. The defendants appeared and filed a demurrer. The demurrer was sustained and from the judgment the plaintiff has appealed.

In its brief the plaintiff sets forth an abstract of the first count. In substance that abstract is as follows. The plaintiff is and since 1929 has been a corporation; that Max I. Ginsberg, Jeanette Ginsberg and Sol Gendel are directors of Bell Nut Products, a corporation in dissolution; that Max I. Ginsberg is and has been doing business under the name of Bell Potato Chip & Pretzel Co.; that Max I. Ginsberg is and has been doing business under the name of Los Angeles Saratoga Chip & Pretzel Co.; that plaitniff has been engaged in manufacturing food products in southern California and has built up a valuable good will; that it puts up its products in containers and packages with distinctive characteristic labels and designs; that defendants have imitated such distinctive and characteristic containers and packages together with the labels and designs; that among others since February 1, 1940, plaintiff has put up a certain bag containing twelve ounces of merchandise; that said bag is attached as Exhibit A; that within four months thereafter defendants put up a similar bag, a sample of which is attached to the complaint and marked Exhibit B; that plaintiff's mode of packing became associated in the mind of the public with plaintiff's goods and that except for the defendants' acts the public could have continued to easily and readily and without the necessity of close reading identify plaintiff's merchandise; that defendants' acts are for the express purpose of misleading the public; that the similarity in packages is such that the public are and have been misled; and that by reason of the acts of defendants plaintiff has been damaged in the sum of $25,000. The second count contains similar allegations but with reference to a different package or container. One of the plaintiff's containers is annexed as Exhibit C, and one of defendants' containers is annexed as Exhibit D. Damages in the sum of $25,000 are alleged in that count also. In the third count similar facts are alleged regarding a three pound box. No exhibit is attached but the plaintiff's box is described in detail and the defendants' box is also described in detail. Damages in the sum of $25,000 are also alleged. The fourth count contains similar averments regarding a label used by the plaintiff. A copy is set forth as Exhibit E. The defendants' label is set forth as Exhibit G. Damages in the sum of $25,000 are also alleged. The fifth count alleges similar facts and describes a package of potato chips put up by the plaintiff which contains a weight of seven ounces. In paragraph III it is alleged that defendants offer a bag of light weight for sale, showing on the face thereof a price of 25 cents, instructing the retail dealers, however, to sell this bag for 15 cents. In paragraph IV it is alleged that the arrangements alleged in paragraph III lead the purchasing public to believe they are getting 25 cents of potato chips for 15 cents, if they shop with defendants, but they do not get 25 cents worth of potato chips for 15 cents, when they shop with the plaintiff. It is alleged that this device is used in order to induce purchasers who purchase from the plaintiff to purchase from the defendants. It is further alleged that the acts stated are done with a fraudulent intent to injure and divert the business of the plaintiff and to deprive plaintiff of profits which would otherwise accrue. Damages under this count are also alleged in the sum of $25,000.

[1] Before proceeding further it should be noted that the foregoing pleading does not even purport to allege that either party had a trade-mark nor that a trade-mark has been infringed. Sun-Maid Raisin Growers v. Mosesian, 84 Cal.App. 485, 258 P. 630, and cases there cited, need not be discussed. Nor is it claimed that the trade name of a store or the proprietor has been pirated. It is therefore patent that American Automobile Ass'n v. American Automobile O. Ass'n, 216 Cal. 125, 13 P.2d 707, 83 A.L.R. 699, and cases there cited, need not be dwelt upon. Nor is any attempt made by the plaintiff to allege that it was the first in the field of action to use a specific trade name and had built up an established trade thereunder and that the defendants were newcomers who have attempted, and are now attempting, to pirate the plaintiff's trade name and established trade. It follows that the case entitled Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 P. 142, 30 L.R.A. 182, 50 Am.St. Rep. 57, is not necessarily controlling. Nevertheless the question remains whether the plaintiff has a cause of action against the defendants by reason of unfair competition. 24 Cal.Jur. 628. In Katz v. Kapper, 7 Cal.App.2d 1, 4, 44 P.2d 1060, 1061, the court said: "In deciding whether the conduct of defendants, alleged in the complaint is actionable, it is necessary to apply certain well-settled rules relating to competition in business. These may be generally stated as follows: 'Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, but every trader is left to conduct his business in his own way, so long as the methods he employs do not involve wrongful conduct such as fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, or the procurement of the violation of contractual relations. If disturbance or loss comes as the result of competition, or the exercise of like rights by others, as where a merchant undersells or oversells his neighbor, it is damnum absque injuria.' 15 R.C.L., p. 73, and cases cited."

[2] Counts 1 and 2 being the same except they are addressed to different sized packages and containers may be considered together. In those counts the plaintiff has pleaded exhibits. Such exhibits show the defendants are using such colors, printing, paper, boxes, and combinations of color, printing, and arrangement as any one engaged in trade is entitled to use and therefore the plaintiff may not complain. They are all common to the public. "Plaintiff must show deception arising from some feature of its own, not common to the public." Southern California F. Co. v. White Star C. Co., 45 Cal.App. 426, 430, 187 P. 981, 983. In said counts plaintiff has not stated a cause of action. The allegation of "imitation" frequently made adds nothing to the pleading regarding matters common to the public.

Count 3 does not plead exhibits. However paragraph 2 pleads a detailed description of plaintiff's three-pound box and paragraph 3 pleads a detailed description of defendants' three-pound box. All that we have said with reference to counts 1 and 2 is equally applicable to count 3.

[3-5] Count 4 is addressed to labels. Exhibits are attached showing plaintiff's label and defendants' label on similar products. They are different and the difference is so pronounced that one who runs may read. Both sets are the labels used respectively by the plaintiff and defendants on their packages of peanut butter. Said labels include two sets for each package. Exhibit E is plaintiff's. It is an oval the size of a turkey egg. Exhibit F is defendants'. It is a bell 2¼ inches high and 2¼ inches in diameter. Both have a dark navy blue background. Both have lettering in gold. Each has the words "Peanut Butter" printed thereon. There is not another similar feature. The other set has a yellow background. Each label has some printing in red, some in black, some in white. On the plaintiff's there is a blue bird. On the defendants' there is a blue bell. Speaking of a similar contention, in Purity Springs W. Co. v. Redwood Ice Delivery, 203 Cal. 286, 289, 263 P. 810, 811, the court said: "Without attempting to convey the exact contour and form of said labels or their complete wording, it is sufficient to say that they are utterly dissimilar in shape, design, lettering, size, wording and coloring. A most casual glance should reveal to any purchaser by what company the water is sold." Injunction was denied. Again in Italian Swiss Colony v. Italian Vineyard Co., 158 Cal. 252, at page 257, 110 P. 913, at page 915, 32 L.R.A.,N.S., 439, the court said: "'There is no principle more firmly settled in the law of trade-marks than that words or phrases which have been in common use, and which indicate the character, kind, quality, and composition of the thing, may not be appropriated by any one to his exclusive use.' Caswell v. Davis, 58 N.Y. 223, 17 Am.Rep. 233; Amoskeag Mfg. Co. v. Spear & Ripley, 2 Sandf., N.Y., 599; * * *. This rule, fundamental in the law of trade-marks, finds statutory recognition in section 991 of the Civil Code, which prohibits the appropriation as a trade-mark of 'any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on.'" And in Schmidt v. Brieg, 100 Cal. 672, at page 681, 35 P. 623, at page 625, 22 L.R.A. 790, the court quoted with approval as follows: "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader as that *ordinary* purchasers buying with *ordinary* caution are likely to be misled." (Italics ours.) So in the instant case any one who can read common print and has ordinary sight cannot possibly be imposed upon by taking the labels of the defendants for the labels of the plaintiff.

[6, 7] The fifth count is based on a distinctly different theory from the theory underlying the other four counts. The plaintiff alleges that each party puts up a seven ounce package of potato chips. The defendants print in large figures, one inch high, in a flaming red color, "25¢" on each package. But they instruct the dealers to sell for 15 cents. There is no allegation what the sales price of plaintiff's package is. There are numerous allegations to the effect that defendants' acts are for the purpose of defrauding the public and the plaintiff in particular. The latter cites no authority and we know of none showing the alleged acts of defendants to be actionable. Assuming, although it is not alleged, that the defendants cause the dealers to mark the packages by scratching the "25¢" and writing thereon "15¢," such conduct is, we think, a trade practice of which no one may complain.

Returning to counts 1, 2, 3 and 4, if we correctly understand the plaintiff's contentions, they are not at variance with any rule of law we have cited. However, the plaintiff relies on the sequence of events and charges the defendants with imitation apparently under the impression that imitation is per se actionable. That impression is not sustained by the authorities as clearly appears from what is said in Southern California F. Co. v. White Star C. Co., supra. Again, on page 13 of the plaintiff's brief it speaks of the ruling of the trial court and says: "The court's action could be correct only if it appears as a matter of law, by viewing the exhibits that confusion cannot arise, no matter what defendants' motives may be." If by that statement the plaintiff means that if the defendants exercise rights common to the general public but that in doing so they acted with a bad motive, then the trial court should have overruled the demurrers, such contention is not sustained by the authorities. It is settled law in this state that "An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action." Parkinson Co. v. Building Trades Council, 154 Cal. 581, 595, 98 P. 1027, 1033, 21 L.R.A.,N.S., 550, 16 Ann. Cas. 1165.

We find no error in the record. The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

PEOPLE v. LAMARR. *

Cr. 3550.

District Court of Appeal, Second District, Division 3, California.

June 5, 1942.

Hearing Granted July 2, 1942.

See 128 P.2d 345.

1. Bigamy 🔑1

Accused was not entitled to acquittal of bigamy because he proved that at time of his second marriage, alleged in information to be the lawful marriage, he was legally married to another and remained such other's husband at time of third and allegedly bigamous marriage, since if at time of third marriage, accused was already validly married to any spouse, he became guilty of "bigamy" on the third marriage. Pen.Code, § 281.

See Words and Phrases, Permanent Edition, for all other definitions of "Bigamy".

2. Bigamy 🔑1

If no valid prior marriage is proved, alleged bigamous marriage is in fact a legal marriage, but if any valid prior existing marriage is proved, then status of accused as a married person is established and a subsequent marriage during existence of such status is "bigamous". Pen.Code, § 281.

See Words and Phrases, Permanent Edition, for all other definitions of "Bigamous".

3. Indictment and Information 🔑101

A misnomer in information of spouse, marriage to whom established the status of defendant as a married person is not necessarily fatal to judgment of conviction of bigamy. Pen.Code, § 281.

4. Bigamy 🔑1

The essential things for pleading and proof to show to establish "bigamy" are the previously established status of defendant as a married person and his additional marriage during continuance of that status. Pen.Code, § 281.

5. Bigamy 🔑5

The name of person with whom, and to some extent the place where and the date when bigamous marriage took place are important to protect defendant against being placed in jeopardy more than once, but the name of person with whom and place where and time when marriage establishing status was consummated are important only to extent that defendant be not prejudiced in preparing his defense on facts tending to establish such status. Pen.Code, § 281.

6. Criminal law 🔑1186(1)

A mistake of law as to what would constitute a technical defense is no ground for reversal of judgment since a "mistake of fact" is where a person understands the facts to be other than they are, whereas a "mistake of law" is where a person knows the facts as they really are but has a mistaken belief as to legal consequences of those facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake of Fact" and "Mistake of Law".

7. Bigamy 🔑2

Proof of valid existing marriage at time of marriage alleged in information to be the first or status-establishing marriage may or may not constitute a defense to bigamy, since if it existed at time of alleged first marriage but was dissolved before alleged bigamous marriage, it constitutes a defense because then alleged bigamous marriage is in fact valid, but if first marriage continues from time previous to first alleged marriage, through time when alleged bigamous marriage was contracted, then such proof supports conviction. Pen.Code, § 281.

8. Indictment and Information 🔑171

The test of "materiality" of a variance is whether indictment or information so

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* Subsequent opinion 128 P.2d 345.

fully informs defendant of criminal act with which he is charged that taking into consideration the proof, he is not misled in making his defense or placed in danger of being twice put in jeopardy for same offense. Pen. Code, § 1151.

See **Words and Phrases, Permanent Edition, for all other definitions of "Material Variance".**

9. Bigamy 🔑5

Where accused showed that at time of his second marriage, alleged in information to be the lawful marriage, he was legally married to another and remained such other's husband at time of third and allegedly bigamous marriage, any variance between information and proof was not "material". Pen.Code, §§ 281, 1151.

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Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Reginald Raymond Lamarr was convicted of bigamy, and he appeals.

Affirmed.

Donald Kolts, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

SCHAUER, Presiding Justice.

Defendant appeals from a judgment convicting him of the crime of bigamy under section 281 of the Penal Code, and from an order denying his motion for a new trial. The pertinent facts developed at the trial are as follows: On May 24, 1929, defendant married one Wally Meyer Lamarr in San Francisco, California; on March 20, 1935, he married Selma Lamarr in Ventura, California, while his marriage to Wally Meyer Lamarr was still in effect; and on November 23 or 24, 1938, he married Josephine Lamarr at Yuma, Arizona, neither of the two earlier marriages having been theretofore annulled or dissolved by divorce or death of a contracting party. The three wives were present in court and testified at the trial. Section 281 of the Penal Code provides that "Every person having a husband or wife living, who marries any other person, except * * * [in certain situations not existing here], is guilty of bigamy."

The amended information, upon which defendant was convicted, alleged "That the said Reginald Raymond Lamarr on or about the *23rd* day of *November*, 1938, at Yu*n*a, Arizona, ~~at and in the County of Los Angeles, State of California,~~ did knowingly, willfully, ~~unlawfully~~ and feloniously marry one Josephine Roney, said defendant being then and there the lawful husband of another person to-wit: Mrs. Selma Lamarr, then and there living, the marriage of said defendant and said Mrs. Selma Lamarr not having been annulled or dissolved and said defendant and said Josephine Roney having thereafter cohabited together as husband and wife in the County of Los Angeles, State of California. * * *" It was not until the trial that, by the testimony of defendant and of defendant's witness, Wally Meyer Lamarr, the fact of defendant's marriage to Wally Meyer Lamarr previous to his other two marriages was disclosed. Although some question is raised in the appeal briefs of the parties as to whether the trial court accepted the testimony of defendant and of Wally Meyer Lamarr concerning their marriage to each other, and as to whether the court may have drawn an inference of a divorce between them before defendant contracted his next marriage, to Selma Lamarr, we find no indication in the record as to the relative weight given by the trial court to the testimony of the various witnesses or as to the inferences deducible therefrom, and so proceed on the basis of the facts as set forth above.

[1-5] Defendant contends, chiefly, that he could not be convicted under the allegations of the amended information for the reason that at the time of his marriage to Selma Lamarr, alleged in the information to be the lawful marriage, he was legally married to Wally Meyer Lamarr. This contention cannot be sustained. It is to be noted that defendant makes no claim to having been divorced from Wally Meyer Lamarr at any time, and on the contrary the evidence produced by him established without contradiction that he was still her husband at the time of his third marriage.

We know of no California case in which this point has been squarely decided. It is necessary therefore that we proceed by reason, examining en route such authorities as seem pertinent to ascertain whether they either tend to guide us to or away from the conclusion which reason suggests.

Defendant relies principally upon People v. Spitzer, (1922) 57 Cal.App. 593, 208 P. 181, in which a contention of the defense, as here, was that defendant was the lawful husband of another woman at the time he was married to the wife alleged in the information to be the lawful (or first) wife. In that case the court said, at page 594 of 57 Cal.App., at page 182 of 208 P., "It seems to be the law that, if the first marriage alleged in an information charging the crime of bigamy be shown to have been void because of a previous valid existing marriage, the defendant cannot be convicted thereunder. Commonwealth v. McGrath, 140 Mass. [296] 297, 6 N.E. 515; State v. Sherwood, 68 Vt. 414, 35 A. 352; People v. Mock Yick Gar, 14 Cal.App. 334, 111 P. 1039. As said in Lane v. State, 82 Miss. 555, 34 So. 353: 'The rule is thoroughly settled that one indicted for bigamy must be acquitted on that indictment if he can show that the first marriage alleged in the indictment is void by reason of the existence of a prior lawful marriage, still existing.'" The court also stated in denying a petition for rehearing that "* * * while, as held in the main opinion, the New York marriage to Mary Truell [first marriage], had it been established, would have constituted a technical defense, nevertheless, since it was not proven, defendant must upon this record be deemed guilty as charged." It appears therefore that this case is not actually authority for the proposition on which defendant relies. The court's declaration of what "seems" to be the law is merely an assumption for the purposes of the decision. The court did not rule that the judgment of conviction had to be reversed. On the contrary it affirmed the judgment. In reality therefore the legal effect of its ruling merely is that assuming in favor of defendant the tenability of his contention, still the evidence did not require a finding that its factual basis had been established. Furthermore, the statement of the court that the New York marriage if proved "would have constituted a technical defense" is but dictum which was not a necessary conclusion from the proposition previously stated.

There is a fundamental difference between the proposition that proof of *a* valid previously contracted and existing marriage is absolutely essential as a basis for guilt of bigamy on subsequently contracting another marriage and the theory that proof of invalidity of the first marriage *charged in the information*, through establishing a prior existing marriage requires acquittal. If there was *no* valid existing marriage at the time of the alleged bigamous marriage obviously the defendant is not guilty of bigamy. Proof of a marriage contracted prior to and valid at the time of that alleged in the information to be the valid or first marriage would destroy the probative value of the *alleged* first marriage and to that extent would be material. But the gravamen of the offense is the *bigamous marriage*. If at the time of the *alleged bigamous marriage*, the defendant was already validly married to *any* spouse, he obviously became guilty (in fact) of bigamy on the latter marriage. The former proposition involves a question of substantive proof, the latter a question of pleading and procedure. If *no* valid prior marriage is proved then the alleged bigamous marriage is in fact a legal marriage but if *any* valid prior existing marriage is proved then the *status of the defendant as a married person* is established and a subsequent marriage *during the existence of that status* is bigamous. A misnomer in the information, of the spouse, marriage to whom established the *status* of the defendant, is not necessarily, in our opinion, fatal to the judgment. It was said in People v. Priestley, (1911) 17 Cal.App. 171, 176, 118 P. 965, 967, that "It is immaterial when or where the first marriage took place if the accused, at the time of the second marriage, had a wife living. * * * 'As the first marriage is not criminal, but its existence a condition which makes the second marriage a crime, it is of itself a fact, and there is no substantial reason why the averment of it should ever have been required except in general terms.'" The essential things for the pleading and proof to show are (1) the *previously established status* of the defendant as a married person and (2) his additional marriage *during perdurance* of that status. It is the *additional* marriage which identifies the particular crime. The name of the person with whom, and to some extent the place where, and the date when, the additional or bigamous marriage took place are important to identify the crime and protect the defendant against being placed in jeopardy more than once for that offense, but the name of the person with whom and the place where and the time when the *marriage establishing the status* was consummated have no significance in identifying the particular crime and are important only to the extent that the defendant be not misled and prejudiced in preparing his defense on the facts tending to establish such status.

[6] If the people rather than the defendant had produced the evidence of defendant's marriage to Wally Meyer Lamarr, seeking without previous notice to defendant to establish his status as a married person by virtue of his marriage to Wally in San Francisco on May 24, 1929, instead of by virtue of the specifically alleged marriage to Selma in Ventura on March 20, 1935, he perhaps would have some basis for contending that he had been misled in preparing his defense, that the information should have been amended, or at least that he should have had a continuance to enable him to prepare to meet such "surprise" testimony. But here the defendant did not seek any continuance and certainly he was not surprised by facts which he himself adduced. By the information which was filed he was fully and correctly informed of the particular criminal act with which he was charged. His own testimony, voluntarily given, and that of his witness, was as competent to prove his previously contracted married status and its existence at the time of the bigamous marriage as could have been any evidence that the People might have produced. It therefore appears that the defendant has not been misled as to the nature or identity of the criminal charge against him, he has not been taken by surprise by the evidence adduced, and he is not in danger of being twice put in jeopardy for the same offense. A mistake of law as to what would constitute a technical defense is no ground for reversal of the judgment. "A 'mistake of fact' is where a person understands the facts to be other than they are; whereas a 'mistake of law' is where a person knows the facts as they really are, but has a mistaken belief as to the legal consequences of those facts." (Quoted from O'Brien v. Selskab, 94 N.J.L. 244, 246, 109 A. 517; 40 C.J. 1227, in People v. Kelly, (1939) 35 Cal.App.2d 571, 574, 96 P.2d 372.

It is not to be implied from what we have said that the state could allege as the lawful marriage a defendant's marriage to B and a subsequent bigamous marriage to C; and then upon proof by the defendant, or otherwise, that he had in fact previously married A and that the marriage to B took place during the existence of the marriage to A, thereupon claim a conviction on the charge as laid *on the theory that the B marriage was the bigamous one.* On that theory the defendant would be entitled to acquittal on the ground of variance (§ 1151, Pen.Code); there would be a failure of proof; i. e., the identity of the crime would be different. The first marriage (to A), while it continued to exist at the time of the marriage to B might have been terminated before the marriage to C. In that case the C marriage would be lawful and the B marriage although bigamous in fact, could not support a conviction on the charge as stated because *it* was not alleged as the crime. But if, as here, it appeared that the A marriage continued as a valid status not only at the time of the B marriage but also at the time of the C marriage, then the C marriage would be bigamous as charged and would support a conviction. Proof of *any* valid marriage previous to the alleged bigamous marriage and existing at the time of the latter would establish the married status of the defendant and support the charge that the latter marriage was bigamous. The identity of the crime for that bigamous marriage would obviously be the same regardless of when, where, or with whom the valid status-establishing marriage took place.

[7] It is thus apparent that proof of a valid marriage prior to and existing at the time of the marriage alleged in an information to be the first or status-establishing marriage may or may not constitute a defense to the charge. If it existed at the time of the *alleged* first marriage but was dissolved before the alleged bigamous marriage it constitutes a complete defense because in that case the alleged bigamous marriage is in fact valid. But if the proof shows that the first consummated marriage perdured from a time previous to the first *alleged* marriage through the time when the alleged bigamous marriage was contracted then that proof supports conviction.

We turn now to examine the authorities which have reached our attention. We have noted that the case of People v. Spitzer, (1922) supra, 57 Cal.App. 593, 208 P. 181, merely assumes the technical rule contended for by defendant; i. e., that proof of a marriage contracted previous to, and existing at the time of, that alleged in the information as the status-establishing marriage absolutely requires acquittal. It cites four cases as authority, each of which we will consider. The first is Commonwealth v. McGrath, (1885) 140 Mass. 296, 297, 6 N.E. 515. In it the court merely held that the issue of the existence of marriage number one at the time of marriage number two should have been presented to the jury where defendant was charged with polygamy in marrying the woman that he claimed was wife number three, but cited no authority relative to that issue. The court concerned itself principally with the right of the defendant to have the jury consider presumptions of continued life and of innocence in their determination of questions of fact. Incidentally it stated, at page 516 of 6 N.E., concerning the status-establishing marriage, that "The allegation of the time of the marriage was not material, and it was not necessary to prove it as laid."

The second authority cited in the Spitzer case is State v. Sherwood, (1896) 68 Vt. 414, 35 A. 352. In that case the defendant was prosecuted for alleged bigamy. At the trial the defendant offered evidence tending to show that the marriage which the information charged as his first marriage was in fact void because the woman with whom it was contracted was at the time of the ceremony the wife of another man. Testimony tending to establish such facts was excluded. Such ruling was held error and the judgment reversed. Obviously that ruling was correct but equally obviously it has no application to our case. The evidence which was erroneously excluded would have tended to show that the defendant there did not occupy the status of a married person at the time he contracted the alleged bigamous marriage.

The third case cited in the Spitzer opinion is People v. Mock Yick Gar, (1910) 14 Cal.App. 334, 111 P. 1039. In it the defendant was accused of placing *his wife* in a house of prostitution. The offense defined (§ 266g Pen.Code) required proof that the woman was the wife of the defendant. Uncontradicted testimony was held to establish that the woman was not the defendant's wife because at the time of his marriage to her he occupied the status of a married person from a previously contracted and existing marriage. The judgment of conviction was reversed. Again, this ruling was legally correct, but it bears no relation to our question.

The fourth case cited in the Spitzer opinion is Lane v. State, (1903) 82 Miss. 555, 34 So. 353. That case, for what it is worth, directly supports defendant's contention here. The court said (34 So. at page 353): "The first marriage alleged in the indictment being the one with Rosa Pitts, and that marriage being void because appellant had theretofore been lawfully married to Patty Morris, who was then living, and who was also living at the time of the marriage to Teresa Whetstone, the defendant could not be convicted of bigamy *under this indictment and proof.*" (Italics added.) We note as indicated by the portion we have italicized, that the question was one of pleading and proof under the Mississippi law. We note also that the opinion and decision were *based on error confessed* by the attorney general. The authorities cited by that court in support of its decision so arrived at upon examination seem scarcely worthy, *in that application,* of the sanctity attributed to them. They are: State of West Virginia v. Goodrich, (1878) 14 W.Va. 834; Commonwealth v. McGrath, (1885) 140 Mass. 296, at pages 297, 298, 6 N.E. 515 (also cited in People v. Spitzer, supra); Am. & Eng. Enc. of Law, 2d Ed., vol. 4, p. 38; and Crawford's Case (also entitled Crawford v. State), (1895) 73 Miss. 172, 18 So. 848, 35 L.R.A. 224. For the reasons that will appear in the following discussions of each of these authorities we conclude that none of them is controlling here.

In State of West Virginia v. Goodrich, supra (the authority cited first in the Lane case), the defendant's marriages and cohabitation with wives numbers one and two took place *out of the State of West Virginia* and *on that account,* under its law, defendant could not be punished in West Virginia for his admittedly bigamous second marriage. Before he married wife number three and subsequently cohabited with her in West Virginia, wife number one had secured a divorce from him, thus leaving in existence *no* valid prior marriage at the time of marriage number three for which defendant was indicted in West Virginia for bigamy. Accordingly the judgment was reversed.

The case of Commonwealth v. McGrath, supra (cited second in the Lane case), also cited in the Spitzer case, has been heretofore discussed, supra.

Am. & Eng. Enc. of Law, 2d Ed., vol. 4, page 38 (cited third in the Lane case), makes the statement that "If the defendant was already lawfully married at the time the first marriage alleged in the indictment took place, such marriage is a nullity, and the second marriage laid in the indictment cannot constitute the offense of bigamy," and cites in note 5, State of West Virginia v. Goodrich, discussed supra; Madison's Case (about 1648), 1 Hale 693; Commonwealth v. McGrath, discussed supra; and People v. Chase, (1882) 27 Hun., N.Y., 256. In Madison's Case it was held that if A married B, and afterwards married C, and then married D during the marriage with C but after the death of B, A will not be guilty of bigamy as to the marriage with D. That, of course, is not the situation in the instant case. In People v. Chase, supra, the court in reversing the judgment of conviction apparently proceeds upon the assumption, but does not give a considered ruling on the proposition, that the law is as asserted by defendant in the instant case. It does not support its implied holding by discussion or by the citation of authority.

In Crawford's Case (1895) supra, 73 Miss. 172, 18 So. 848, 35 L.R.A. 224 (the fourth authority in the Lane case), the marriage to wife number two was held valid (a divorce having been previously obtained by wife number one) and hence it obviously is not in point as to our case.

We regard none of the cases heretofore discussed as requiring us to uphold the defendant's contention here. In so far as the statements in the Lane case and the implications in any of the other cases are inconsistent with our views we prefer not to follow such cases.

[8, 9] If there be any point to defendant's contention it is purely a question of variance between pleading and proof. An immaterial variance should be disregarded. 14 Cal.Jur. 96; People v. Mizer, (1940) 37 Cal.App.2d 148, 153, 154, 99 P.2d 333. The test of the materiality of a variance is whether the indictment or information so fully and correctly informs the defendant of the criminal act with which he is charged, that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense. 14 Cal. Jur. 96; People v. Terrill, (1901) 132 Cal. 497, 499, 500, 64 P. 894; People v. Freeman, (1916) 29 Cal.App. 543, 544, 545, 156 P. 994; People v. Harrington, (1928) 92 Cal.App. 245, 254, 255, 267 P. 942; People v. Thorn, (1934) 138 Cal.App. 714, 733, 734, 33 P.2d 5; People v. Jacobs, (1935) 11 Cal. App.2d 1, 6, 52 P.2d 945; People v. Woodson, (1936) 11 Cal.App.2d 604, 606, 54 P.2d 33; see, also, People v. Arras, (1891) 89 Cal. 223, 226, 227, 26 P. 766; People v. Evanoff, (1919) 45 Cal.App. 108, 112, 187 P. 54. From what has been said, we regard it as evident that under the test stated in the authorities cited any variance in the instant case was not material.

Appellant calls to our attention the cases of People v. Beevers, (1893) 99 Cal. 286, 33 P. 844; People v. LeDoux, (1909) 155 Cal. 535, 102 P. 517; People v. Bisbee, (1933) 134 Cal.App. 181, 25 P.2d 232; and People v. Kelly, (1939) 32 Cal.App.2d 624, 90 P.2d 605. In only two of these cases, People v. Bisbee and People v. Kelly, were three marriages of a defendant involved. Neither of the other two cases states any principle pertinent to our discussion. In People v. Bisbee defendant claimed as a defense to the charge of bigamy the fact that he had married another woman prior to the marriage alleged in the information to be the lawful one. On denying petition for rehearing after affirming defendant's conviction of bigamy, the court there said at page 183 of 134 Cal.App., at page 233 of 25 P.2d:

"Appellant testified positively that he had been absent from, had not seen nor heard of or from, Marie Shay for about six years before he married Viola Kelly and that he did not know whether she was dead or alive. Under this testimony the second marriage was 'valid until its nullity is adjudged by a competent tribunal.' Section 61, Civ.Code.

"The testimony demonstrates that, of the three marriages proved, he contracted the third one without any dissolution of the second one. In these circumstances neither the trial court nor an appellate court will indulge in strained inferences from inconsistent, indefinite, and improbable testimony that perhaps, after all, appellant was married to some one else when he married the second wife, therefore he should be acquitted of legal wrong in taking the third wife under representation that he was an unmarried man."

We perceive nothing in that case (People v. Bisbee) which requires us to make the holding defendant seeks by this appeal. Defendant's second marriage there was found valid, and the decision does not constitute authority for the proposition that had it been found invalid and had the first marriage continued in effect at the time of the third, defendant would have been entitled to an acquittal.

In People v. Kelly, (1939) supra, 32 Cal.App.2d 624, 90 P.2d 605, the judgment of conviction of bigamy and the order denying defendant's motion for new trial were affirmed, where the question of defendant's marriage to another woman prior to the marriage relied upon by the prosecution as the lawful marriage was not raised until the hearing on the motion for a new trial. On a subsequent appeal (People v. Kelly, (1939) 35 Cal.App.2d 571, 96 P.2d 372) an order denying defendant's motion to vacate the judgment of conviction was also affirmed. Defendant, however, contended that his admittedly third marriage, for which he was prosecuted, was not itself bigamous but was rendered valid under the provisions of subdivision one of section 282 of the Penal Code by the fact that he had not heard from his first wife for five years at the time he married his third (see page 574 of the opinion in 35 Cal.App.2d, 96 P.2d 372). That is not akin to the factual basis in the present appeal.

People v. Burke, (1941) 43 Cal.App.2d 316, 110 P.2d 685, is also a case in which three marriages of defendant were involved. All three were proved by the prosecution and admitted by defendant, who contended, however, that neither number two nor number three was bigamous, by reason of various presumptions asserted by him as to innocence and as to the continuance of life of wife number one beyond the time of his marriage to number two but terminating before that to number three. His conviction was affirmed on appeal and we find nothing in that case to influence us here.

The judgment and order appealed from are affirmed.

SHINN and PARKER WOOD, JJ., concurred.

STOLL v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16679.

Supreme Court of California.

June 16, 1942.

Rehearing Denied July 13, 1942.

1. Workmen's compensation ⟹1730

Irregularity in having the evidence as to employee's injury and subsequent illness presented before three different referees, none of whom was familiar with entire record, was "waived" by petitioner's failure to demand further hearing in accordance with commission's order submitting the matter for determination unless good cause was shown.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Workmen's compensation ⟹1549

Evidence supported Industrial Commission's finding denying an award of compensation on ground that employee's death was due to active tuberculosis and that an injury sustained eight months previously which incapacitated him for a month did not cause or aggravate the disease.

3. Workmen's compensation ⟹1939

Findings of the commission based on medical testimony as to the cause of employee's death are conclusive upon review when supported by substantial evidence.

◆

In Bank.

Proceeding to review an order of the Industrial Accident Commission awarding compensation for personal injuries. Award affirmed.

Proceeding by Mayo Byron Stoll, a minor, against the Industrial Accident Commission, and others, to recover an award under the Workmen's Compensation Act for the disability and subsequent death of plaintiff's decedent.

Award affirmed.

Fitz-Gerald Ames and John Clare Jury, both of San Francisco, for Petitioner.

Everett A. Corten, J. Gould, and Burbank, Laumeister & Littler, all of San Francisco, for Respondents.

EDMONDS, Justice.

On September 28, 1937, a heavy timber fell upon Charles Stoll while he was engaged in reinforced concrete work. In an application for workmen's compensation, he claimed to have received injuries to his right chest and also that his right shoulder and back had been severely wrenched. Eight months later, and before any decision had been made upon his application, he died. His minor child, by a guardian ad litem, was then substituted for him as the applicant in the proceeding, and the Industrial Accident Commission made an award of compensation based upon a finding that Stoll had been totally disabled for one month following the accident. The Commission also found that any disability sustained by him subsequent to that caused by the accident was due to tuberculosis, which was neither proximately caused nor exacerbated by his injury or by any injury arising out of and in the course of his employment. Upon a rehearing the Commission affirmed the findings and award which it had previously made.

The present proceeding was then commenced. It was alleged as grounds for the issuance of the writ, that the Commission acted without and in excess of its powers and jurisdiction; that the evidence does not justify the findings of fact; and that the findings and award and the decision after rehearing are unreasonable.

[1] Concerning the first of these grounds, the petitioner asserts that the evidence as to the injury suffered by Stoll and his subsequent illness was presented before three different referees of the Commission, none of whom was familiar with the entire record. The record supports the petitioner's assertions in this regard and shows various hearings which extended over a period of 18 months. But in granting the petition for rehearing which was made upon all of the statutory grounds, the Commission declared that it would submit the matter for reconsideration and determination upon the record then before it, ten days after service of the order, "unless within the said time good cause be shown to the contrary, in writing, and within which time any further requests either to file further medical reports or to request further hearing be requested and granted." In response to that order the petitioner's attorney asked for and was granted leave to file certain medical data, but there was no criticism of what the Commission termed "the record as it now stands." Under these circumstances any irregularity in the Commission's procedure was waived

by the petitioner's failure to demand a further hearing in accordance with its order.

[2] The petitioner's statement of the evidence, which he asserts does not justify the findings of fact, may be briefly summarized as follows: Before the injury Stoll was in good health and had worked steadily for some time. He had no symptoms of tuberculosis, but within three weeks after the accident occurred, there were definite evidences of that disease. During that time he received lamp treatments and massages. Within two months he was hospitalized, and he died of chronic tuberculosis about six months later. The only evidence that he was suffering from active tuberculosis at the time of the injury is certain x-ray pictures taken two days after the accident, and these are not determinative of the question. On the contrary, the evidence shows that the injury lighted up a tubercular infection which was in a dormant, quiescent and latent state.

But the record does not support these conclusions. Although there is some evidence which would support a finding that Stoll's injury aggravated and produced an active tuberculosis from a previously dormant condition, there is other evidence directly to the contrary. The Commission was confronted with this conflict of opinion concerning the cause of Stoll's illness and death and decided that, except for one month of disability, neither was caused by the accident.

The evidence in the case includes the testimony of Stoll, his wife and the foreman on the job where he was injured, and the written reports of several physicians. Two of the physicians supplemented their reports by testimony before the Commission. All but two of them had examined Stoll.

At the first hearing upon his claim for compensation, Stoll testified that he had been in very good health before the happening of the accident and "never did have any trouble" requiring the services of a physician. His testimony is corroborated to some extent by his wife, who met him about a year before. During that time, she said, he gave no evidence of ill health or tuberculosis. The foreman, who had known him for some time, stated that he never knew him to be ill.

The first physician who examined Stoll was Dr. F. Justin McCarthy, who saw him two days after the accident occurred. His report includes a statement of the facts concerning the accident which is substantially the same as the testimony of Stoll. Dr. McCarthy's opinion, based in part upon x-ray pictures taken that day, was that Stoll had "a definite muscle strain causing soreness. He will be under treatment for three or four weeks and should make a complete recovery." Dr. McCarthy examined Stoll again about three weeks later. His findings were: "Insofar as the injury is concerned, he is practically well at this time. He states that he has been losing weight and I have therefore referred him to Dr. H. M. F. Behneman for examination."

The report of Dr. Behneman is based upon a very complete examination of Stoll made on October 26, 1937. It also includes a statement concerning the happening of the accident which agrees with that given by Stoll. Dr. Behneman expressed the opinion: "There is ample evidence here of the diagnosis of advanced pulmonary tuberculosis. There was also definite evidence of the pathology in the pictures of the right shoulder taken the day after his accident. The process was so advanced that previous to the accident we have evidence of numerous subjective symptoms, proving its chronicity. It is our firm belief that neither the accident nor the physical therapy treatments exacerbated this tuberculosis."

The day following his examination by Dr. Behneman, Stoll was examined by Dr. Shipman. This examination included fluoroscopy, x-ray and laboratory work. Based upon it, Dr. Shipman expressed the opinion that Stoll gave evidence of "advanced, active, pulmonary tuberculosis with infiltration, consolidation and cavitation of the right upper lobe. Since the changes are advanced and involve cavitation as well as fibrosis, the latter being indicated by some deviation of the trachea toward the affected side, it is obvious that the disease existed long before the date of the accident and in addition there is x-ray evidence two days after the accident to show that the disease actually did exist in an advanced state at that time. There is, therefore, no reason to suppose that the accident or subsequent manipulation of his right shoulder had anything to do with his tuberculosis. Since his disease is active, Mr. Stoll should be hospitalized and receive appropriate treatment."

On November 12, 1937, Stoll was received as a patient in San Francisco Hospital. In March, 1938, he filed with the Commission a report made by Dr. W. C. Eidenmuller based upon a case history, which is in accord with the testimony of Stoll, and the reports made by the other physicians who had examined him. Although Dr. Eidenmuller stated as the concensus of medical opinion that either quiescent or active lung infection may become gradually or abruptly activated by trauma resulting from even slight stress or force, he stated that he could not say definitely whether either the accident or the treatment by light and massage had anything to do with the rapid spread of the tuberculosis. To express an opinion either way, he said, "presupposes knowledge and comprehension beyond the powers of man however well trained and experienced."

Following the filing of this report, on April 14, 1938, the Commission held a hearing for the purpose of allowing counsel for Stoll to cross-examine Dr. Shipman. The physician agreed with the medical opinion, which he said is well established, that trauma, strain or even physiotherapy treatments can exacerbate a preexisting tuberculosis condition and bring about a frank onset of pulmonary tuberculosis. But there was not enough ground, he said, for concluding that Stoll's injury had activated his lesion, and in reaching his opinion he relied, in part, upon the x-rays taken two days after the injury and those made a month later.

The applicant then filed a second report made by Dr. Eidenmuller under date of April 22, 1938. In this report Dr. Eidenmuller considered the opinion of Dr. Shipman, and discussed the x-rays mentioned by him. It is questionable, said Dr. Eidenmuller, whether that taken two days after the accident shows active tuberculosis. The x-ray of October 22nd showed extensive involvement of the upper two lobes of the right lung with a large cavity, the presence of which leads one to believe that it probably was there two days after the accident. "But there still is doubt in my mind," he continued, "that the disease was active at the time of the accident, and there is likewise also a doubt that the accident was the proximate cause of the activation of the T. B."

The next medical report, dated May 13, 1938, was made by Dr. B. L. Freedlander on behalf of Stoll. It states that he had examined the injured man about four weeks after the accident and also on several occasions after his entry into the San Francisco Hospital. He also said that he had read the reports made by the other physicians. Because of blurring caused by faulty technique, he said, no conclusions can be drawn from the first x-ray. "It is reasonable to presume," he concluded, "that the tuberculosis could have progressed to the advanced stage within the next four weeks, as shown in the next x-ray taken October 22, 1937."

The insurer then filed the written opinion of Dr. Irving S. Ingber concerning the x-ray films taken in September. In this report, dated May 23, 1938, the physician stated that in one of these films "a definite lung lesion can be seen but no details can be evaluated." The later x-ray, he said, shows "extensive infiltration of the right upper lobe with cavity formation." A second report by Dr. Ingber, dated a week later, gives additional reasons for his conclusion concerning the first x-rays.

Following the death of Stoll, and after the minor son had been substituted for him as an applicant, there was filed in behalf of the insurer a report of Dr. Jesse L. Carr, dated December 7, 1938. This report also includes a case history which agrees with that given by the other physicians. His diagnosis, based upon the rapidity of the development of the disease and the appearance of the x-rays, was of caseous gelatinous pneumonia. In his opinion, there was no logical association between the accident and the definite and characteristic course of tuberculosis in the patient.

Almost a year after Dr. Carr's report was filed, the Commission submitted its file to Dr. Harold Guyon Trimble, who after reviewing the medical reports and the x-rays, concluded that at the time of his injury Stoll was suffering from active pulmonary tuberculosis which had no direct relation to his occupation. The injury, he said, did not cause a latent pulmonary tuberculosis to spread.

Following the filing of this report, the Commission held a hearing for the purpose of allowing counsel for the applicant to cross-examine Dr. Trimble. Conceding that the x-ray taken in September is not a good picture of the chest, he expressed the opinion that it definitely indicates a tuberculosis cavity. He based his opinion concerning Stoll's condition at the time of the injury, he said, upon all of the case history, as shown in the file, and not upon the x-ray alone.

[3] According to one medical authority quoted by a physician testifying on behalf of the petitioner: "The problem of the indirect influence of trauma on disease of the respiratory tract is of every degree of difficulty; until in many cases of pulmonary tuberculosis, for instance, individual patients offer almost insoluble difficulties." Unquestionably the Commission was keenly aware of such difficulties because, before reaching its decision it submitted the entire record to a physician of its own choosing for an opinion upon the medical question involved. Aside from the testimony of that physician, who said Stoll was suffering from active tuberculosis at the time he was injured, there is substantial evidence to support the Commission's findings. Under such circumstances they are conclusive upon review. Associated Indem. Corp. v. Industrial Acc. Comm., 18 Cal.2d 40, 112 P.2d 615; Schaller v. Industrial Acc. Comm., 11 Cal.2d 46, 77 P.2d 836; S. A. Gerrard Co. v. Industrial Acc. Comm., 17 Cal.2d 411, 110 P.2d 377.

The award is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 457

BLANK v. COFFIN et al.

S. F. 16693.

Supreme Court of California.

June 24, 1942.

1. Automobiles 🔑244(26)

Where evidence shows that an automobile was being driven by owner's employee at time of accident, jury may infer that employee was operating automobile with owner's permission within statute imputing negligence to owner for all purposes of civil damages. Vehicle Code, § 402(a, b), St.1937, p. 2353; Code Civ.Proc. §§ 1832, 1958, 1960.

2. Evidence 🔑594, 595
Trial 🔑139(1)

Where a jury can reasonably infer from primary facts established that the material fact attempted to be proved exists, a party has introduced sufficient evidence to entitle him to have the jury decide the issue, but the jury is not compelled to draw the inference even in the absence of contrary evidence and may refuse to do so. Code Civ. Proc. §§ 1832, 1958, 1960.

3. Trial 🔑142

Whether a particular inference can be drawn from certain evidence is a "question of law" but whether the inference should be drawn in any given case is a "question of fact" for the jury. Code Civ.Proc. §§ 1832, 1958, 1960.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

4. Trial 🔑139(1)

Where evidence contrary to existence of the fact in issue is clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved, the court must instruct the jury that nonexistence of the fact has been established as a matter of law. Code Civ.Proc. §§ 1832, 1958, 1960.

5. Evidence 🔑588, 594

The jury is the sole judge of the credibility of witnesses and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. Code Civ.Proc. §§ 1847, 2061, subd. 3.

6. Evidence 🔑590

The jury in passing on the credibility of a witness may consider his interest in the result of the case. Code Civ.Proc. §§ 1847, 2061, subd. 3.

7. Automobiles 🔑245(30)

In action against corporation and its employee for injuries sustained by guest riding in automobile which collided with corporation's automobile driven by employee, evidence was sufficient to go to jury on question whether employee, who had been instructed not to use automobile for personal business and pleasure, had permission to use automobile at time of accident. Vehicle Code, § 402(a), St.1937, p. 2353.

8. Automobiles 🔑244(26)

That corporation's employee driving corporation's automobile was accompanied by a friend in violation of corporation's rules at time of accident could not establish that employee did not have permission to drive automobile, and though that fact might be pertinent if friend had been injured and had knowledge of rule, it had no relevancy where a third person was injured. Vehicle Code, § 402(a), St.1937, p. 2353.

9. Automobiles ⚷243(5)

Evidence of the existence of a particular condition, relationship, or status, including permission to use an automobile involved in an accident, before and after the act in question, is admissible to indicate the existence of the same status, condition, or relationship at the time of the act.

10. Automobiles ⚷243(5)

In action for injuries to guest riding in automobile which collided with defendant corporation's automobile driven by an employee, trial court erred in refusing to permit guest to question employee and corporation's branch office manager concerning employee's personal use of automobile after accident and manager's knowledge thereof and failure to protest for purpose of indicating relationship existing at time of accident. Vehicle Code, § 402(a), St.1937, p. 2353.

◆

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action for personal injuries by Carol Blank against Ian Coffin and the Mercantile Acceptance Corporation of California. The trial court directed a verdict in favor of the Mercantile Acceptance Corporation of California and the jury returned a verdict against defendant Coffin, and from the judgment entered in favor of the Mercantile Acceptance Corporation of California on the directed verdict, plaintiff appeals.

Reversed.

For prior opinion, see 117 P.2d 53.

James R. Agee, of Oakland, for appellant.

Hagar, Crosby & Crosby and Carlyle C. Crosby, all of Oakland, for respondent.

TRAYNOR, Justice.

On June 11, 1939, at about 4 a.m. an automobile belonging to the Mercantile Acceptance Corporation of California, while being driven by Ian Coffin, one of its employees, collided with an automobile being driven by Lester F. Kain, in which Mrs. Carol Blank was riding as a guest. Mrs. Blank was injured and brought an action for damages against Coffin and the Mercantile Acceptance Corporation, alleging that Coffin was negligent and that he was driving the car with the permission of its owner, the Acceptance Corporation. The Mercantile Acceptance Corporation is engaged in the business of financing automobile loans and maintains a branch office in Oakland in charge of G. N. Stuperich. About three months before the accident Coffin was hired as a field man by Stuperich. His duties consisted principally in the examination and repossession of automobiles, and his territory covered much of the San Francisco Bay area. He was given the exclusive use of a company car to facilitate his work. He kept the car in the garage at his home in Berkeley free of charge to the company. He had no fixed hours of employment and occasionally worked in the evenings. When he was hired Coffin was furnished with a mimeographed manual of instructions providing: "Each field man or collector will be supplied with a company owned car. The employee to whom the car is assigned must see that it is kept in excellent condition at all times at a minimum expense. Please note the following instructions: * * * The company does not allow employees operating company cars to pick up riders or carry passengers unless they are employed by the company * * *. Company owned cars must not be used by the employees on their vacations." Coffin testified that when he was hired Stuperich told him orally never to use the car for pleasure or personal matters. He also testified that he used the car on Sundays for his own pleasure and made overnight trips in it from time to time for his own pleasure but that at the time of the accident he was not on a vacation. He stated that each week he reported the mileage covered, including that covered on his personal business, but his reports on gasoline consumed omitted gasoline purchased for his personal trips. Stuperich testified that he instructed Coffin not to use the car for personal business and that before the accident he severely reprimanded Coffin for taking the car on a week-end pleasure trip and threatened to discharge him in the event of another infraction. After a week's lay-off Coffin resumed work and possession of the car.

On the night of the accident Coffin and a friend attended a social function in the company of two young women. They had taken the young women home and were returning to Berkeley when the accident occurred. Coffin was driving north on

Webster Street in Alameda, and Kain was driving south. Coffin's car struck Kain's car on the right side between the hood and the door. Coffin testified that Kain's car swerved over the center line of the street into his path. Kain and other witnesses for the plaintiff testified that Coffin's car swerved across the center line of the road, came over to the west side, and then swung back toward the center, striking the Kain car. The trial court directed a verdict in favor of the Mercantile Acceptance Corporation, and the jury returned a verdict against Coffin for $7,500. Plaintiff has appealed from the judgment entered in favor of the Mercantile Acceptance Corporation upon the directed verdict.

Section 402(a) of the Vehicle Code, St. 1937, p. 2353, provides: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." Section 402(b) limits this liability to $5,000.

[1] If the evidence shows that an automobile was being driven by an employee of the owner at the time of an accident, the jury may infer that the employee was operating the automobile with the permission of the owner. Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 2 P.2d 550; McWhirter v. Fuller, 35 Cal.App. 288, 170 P. 417; Pozzobon v. O'Donnell, 1 Cal.App.2d 151, 36 P.2d 236; Brown v. Chevrolet Motor Co., 39 Cal.App. 738, 179 P. 697; Wagnitz v. Scharetg, 89 Cal.App. 511, 265 P. 318; Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. See cases cited in 2 Cal.Jur.Supp. 508, sec. 326. Defendant recognizes that a jury may draw such an inference but contends that the evidence introduced by it in the present case to show that Coffin was driving the car without its permission was so clear, positive, and uncontradicted that the jury could not reasonably conclude that it had given permission, express or implied, for such use. Plaintiff concedes that Coffin was not acting within the scope of his employment at the time the accident occurred but contends that the evidence is sufficient to justify a finding by the jury that at the time of the accident Coffin was operating the automobile with the implied permission of defendant and that the directed verdict was therefore improper.

An inference is a conclusion as to the existence of a material fact that a jury may properly draw from the existence of certain primary facts. Cal.Code Civ.Proc. §§ 1958, 1960, 1832; see cases cited in 10 Cal.Jur. 736–738, § 59.

[2, 3] It is not always possible for a party to a lawsuit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material fact. If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue. The jury is not compelled to draw the inference, however, even in the absence of contrary evidence and may refuse to do so. Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury. See cases cited in 10 Cal.Jur. 738, 739, § 60.

[4, 5] Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue, and the jury must then determine the existence or nonexistence of the fact from all the evidence before it. If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law. Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 54 P.2d 709; Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198. The jury, however, is the sole judge of the credibility of the witnesses (Cal.Code Civ.Proc., § 1847; see cases cited in 27 Cal.Jur. 182, § 156) and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America, etc., Ass'n, 34 Cal.App.2d 594, 94 P. 2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99. See cases collected in 27 Cal.Jur. 184, sec. 156; Kelly v. Jones, 290 Ill. 375, 125 N.E. 334, 8 A.L.R. 796. In

most cases, therefore, the jury is free to disbelieve the evidence as to the nonexistence of the fact and to find that it does exist on the basis of the inference. Bushnell v. Yoshika Tashiro, supra; Market Street Ry. Co. v. George, 116 Cal.App. 572, 576, 3 P.2d 41; Day v. General Petroleum Corp., 32 Cal.App.2d 220, 89 P.2d 718.

[6] There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility." Section 2061, subd. 3, of the Code of Civil Procedure provides: "That a witness false in one part of his testimony is to be distrusted in others." In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case. See cases collected in 27 Cal.Jur. 180, § 154.

[7, 8] The application of these well settled rules to the facts of the present case makes it clear that the trial court erred in directing a verdict for the defendant. See In re Estate of Flood, 217 Cal. 763, 21 P.2d 579; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768. The fact that the car was owned by defendant and was being driven by one of its employees was sufficient to permit the jury to infer that the car was being driven with defendant's permission. When defendant introduced evidence contrary to such an inference in the testimony of Coffin and Stuperich, the issue of permission could be taken from the jury and a verdict directed for the defendant only if the testimony could not be rationally disbelieved. There were several grounds on which the jury could disbelieve the testimony. Both Stuperich and Coffin, employees of the defendant, had an interest in the outcome of the case since they would naturally wish to remain in the good graces of their employer. Coffin's testimony as to how the accident occurred directly contradicted the testimony of plaintiff's witnesses, and if the jury disbelieved Coffin in this respect, it could disbelieve him in all respects. The testimony of Coffin and Stuperich revealed the following facts that would justify the jury in concluding that Coffin was driving the automobile with the tacit permission of the defendant: Coffin was given exclusive possession of the automobile; he kept it in his own garage without charge to the company; the manual of instructions that he received forbade the use of the car on vacations, but did not forbid its use for personal matters; the company could determine that Coffin was habitually using the car for his personal business by checking his mileage reports against his gasoline reports; Coffin was not discharged after discovery of his use of the car on a week-end trip and was allowed to resume possession of it after a short lay-off. The fact that Coffin was accompanied by a friend in violation of the rules of the company could not establish that he did not have permission to drive the car. This fact might be pertinent if the passenger were injured and had knowledge of the rule (Albers v. Shell Company, 104 Cal.App. 733, 286 P. 752), but it has no relevancy where a third person is injured. Gibbons v. Naritoka, 102 Cal.App. 669, 283 P. 845; Nord v. West Michigan Flooring Co., 238 Mich. 669, 214 N.W. 236; Wright v. Maddox, Tex.Civ.App., 288 S.W. 560.

[9, 10] Plaintiff also contends that the trial court erred in refusing to permit her to question Coffin and Stuperich concerning Coffin's personal use of the car after the accident and Stuperich's knowledge thereof and failure to protest. Defendant contends that evidence of circumstances after the accident cannot be used to establish that Coffin was driving the car with the permission of defendant at the time of the accident, and relies upon cases holding that evidence of precautions taken after an accident are not admissible to show a negligent condition at the time of the accident. See cases cited in 10 Cal.Jur. 829, 830, § 115. These cases, however, are not analogous to the present one. Evidence of the existence of a particular condition, relationship, or status, including permission to use an automobile, before and after an act in question is admissible to indicate the existence of the same status, condition, or relationship at the time of the act. Chouinard v. Wooldridge, 102 Conn. 66, 127 A. 908; Walker v. Klopp, 99 Neb. 794, 157 N.W. 962, L.R.A.1916E, 1292; Leonard v. Kreider, 51 Ohio App. 474, 1 N.E.2d 956; see Snowwhite v. Metropolitan Life Ins. Co., 344 Mo. 705, 127 S.W.2d 718; see cases cited in Wigmore, Evidence, 3rd Ed. §§ 382, 377; 10 Cal.Jur. 830, note

9, 828, 829, § 114; 32 L.R.A.,N.S., 1117 et seq. In the present case the testimony of Coffin and Stuperich revealed facts that would justify the jury's concluding that Coffin had permission to use the car for personal business before the accident, and plaintiff should have been permitted to question them concerning Coffin's permission to use the car for his personal business after the accident for the purpose of indicating that the same relationship existed at the time of the accident.

The judgment is reversed.

GIBSON, C. J., CURTIS, and EDMONDS, JJ., concurred.

CARTER, Justice (concurring).

I concur in the conclusion reached in the majority opinion but cannot agree with the following legal principle stated therein:

"If the evidence contrary to the existence of the fact is clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law." That statement is inconsistent with other principles enunciated in the opinion.

It is there said: "If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue. The jury is not compelled to draw the inference, however, even in the absence of contrary evidence and may refuse to do so. *Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury.*" (Italics added.)

Also: "Usually, the opposing party introduces evidence as to the nonexistence of the fact in issue, and the *jury must then determine the existence or nonexistence of the fact from all the evidence before it.*" (Italics added.)

"The *jury,* however, is the *sole judge of the credibility of the witnesses* * * * and *is free to disbelieve them even though they are uncontradicted* if there is any rational ground for doing so." (Italics added.)

It seems illogical to me to say, that if a jury may reasonably infer from the primary facts the existence of the material fact, the case may then be *decided by the jury,* but that evidence contrary to the inferred fact destroys the inference if it is clear, positive, uncontradicted, and cannot be disbelieved. *The query at once arises, disbelieved by whom?* The jury may or may not draw that inference as it chooses, but immediately that it is determined as a matter of law that it may be drawn by the jury, it is evidence in the case, equal in weight and value with any other evidence. Whatever evidence may be introduced by the opponent does nothing more than create a conflict in the evidence which must be resolved by the trier of fact. That conclusion necessarily stems from the rule stated in the majority opinion that the jury is the sole judge of the credibility of witnesses. What difference can it make on appeal where matters of law alone are considered whether the evidence opposing the inference is clear, positive and uncontradicted? It is still within the province of the trier of fact to disbelieve such evidence, and if it does, the inference stands unimpeached. If the jury is the sole judge of the credibility of the witnesses, this court cannot say as a matter of law that this evidence or that evidence, is clear, positive, uncontradicted and cannot be disbelieved. The very fact that the jury finds in favor of the inference and against such evidence conclusively shows that it is not clear, or uncontradicted or positive, or cannot be disbelieved. The jury necessarily must have found it unreliable because of one of those factors.

In my opinion, the true rule with reference to the effect of inferences in a case is, that this court's function begins and ends with the determination of the sole question of whether a certain inference may be drawn from certain evidence. That question is one of law. If the facts do not justify the inference, it cannot be drawn, and the one relying upon the purported inference must fail. If, however, it may be said that the inference reasonably may be drawn, then it becomes the sole function of the jury to decide whether or not it shall draw the inference, and whether or not opposing evidence prevails over it. It may, without qualification, weigh that inference against any and all evidence opposing it of whatever character or nature. Its conclusion on the completion of that process is final and conclusive.

The statement that evidence contrary to the existence of the fact established by the inference may overcome the inference as a matter of law, if clear, positive, uncontradicted and of such nature that it cannot be disbelieved, cannot stand in the face of the principles that an inference once permissible, is evidence, and that the jury is the exclusive judge of the credibility of witnesses and the weight of the evidence. Furthermore, it should be observed that the rule stated in effect declares that direct evidence is of greater weight or value than indirect or circumstantial evidence. Circumstantial evidence is nothing more than one or more inferences drawn from a series of proven facts. It is entitled to be given the force equal to direct evidence. 10 Cal.Jur. 1157.

The legal test as to the existence of whether an inference arises is stated in section 1960 of the Code of Civil Procedure:

"An inference must be founded:

"1. On a fact legally proved; and,

"2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature." It is for the court to apply that test to determine whether an inference may be reasonably drawn from any given facts.

Adherence to the principles above-stated admits of only one possible limitation to the rule above-stated. If the credibility of the evidence in opposition to the inference is beyond any question when such evidence is subjected to any of the tests of credibility, then it might be said to be conclusive on the trier of fact. It is at once apparent that that limitation does not apply to oral testimony for the reason that one of the tests of credibility is the demeanor of the witness and his manner of testifying (Code Civ.Proc., § 1847); the observation of that factor may be made only by the trier of fact. It necessarily cannot be determined by an appellate court. It is conceivable that under proper circumstances documentary evidence might be conclusive, but the instances would be rare. It is doubtful if the physical circumstances would ever be conclusive inasmuch as their effectiveness is practically invariably dependent upon inferences that may arise therefrom, and as we have seen, the trier of fact may or may not draw those inferences. The statutes indicate the rarity of conclusive evidence. They provide:

"Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it." Code Civ.Proc., § 1837.

"No evidence is by law made conclusive or unanswerable, unless so declared by this code." Code Civ.Proc., § 1978.

The cases, Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Crouch v. Gilmore Oil Co., 5 Cal.2d 330, 54 P.2d 709; and Maupin v. Solomon, 41 Cal.App. 323, 183 P. 198, have added only confusion to an otherwise clear and concise rule. They should not be followed, much less extended. They fail to give to an inference its proper place in the law, and entirely overlook the principle that the trier of fact is the exclusive judge of the weight of the evidence and credibility of witnesses.

In my opinion the evidence in the case at bar is sufficient to justify the inference that defendant Coffin was driving the automobile involved in the accident with the permission of defendant Mercantile Acceptance Corporation, and this issue should have been submitted to the jury. The judgment entered on the order granting a directed verdict as to the last named defendant should therefore be reversed.

SHENK, J., concurred.

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20 Cal.2d 446

JOHNSON v. MORRILL, County Clerk, and three other cases.

S. F. 16733–16736.

Supreme Court of California.

June 16, 1942.

1. United States 🔑3

Housing projects, which were constructed by the United States on military or naval reservations or bases within the State of California for accommodation of defense workers and others, are subject to the exclusive jurisdiction of the United States. 42 U.S.C.A. § 1521 et seq.

2. United States 🔑3

If housing projects constructed by the United States for defense workers were forts, magazines, arsenals, dockyards, or other needful buildings, within meaning of the provision of the Federal Constitution giving Congress power to exercise "exclusive legislation" over such places, and state statute consenting to the purchase or condemnation of such places by the United States, then the projects were acquired by the United States with the consent of the Legislature, and the United States had "exclusive jurisdiction" over the land so acquired; the quoted terms being synonymous. Pol.Code, § 34; U.S.C.A.Const. art. 1, § 8, cl. 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Exclusive Jurisdiction" and "Exclusive Legislation".

3. Elections 🔑78
United States 🔑3

Where realty on which the United States constructed housing project for defense workers was merely leased to the United States, the land was not "purchased" within meaning of constitutional provision giving Congress power to exercise exclusive legislation over all places purchased by consent of State Legislature for erection of forts, magazines, arsenals, dockyards, and other needful buildings, nor within meaning of state statute consenting to the purchase or condemnation by the United States of such places, and the United States did not have "exclusive jurisdiction" of the realty, and hence defense worker who resided in housing project was entitled to register as an elector of the state in county where project was located. Act Cong. March 1, 1941, 42 U.S.C.A. § 1523 note; U.S.C.A.Const. art. 1, § 8, cl. 17; Pol.Code, § 34.

See Words and Phrases, Permanent Edition, for all other definitions of "Purchase".

4. Elections 🔑78
United States 🔑3

The United States did not have "exclusive jurisdiction" over housing projects constructed for defense workers under the Lanham Act providing that the acquisition of realty shall not deprive any state or political subdivision thereof of its civil or criminal jurisdiction or impair civil rights, and hence defense workers living in housing projects were entitled to register as electors of the state in counties where the housing projects were located. 42 U.S.C.A. §§ 1521 et seq., 1547; U.S.C.A.Const. art. 1, § 8, cl. 17; Pol.Code, § 34.

5. United States 🔑3

The United States may acquire land within a state by donation, purchase, or condemnation and devote it to a public use without withdrawing such lands from the jurisdiction of the state.

6. States 🔑14

A state may cede and the United States may accept cession of jurisdiction of lands within a state on any express terms, conditions, or reservations.

7. United States 🔑3

A state and the United States may make any suitable agreement with respect to mutual or exclusive exercise of jurisdiction over land acquired by the United States within a state, or to be acquired by the United States.

8. United States 🔑3

The phrase "civil rights" as used in the section of the Lanham Act that acquisition of realty for housing projects constructed for defense workers shall not deprive any state or political subdivision thereof of its civil or criminal jurisdiction over such property, or impair the civil rights under the state or local law of the inhabitants of such property, includes the political right of suffrage. 42 U.S.C.A. § 1547.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Rights".

9. United States 🔑3

Land acquired by the United States, but which is not subject to the exclusive legislative authority of the United States under the Federal Constitution, remains subject to the jurisdiction of the state in matters not inconsistent with the free and effective use of the land for the purpose for which it was acquired. U.S.C.A.Const. art. 1, § 8, cl. 17.

10. United States 🔑3

The United States cannot be compelled to accept the burdens of exclusive jurisdiction of land within meaning of the Constitution, along with title to land, where the land is acquired for purposes not strictly within the classes designated within the Constitution. U.S.C.A.Const. art. 1, § 8, cl. 17.

11. Elections 🔑78
United States 🔑3

Where housing project, constructed by the United States for defense workers and enlisted men employed in national defense activities in naval reservation over which the United States had acquired exclusive jurisdiction, was not located on reservation and the buildings merely served as dwellings, and the United States government had not sought to acquire exclusive jurisdiction over the project, the United States did not have "exclusive jurisdiction" within meaning of the Constitution, and worker living in project was entitled to register as an elector of the state in the county where the project was located. 42 U.S.C.A. § 1501 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 17; Pol. Code, § 34.

◆

In Bank.

Separate and original mandamus proceedings by Dorothy Johnson, Irving Cohen, Freda Allen, and Miyo Zulim against Lewis Morrill, as County Clerk of the County of Solano, respondent, to compel the respondent to accept for filing and registration the affidavits of the petitioners' qualifications as electors residing in the county of Solano.

Peremptory writ issued as prayed in each proceeding.

C. A. Linn, of San Francisco, and Ernest C. Crowley, of Fairfield, for petitioners.

Earl Warren, Atty. Gen., Robert W. Harrison, Chief Asst. Atty Gen., and P. B. Lynch, Dist. Atty., of Fairfield, for respondent.

SHENK, Justice.

The petitioners, Johnson, Cohen, Allen and Zulim, separately seek the writ of mandamus to compel the respondent, Morrill, as County Clerk of the County of Solano, to accept for filing and registration the affidavits of their qualifications as electors residing in that county. The matters are submitted on the petitions, the answers thereto, and a stipulation of the facts.

The petitioners are employed in national defense activities at Mare Island Navy Yard near the city of Vallejo, Solano County, and reside on various defense housing projects constructed outside the confines of the Navy Yard and in said county. The petitions and the answers thereto were consolidated for argument and decision. They present the question whether the United States has acquired exclusive jurisdiction of the areas occupied by said defense housing projects, and on which the petitioners reside, so as to preclude the exercise by the petitioners of the right of suffrage in said county and the State of California.

[1] The defense housing program was projected pursuant to laws passed by the Congress following the declaration by the President on September 8, 1939, that a national emergency was created by the outbreak of the second World War in 1939 after the Munich incident, and more immediately by German bombings of neutral ships in the free lanes of the Atlantic Ocean. After the attack on Pearl Harbor at Honolulu, on the islands of Midway, Wake and Guam, and on Manila by the Japanese in December, 1941, and on April 1, 1942, 33,219 units of housing to accommodate defense workers and others had been constructed or projected within the State of California. Seven projects, including 995 housing units, are constructed or are to be constructed on military and naval reservations or bases. Unquestionably they would be subject to the exclusive jurisdiction of the United States. Standard Oil Co. v. California, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775. The remaining projects occupy 63 separate tracts of land acquired by the United States through purchase or lease, and are located in or adjacent to 23 different cities or towns. About 10,870 units of housing are completed or in the course of construction in Solano County, 300 of which were constructed within the Navy Yard Reservation at Mare Island. Pursuant to the provisions of title II of Public Law No. 849, 76th Congress, as amended by Public Law No. 137, 77th Congress, 42 U.S.C.A. § 1521 et seq., the United States Government made grants of money and property, aggregating $20,707,839 as of March 21, 1942, to the State of California to enable it to furnish to the housing projects essential community services and facilities. The county of Solano received property of the total value of $5,828,167 for construction, equipment and maintenance of public schools, pumping and distribution of water, hospital buildings and equipment, sewage systems, fire protection, and playground and recreation centers.

The petitioner Irving Cohen resides in Dormitory A of Defense Housing Site 1-D of project "California 4087," situate about two miles east of the city of Vallejo. The land was leased to the United States of America by Carquinez Development Company on May 26, 1941. The leasing of the land and the financing of the project were authorized by the Urgent Deficiency Appropriation Act, approved March 1, 1941, Public Law No. 9, 77th Congress, 55 Stats. 14, 42 U.S.C.A. § 1523 note.

The petitioner Freda Allen resides at 34 Rodgers Street in the city of Vallejo within defense housing projects officially designated as "California 4083-4," and known as Federal Terrace. The site is at the north end of Vallejo on the mainland adjacent to Napa Bay, and was acquired by the United States in fee by Declaration of Taking filed in a condemnation proceeding. The projects were authorized and financed pursuant to said Public Law No. 849, 76th Congress, 54 Stats. 1125, also called the Lanham Act.

The petitioner Miyo Zulim resides at 205 Madison Street in the city of Vallejo within defense housing project "California 4086," also known as Carquinez Heights, at the southerly end of the city adjoining Mission Bay. The site was acquired by the United States in fee pursuant to Declaration of Taking filed in a condemnation proceeding, and was authorized and financed likewise pursuant to the Lanham Act.

The petitioner Dorothy Johnson resides at 234 Cunningham Street in the city of Vallejo within defense housing project designated as "California 4082" and "Navy-2," known as Roosevelt Terrace. The site is located at the north end of Vallejo adjacent to Federal Terrace (California 4083-4), and was acquired by grant from Martin Aden and others. The land was leased to the Navy Department by the United States Housing Authority, and the project, consisting of 600 dwelling units, was constructed by the Navy Department, pursuant to title II, Public Law No. 671, 76th Congress, 54 Stats. 676, 42 U.S.C.A. § 1501 et seq.

None of the projects here involved has been expressly accepted for exclusive jurisdiction by the United States by the filing of any notice of acceptance of exclusive jurisdiction pursuant to the provisions of section 355 of the Revised Statutes, 40 U.S.C.A. § 255 or by any other express acceptance. The immediate question for determination is whether the United States has acquired exclusive jurisdiction without such express acceptance, pursuant to the provisions of section 8, article I of the United States Constitution, and section 34 of the Political Code of the state.

Clause 17 of said section 8 provides that the Congress shall have power to exercise exclusive legislation over all places purchased by the consent of the Legislature of the state in which the same shall be, "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

Section 34 of the Political Code provides that the legislature consents to the purchase or condemnation by the United States of any tract of land within the state "for the purpose of erecting forts, magazines, arsenals, dock-yards, and other needful buildings," with certain reservations of authority to serve civil and criminal process and power to tax, not here material.

[2] The exercise of exclusive legislation and of exclusive jurisdiction have been held to be synonymous. Surplus Trading Co. v. Cook, 281 U.S. 647, 652, 50 S.Ct. 455, 74 L.Ed. 1091. If the projects here involved may be included in any of the purposes designated in the Constitution and the Political Code section, namely, if they can be said to be forts, magazines, arsenals, dockyards, or other needful buildings, then they have been acquired by the United States with the consent of the Legislature within the meaning of said section 8 of the Federal Constitution and the United States has exclusive jurisdiction over the land so acquired. Surplus Trading Co. v. Cook, supra, 281 U.S. page 652, 50 S.Ct. 455, 74 L.Ed. 1091; Standard Oil Co. v. California, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775; Consolidated Milk Producers v. Parker, 19 Cal.2d 815, 123 P.2d 440. Obviously, houses built for defense workers, without more, are not forts, magazines, arsenals, or dockyards. Whether they are or were intended to be "other needful buildings" requires an examination of the laws under which the projects were authorized, and of the facts presented here.

[3] Public Act 9, 77th Congress, approved March 1, 1941, was "an act making additional appropriations for the fiscal year 1941 urgently required for the Work Projects Administration and certain other Federal agencies, and for other purposes." It provided for the appropriation of emergency funds to enable the President through government agencies to provide temporary shelter, including the acquisition of land or interests therein, in localities where by reason of national defense ac-

tivities a shortage of housing existed, and when it was not practicable under other acts or private enterprise to meet the needs. There was no provision therein which indicated that the Congress intended that the United States would acquire exclusive jurisdiction in such areas. An indication to the contrary is found in the provision for assistance to state and local authorities in conducting and furnishing health and sanitary activities and other services therein. In any event the land on which project "California 4087" was financed and constructed pursuant to said act was acquired by lease from the Carquinez Development Company. The parties to the present proceedings are in agreement that exclusive jurisdiction over that land was not acquired by the United States Government because the land was not "purchased" as provided by said section 8 of the Constitution. Therefore the petitioner Cohen, who resides in that area, would be entitled to register as an elector residing in Solano County in accordance with his application.

The Lanham Act, Public Law No. 849, 76th Congress, 54 Stats. 1125, approved October 14, 1940, was enacted "to expedite the provision of housing in connection with national defense, and for other purposes." It authorized the Federal Works Administrator to provide housing for persons engaged in national defense activities and their families in the areas in which the President should find that an acute shortage of housing exists or is impending and for that purpose to acquire, prior to the approval of title by the Attorney General, land by purchase, lease or condemnation. It conferred on the administrator designated powers and made appropriations to accomplish the purposes of the act. "Persons engaged in national defense activities" were defined to include enlisted men in the naval or military service, employees in the Navy or War Departments assigned to duty at naval or military reservations, posts or bases, and workers in industries connected with and essential to the national defense. It provided for termination of the authority when the President should state that the emergency declared by him on September 8, 1939, ceased to exist, and in that event for the disposition of the property. The administrator was empowered to pay to the state or political subdivision annual sums in lieu of taxes upon property not exempt from taxation.

Section 10 of the Lanham Act reads: "Notwithstanding any other provision of law, the acquisition by the Administrator of any real property pursuant to this Act [subchapters II–IV] shall not deprive any State or political subdivision thereof * * * of its civil or criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property."

[4-8] Regardless of other considerations, the provisions of the section just quoted appear to be determinative of the question insofar as the rights of the petitioners, Freda Allen and Miyo Zulim are concerned. A fair construction of that section may be said to be the following: Notwithstanding the fact that the United States may acquire exclusive jurisdiction over such defense housing projects, exclusive jurisdiction is not to be deemed to be created by pursuing the authority vested by this act. It is well settled that the United States Government may acquire land within a state by donation, purchase or condemnation and devote the same to a public use without withdrawing such lands from the jurisdiction of the state. Surplus Trading Co. v. Cook, supra. And it is not questioned that under the law the state may cede and the United States may accept cession of jurisdiction upon any express terms, conditions or reservations (United States v. Unzeuta, 281 U.S. 138, 50 S.Ct. 284, 74 L. Ed. 761), and that the state and the United States may make any suitable agreement with respect to mutual or exclusive exercise of jurisdiction over land acquired or to be acquired by the United States. Collins v. Yosemite Park & C. Co., 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502. It follows from the express refusal in the Lanham Act to take exclusive jurisdiction that the citizens residing in the areas affected by that act have not been deprived of the exercise of their rights of suffrage in the county in which the areas are situated. The use of the expression "civil rights" in the language of the section may be deemed to include the political right of suffrage. Certainly where the Congress has declined exclusive jurisdiction and has expressly preserved to the citizens their civil rights, we should not labor to find an inference which would deprive them of the right of suffrage. The petitioners Allen and Zulim are therefore entitled to have their affidavits of registration accepted by the respondent.

Public Law No. 671, 76th Congress, 54 Stats. 676, approved June 28, 1940, was "an act to expedite national defense, and for other purposes." Title II thereof authorized the Navy and War Departments and the United States Housing Authority, in connection with the national defense program, to cooperate in making available necessary housing for persons engaged in national defense activities. It defined "persons engaged in national defense activities" as enlisted family men (exclusive of officers) who were in the naval and military service, employees of the Navy and War Departments assigned to duty at naval or military reservations, posts or bases, and workers with families who were engaged in industries connected with and essential to the national defense program. Authority to proceed was made dependent upon the approval of the President and upon his determination that there existed an acute shortage of housing in the locality involved which impeded the national defense program. Under the operation of that act the United States Housing Authority would obtain title to the land and lease it to the Navy or War Department. The act provides: "Notwithstanding other provisions of this or any other law, the Department leasing a project shall have the same jurisdiction over such project as it has over the reservation, post or base in connection with which the project is developed." It also provides that "the provisions of section 355 of the Revised Statutes [733 of Title 33, 520 of Title 34, 255 of Title 40, and 175 of Title 50] shall not apply to the acquisition of any real property by the Navy or War Department or by the Authority for the purposes of this title [sections 1501–1505 of this chapter] or to the project developed thereon."

Section 355 of the Revised Statutes, Amendment approved February 1, 1940, 54 Stats. 19, 33 U.S.C.A. § 733, provided that no public money should be expended upon any site or land purchased by the United States for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy yard, customhouse, lighthouse, or other public building of any kind whatever, until the Attorney General had given his written opinion in favor of the validity of the title. The section also provided that notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States "over lands or interests therein which have been or shall hereafter be acquired by it shall not be required," but the authorized officer of any department or agency was given power in such cases and at such times as deemed by him desirable to accept or secure the state's consent to or cession of jurisdiction, exclusive or partial, over such lands or interests as he deemed desirable, and to indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of acceptance with the Governor of the State. "Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

A comparison of the provisions of the Lanham Act and the earlier Public Law No. 671, 76th Congress, discloses a similarity of objective, namely, provision for necessary housing in connection with national defense activities. A marked distinction between the two enactments is at once apparent. The language of the earlier act imposed on the War or Navy Department the same jurisdiction over the housing project as it had over the reservation, post or base in connection with which the project was developed; it abrogated the provisions of section 355 of the Revised Statutes including the provision which declined acceptance of jurisdiction over land acquired by the United States unless notice of acceptance of such jurisdiction was filed. The language of the later Lanham Act expressly declared an intention not to accept exclusive jurisdiction of any lands acquired pursuant thereto. An examination of the language of the two acts pertinent to the matter of jurisdiction may properly be said to lead to the conclusion that the intent under the earlier act was to acquire lands and develop projects in the nature of naval or military defense housing projects, and under the Lanham Act in the nature of civilian defense housing projects. But this distinction would not likewise lead to the conclusion that the United States Government acquired or intended to acquire exclusive jurisdiction over the naval or military housing project unless it could also be said that such projects were "other needful Buildings" within the meaning of Clause 17, of section 8 of Article I of the Constitution. The jurisdiction over the project granted to the War or Navy Department does not necessarily mean exclusive jurisdiction by the United States unless other facts appearing in the record evidence the acquisition and exercise of such jurisdiction. There is no evidence that the defense housing project known as "Navy 2" or "California 4082," is used strictly for the performance of any governmental functions. It is not located on a naval reservation over which the United States had acquired exclusive jurisdiction. Neither the land nor the dwelling units thereon are used in the performance as such of any naval duties or maneuvers. The buildings merely serve as dwellings for the workers and enlisted men who are employed in national defense activities in the Navy Reservation which is without the confines of the area. There is affirmative evidence in the record that the United States Government has not sought to acquire exclusive jurisdiction over the project known as "Navy 2." On the contrary, pursuant to the amendment to the Lanham Act, it has made grants of money for the benefit of the county of Solano, the Vallejo School District, and the city of Vallejo, to enable them to exercise their respective jurisdictions in the matter of furnishing to said project, municipal facilities and services, including the equipment and operation of schools, sewage disposal, water distribution, fire protection, health centers, and hospital additions. Insofar as the actual exercise of jurisdiction is concerned, no distinction appears to have been made between the project known as "Navy 2" or "California 4082," and the other defense housing projects here involved.

[9-11] No express application for or consent to the exercise of exclusive jurisdiction by the United States Government has been made or given. The term "other needful Buildings" has been considered in the light of the intention of the constitutional and statutory provisions. James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318; Battle v. United States, 209 U.S. 36, 28 S. Ct. 422, 52 L.Ed. 670; United States v. Wurtzbarger, D.C., 276 F. 753; United States v. Tucker, D.C., 122 F. 518; Sharon v. Hill, C.C., 24 F. 722, 726, 10 Sawy. 666; Sinks v. Reese, 19 Ohio St. 306, 2 Am.Rep. 397; Lowe v. Lowe, 150 Md. 592, 133 A. 729, 46 A.L.R. 983; Herken v. Glynn, 151 Kan. 855, 101 P.2d 946. The term has been held to include locks and dams, post offices, custom houses, Indian training schools, homes for disabled volunteer soldiers, and war chemical manufacturing plants; but in each of those cases, as distinguished from the present proceeding, the property was acquired for use by the United States Government in the performance of a governmental function, and exclusive jurisdiction was consented to or ceded by the state and was exercised by the United States. Land acquired by the United States which is not subject to the exclusive legislative authority vested by the Constitution, remains subject to the jurisdiction of the state in matters not inconsistent with the free and effective use of the land for the purpose for which it was acquired. Further or exclusive authority may be ceded by the state on any terms acceptable to the United States. Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264; Palmer v. Barrett, 162 U.S. 399, 16 S.Ct. 837, 40 L.Ed. 1015; United States v. Unzeuta, supra; Surplus Trading Co. v. Cook, supra; Collins v. Yosemite Park & C. Co., supra. There is no showing in the present proceedings that grants of authority have been expressly conferred by cession or agreement. The United States cannot be compelled to accept the burdens of exclusive jurisdiction along with the title to land acquired for purposes not strictly within the classes designated in the Constitution. Silas Mason Co. v. Tax Commission, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187; Atkinson v. State Tax Commission, 303 U.S. 20, 58 S.Ct. 419, 82 L.Ed. 621. By the Lanham Act the federal government expressly declined exclusive jurisdiction; and as to the project known as "Navy 2" acquired under the earlier act, it does not appear to have desired or to have exercised such exclusive jurisdiction. There is therefore no sound basis upon which we may announce the conclusion that the United States has undertaken such jurisdiction of the defense housing project known as "Navy 2" as would deprive citizens residing thereon of the elective franchise, as distinguished from citizens residing on other projects who were expressly declared not to be deemed deprived of their civil or political rights. Accordingly we have concluded that the petitioner, Dorothy Johnson, is also entitled to have her affidavit of registration accepted by the respondent.

Let the peremptory writ issue as prayed in each of said proceedings.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., and WARD, Justice pro tem., concurred.

52 Cal.App.2d 660

EAGLE OIL & REFINING CO., Inc., v. JAMES.

JAMES v. EAGLE OIL & REFINING CO., Inc.

Civ. 13545.

District Court of Appeal, Second District, Division 1, California.

June 11, 1942.

1. Specific performance ⚷121(8)

In action for specific performance of an option contract for an assignment of leases for gasoline filling stations, evidence as to rental value of one of stations and as to purchase price of leases of other three stations supported denial of specific performance on ground that contract was not just, fair and equitable to optionor. Civ.Code § 3391.

2. Joint tenancy ⚷12

One joint tenant cannot bind his cotenant by any contract which he may make relating to the common property.

3. Tenancy in common ⚷41

A cotenant cannot bind his cotenants by grant of an easement over common property, although he may by lease or license grant to another the right to enjoy the common property in his stead to same extent that he is entitled to enjoy it by reason of his cotenancy.

4. Joint tenancy ⚷13
Tenancy in common ⚷3

A joint tenant may convey his interest to a stranger, in which event grantee becomes a tenant in common with the other owner.

5. Husband and wife ⚷14(10)

Where husband and wife owned leases of gasoline filling stations as joint tenants, and wife did not join husband in execution of option to assign leases to third party, since it would be impossible for third party to compel husband to perform terms of option except as to his own interest in property covered thereby, such fact would have effect of terminating joint tenancy and making third party a tenant in common with wife.

6. Specific performance ⚷121(3)

In action for specific performance of an option contract for an assignment of leases for gasoline filling stations, where it appeared that defendant and wife owned leases as joint tenants and that wife did not join defendant in execution of option, and that defendant and plaintiff's officers discussed the possibility of getting wife to sign option and that defendant told officers he did not know whether she would sign, evidence supported finding that neither defendant nor his wife acted in bad faith.

7. Specific performance ⚷128(1)

The right to pecuniary compensation in lieu of specific performance assumes a sufficient contract, performance or an offer to perform by plaintiff, and every other element requisite on plaintiff's part to cognizance of his case in chancery.

8. Specific performance ⚷128(1)

Where trial court found that option contract for an assignment of leases for certain gasoline filling stations was not, as to optionor, just and reasonable, optionor could not be compelled to perform, and, therefore, damages could not be assessed against him for his refusal to perform. Civ.Code, § 3391.

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Appeals from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Eagle Oil & Refining Company, Incorporated, against Grover W. James for specific performance of a contract, wherein Iona James intervened, consolidated with an action by Grover W. James against Eagle Oil & Refining Company, Incorporated, for unlawful detainer. From a judgment in each action in favor of Grover W. James, the Eagle Oil & Refining Company, Incorporated, appeals.

Affirmed.

Cobb, Campbell & Kelley, of Los Angeles, for appellant.

Potter & Potter, of Los Angeles, for respondent.

YORK, Presiding Justice.

The first of the above entitled actions was instituted by Eagle Oil & Refining Co., Inc., against Grover W. James (1) for specific performance of a contract alleged to have arisen upon the exercise of an option dated November 8, 1940, and (2) for $5,000 in damages in the event specific performance could not be had.

The second action was brought by Grover W. James for unlawful detainer of the properties covered by the contract sued upon in the first action. Eagle answered the complaint in the second action admitting all of the allegations thereof, except that there was due or owing any sum to James, and setting up as a separate defense the pendency of the first action.

Judgment in each action was rendered in favor of James, no evidence being offered or received in the unlawful detainer action other than the judgment in the action for specific performance.

Appeals from both judgments are presented to this court upon the same set of briefs, appellant Eagle Oil & Refining Co., Inc., contending as follows:

(1) That the court's finding that the contract sued upon was not just, fair and equitable, is contrary to the evidence;

(2) That in finding to the effect that the property involved was held in joint tenancy and that respondent's wife (the other joint tenant) did not join in the execution of the option, does not render the option void so as to defeat specific performance;

(3) The court erred in finding no bad faith existed on the part of respondent James;

(4) The court erred in finding and entering judgment denying appellant Eagle Oil & Refining Co., Inc., any damages.

A brief summary of the facts which form the background of the instant litigation follows:

Prior to June 21, 1939, respondent Grover W. James and his wife, Iona (intervener) owned as joint tenants a parcel of land, referred to herein as parcel 1, located at 1700 West Adams Street, in the city of Los Angeles, upon which was located a fully equipped gasoline service station. Respondent was also the lessee in leases covering parcel 2 at Pico and La Brea; parcel 3 at Temple & Alvarado; and parcel 4 at West Washington and Hoover, upon each of which was located a fully equipped service station.

On June 21, 1939, respondent leased to Gasoline Sales Company said four parcels at a rental of $311.50 per week, said lease to run to September 20, 1942, with right of lessee to terminate on thirty days' notice after the expiration of the first year of said term. On April 2, 1940, Gasoline Sales Company assigned said lease to appellant, which assignment was consented to in writing by respondent James on March 18, 1941.

On October 29, 1940, appellant wrote respondent that unless he could see his way clear to accept its proposal for certain reductions in rentals, it would be forced to serve him with notice of cancellation of the lease.

According to respondent's testimony, he called at the office of appellant company just before November 8, 1940, where the following conversation took place between him, Mr. Nelson, the president, and Mr. Sterling, the vice president of Eagle Oil & Refining Co.:

"Mr. Nelson said, 'James, we are going to give the stations back to you.' I kind of hesitated and I said, 'What?' and he said, 'We are going to give the stations back to you unless you cut the rent.' 'Why?' I says, 'Those four stations in April and May pumped 240,000 gallons of gasoline and now you want to give the stations back to me,' and at that Mr. Sterling walked into the office and Mr. Sterling says—Mr. Nelson says to Mr. Sterling, who is the vice president, he says, 'I have been telling James that we are going to give the stations back to him,' and Mr. Sterling says, 'Yes, if he doesn't cut the rent,' and we had a little discussion and I said, 'That's out, I can't cut the rent. I made you fellows a wonderful deal that is perfectly satisfactory,' and I says, 'Now you want to cut the rent, that's out,' and Mr. Sterling says, 'Make us some kind of an agreement,' and I says, 'I haven't said anything to my wife about this set up.' Mr. Sterling says, 'We want to show the Board of Directors some kind of a deal, and will you make us some kind of a deal?' and then I says, 'What about $12,000 for Number Three, Number Four and Number Five (Two), they are known as Temple and Alvarado, Hoover and Washington and Pico and La Brea?' Then I says, '$250.00 for Number One at Normandie and Adams.' We had quite a little discussion there. Mr. Sterling says, 'I will give you $10,000 for Number (Two), Number (Three) and Number (Four) and $200.00 for Number One.' He said, 'Will you sign a letter?' and at that he got up out of the chair and walked out and brought a letter back and handed to me to read * * *. So I looked at the letter and I said, 'Mr. Sterling, my wife hasn't seen this letter and I don't know that she will sign it or not,' and he said, 'We want this to show to the Board of Directors,' and we had a little discussion there, and I said, 'All right, I will sign it,' and then he says to me, 'Will she sign the papers?' and I said, 'Mr. Sterling, that I don't know'."

The letter so signed, addressed to appellant and dated November 8, 1940, which is referred to throughout the proceedings herein as the "option," reads as follows:

"In accordance with your letter of October 29, 1940, in regard to Parcel No. 1—1700 W. Adams, Los Angeles, I would agree to lease to you this station for a period of ten years at the rate of $200.00 per month.

"In regard to Parcel No. 2—S/E corner of Pico and La Brea, leased by the undersigned from Mr. Heath, and now sub-leased to you; and in regard to Parcel No. 3—S/E corner of Temple and Alvarado, leased by the undersigned from Tobias R. Archer and now subleased to you; and in regard to Parcel No. 4—1241 W. Washington leased by the undersigned from Elizabeth W. Thomas and now leased to you. Please be advised that I would be willing to accept the total sum of $10,000.00 for the assignment of the above listed parcels; and assignment of all personal property belonging to the undersigned; and the cancellation of the present agreement between the Eagle Oil and Refining Co. Inc. and myself.

"I would also endeavor to secure options for extensions of the present leases on Parcel No. 2 and Parcel No. 4.

"If the above offer meets with your approval I ask that you kindly advise me within 15 days from date hereof.

"Yours very truly, (Signed) Grover W. James."

Respondent further testified that "one week later I didn't get my rent, so I first called and I couldn't get any satisfaction by phone and I went back to the Eagle Oil Company and this time I saw Mr. Sterling alone and I says, 'Mr. Sterling I have been looking around for stations and I find that I can't build one of these stations on major corners like we have for less than $7500.00 to $8500.00.' Well, he handed me my check and that is all that was said."

On November 22, 1940, appellant exercised the option of November 8, 1940, in the following language:

"Dear Mr. James: We refer to your letter to us dated November 8, 1940, wherein you made the following offer to us (then follows a copy of said letter hereinbefore set out).

"We advise you hereby that we accept your offer as outlined above. We shall appreciate your arranging to meet with us at your earliest convenience for the purpose of preparing and executing the necessary papers and documents to consummate this transaction."

On December 2 and 7, 1940, respondent procured extensions of the leases covering parcels three and four, respectively.

On December 26, 1940, respondent again called at the office of appellant and "I went into Mr. Sterling's office. No more had I sat down, Mr. Sterling pressed the buzzer and had his attorney come in and sit down. Then our conversation began about the deal and I said, 'Mr. Sterling, I can't go through with the deal that you made.' He says, 'Why?', and I says 'Because I haven't told my wife about this setup,' and I says, 'I don't think that she would go through with the deal,' and I says, 'I never would have signed that paper if you and Mr. Nelson hadn't harassed me into signing it.' * * * Then Mr. Sterling's attorney pointed on Mr. Nelson's desk to the paper that I had signed and Mr. Sterling got up and said, 'Well, we will sue you and make you go through with it'."

During the holidays of 1940, Mrs. Iona James, wife of respondent, learned that her husband had given an option to appellant for an assignment of said leases, and withheld her consent to the same.

On December 27, 1940, appellant opened an escrow with the Whittier National Trust & Savings Bank to consummate the terms of the option agreement of November 8, 1940.

On January 8, 1941, appellant filed its action for specific performance, on April 23, 1941, Iona James filed her complaint in intervention therein, and on April 15, 1941, respondent filed his action against appellant for unlawful detainer.

[1] In connection with its first point, appellant urges that there is no substantial evidence to support the finding of the trial court as to the rental value of parcel one and the reasonable purchase price of parcels two, three and four, to wit:

"It is not true that the option given by defendant to plaintiff on November 8, 1940 or the contract to purchase by plaintiff on November 22, 1940, are or were at all times fair, just or equitable, or the consideration to be paid of $200.00 per month as rental for Parcel 1 or the sum of $10,000.00 to be paid for the purchase of the leasehold estate owned by defendant Grover W. James in respect to Parcels 2, 3 and 4 was fair, just or equitable or the reasonable market value of the rental of Parcel 1 or the purchase price of Parcels 2, 3 and 4, but the court finds that the rental value of said Parcel 1 was $350.00

per month, and the value of said Parcels 2, 3 and 4 was in excess of $40,000.00."

Appellant argues in this respect that "since these (expert) witnesses based their opinions on facts and premises not supported by the evidence, the opinions should fall."

The above finding was based upon directly conflicting evidence. In giving their opinions of the reasonable rental value of parcel 1 and the reasonable market value of parcels 2, 3 and 4, as is usual with expert testimony, the witnesses called by appellant placed a conservative value on the property, while those testifying on behalf of respondent were quite liberal in their estimates. However, an examination of the opinions given by all of these witnesses, including those given by respondent (who was entitled to give his opinion as to the value of the property owned by him), reveals that the evidence so adduced was based upon a consideration of the following factors:

(1) The location of the oil stations, the size of the lots and the accessibility of approach thereto;

(2) The buying power in the districts where stations were located;

(3) The flow of traffic on the arteries where stations were located;

(4) The aggregate cost of equipment installed and in use, as well as cost of replacements;

(5) The unexpired term of the leases and the possibility of renewals thereof;

(6) The available space for billboard advertising and the amount realized from established advertising;

(7) The monthly gallonage of gasoline sold at the four stations, the price at which sold and competition in the districts where the stations were located;

(8) The type of business, whether cut-rate or truck;

(9) The present income derived from the stations.

Mr. Frederick C. Degens, an employee of respondent who assisted in making an inventory of the service stations at the time they were taken over by Gasoline Sales Company, testified that the average monthly gallonage sold at parcel one from January to June, 1939, was 26,971; at parcel three, 27,871, and at parcel four, 24,612. Respondent testified that the approximate monthly average of gasoline sold at parcel two in January of 1939 was 45,000 gallons.

Henry Claman, a real estate broker specializing in sales of gas stations for a period of nineteen years, testified on behalf of respondent and basing his opinion of rental value on gallonage alone, i. e., 95,000 gallons a month as of April, 1939, sold at the stations located on parcels two, three and four, stated: "* * * three stations like that are worth a terrific bonus outside of the value of the rental, gallonage like that is very hard to obtain. A major company figures if they can get a 10,000 gallon station and invest $12,000 in improvements, they have a very fine station. To get a 34,000 gallon station, they just dream about that, like in Westwood where they invested $40,000 to get such a station, they go away out of proportion, but on a straight gallonage basis, these stations are worth at least $1,350.00 a month rent, that is without any bonus attached to it.

"By the Court: That is the three stations? A. Yes, the three stations.

"Q. By Mr. Potter, Jr.: That is figured upon the basis of one and a half cents a gallon? A. Yes, one and a half cents a gallon.

"Q. You spoke of a bonus that should be paid, a large bonus for these particular stations on account of the gallonage and referred to Standard paying $12,000 for 10,000 gallons what in your opinion would be the bonus that should be paid on stations of this gallonage? * * * A. It isn't set, your Honor, it is a matter of how badly the company wants to get in the field, they want to get distribution and they pay according to how bad they need it. A bonus like this $25,000 to $40,000 would not be excessive."

With the foregoing in mind, it is obvious that there is substantial evidence to support the finding objected to by appellant.

Appellant urges that the finding by the trial court to the effect that the property herein was held in joint tenancy by respondent and his wife, Iona James, and that the latter did not join in the execution of the option, does not render the option void, and "does not defeat specific performance," citing in support thereof the case of Swartzbaugh v. Sampson, 11 Cal.App.2d 451, 461, 54 P.2d 73.

The cited case was one in which a wife (joint tenant) brought suit to cancel a lease executed by her husband (the other joint tenant) as lessor, to a third party, as lessee, without the wife's consent. It was there held at page 457 of 11 Cal.App.2d, at page 76 of 54 P.2d: "It is a general rule that the act of one joint tenant without express or implied authority from or the consent of his cotenant cannot bind or prejudicially affect the rights of the latter. Simpson v. Bergmann, 125 Cal.App. 1, 13 P.2d 531; Oberwise v. Poulos, 124 Cal.App. 247, 12 P.2d 156; Summer v. Vinson, 211 Ky. 571, 277 S.W. 849; Lawrence v. Fielder, 186 Ky. 324, 216 S.W. 1068." But that (page 458 of 11 Cal.App.2d, page 77 of 54 P.2d) "a lease to all of the joint property by one joint tenant is not a nullity but is a valid and supportable contract in so far as the interest of the lessor in the joint property is concerned. * * * [page 461 of 11 Cal.App.2d, page 79 of 54 P.2d] the effect of a lease by one cotenant is to give the lessee the right to share in the possession of the leased property for the term of the lease. * * * [page 462 of 11 Cal.App.2d, page 79 of 54 P.2d] that all a cotenant out of possession is entitled to is to be let into possession with the lessee of his cotenant to enjoy his moiety."

The instant action is brought by third parties against husband (joint tenant) for specific performance of an agreement based upon an option which husband made with said third parties without the knowledge or consent of his wife (the other joint tenant).

[2-4] "One joint tenant or tenant in common cannot bind his cotenant by any contract which he may make relating to the common property. Sarina v. Pedrotti, 103 Cal.App. 203, 284 P. 472; 7 Cal.Jur., p. 358; 33 C.J. p. 913. So one cotenant cannot bind his cotenants by the grant of an easement over the common property (Pfeiffer v. Regents, 74 Cal. 156, 15 P. 622; East Shore Co. v. Richmond Belt Ry., 172 Cal. 174, 155 P. 999; Waterford Irr. Dist. v. Turlock Irr. Dist., 50 Cal.App. 213, 194 P. 757; 7 R.C.L., p. 884), although he may by lease or license grant to another the right to enjoy the common property in his stead to the same extent that he is entitled to enjoy it by reason of his cotenancy. Waterford Irr. Dist. v. Turlock Irr. Dist., supra; Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 28 P. 45. A joint tenant may likewise convey his interest to a stranger, in which event the grantee becomes a tenant in common with the other owner. Tilden v. Tilden, 81 Cal.App. 535, 254 P. 310; Green v. Skinner, 185 Cal. 435, 197 P. 60; Pepin v. Stricklin [114 Cal.App. 32], 299 P. 557." Oberwise v. Poulos, 124 Cal.App. 247, 251, 12 P.2d 156, 158.

[5] In view of the law as above stated, it would be impossible to compel respondent to perform the terms of the contract except as to his own interest in the property covered thereby, and, under the facts presented, this would have the effect of terminating the joint tenancy and making appellant a tenant in common with respondent's wife.

However, since the court found upon sufficient evidence that the contract was not fair, just or equitable in so far as respondent is concerned, he cannot be compelled to perform its terms. § 3391, Civ.Code.

[6] On the question of bad faith of respondent, this is not raised by the pleadings in the action for specific performance. Moreover, the evidence shows that respondent and appellant's officers discussed the possibility of getting Mrs. James to sign the option, and respondent told said officers he did not know whether she would sign or not. Under the circumstances, the finding of the trial court that neither respondent nor his wife acted in bad faith must be sustained.

[7] With respect to damages, it was held in the case of Hupp v. Lawler, 106 Cal.App. 121, 125, 288 P. 801, 803, quoting from Morgan v. Dibble, 43 Cal.App. 116, 184 P. 704: "'The right to pecuniary compensation in lieu of specific performance "assumes, of course, a sufficient contract, performance or an offer to perform by the plaintiff, and every other element requisite, on his part, to the cognizance of his case in chancery." Milkman v. Ordway, 106 Mass. 232, 254. There is no authority for holding that equity can grant damages unless some case of equitable relief is made out also, to which the damages would be applicable or subsidiary. * * * An action to recover damages in lieu of specific performance lies not at law, but in equity, for the right to such damages depends upon the right to specific performance, and is not available until the latter is established.'"

[8] Since the court found that the contract sued upon was not, as to respondent just and reasonable, he cannot be compelled to perform (§ 3391, Civ.Code); therefore, damages cannot be assessed against him.

For the reasons stated, the judgments appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concurred.

52 Cal.App.2d 661

PEOPLE v. HYCHE.

Cr. 3566.

District Court of Appeal, Second District, Division 1, California.

June 10, 1942.

1. Criminal law ⚿1159(1)

Although a reviewing court might be of opinion that circumstances could also be reasonably reconciled with defendant's innocence, reviewing court may not interfere with determination of trial court or jury if same circumstances reasonably justify jury's verdict or trial court's decision.

2. Infants ⚿20

Evidence supported conviction of lewd conduct with a ten-year old girl. Pen.Code, § 288.

3. Criminal law ⚿1169(3)

In prosecution for lewd conduct with a ten-year old child, even if companion of prosecuting witness was told to testify that defendant had given prosecuting witness 20 cents, defendant was not prejudiced thereby, where defendant himself testified that he gave money to the children. Pen.Code, § 288.

4. Criminal law ⚿938(1)

A motion for new trial for "newly discovered evidence" was properly denied, where supporting affidavits contained matters merely tending to contradict child witness named therein and there was no showing that evidence in affidavit could not with due diligence have been produced at trial or that any effort was made to produce it.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Clarence Hyche was convicted of lewd conduct with a ten-year old girl, and he appeals.

Affirmed.

Maurice A. Gleason, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, appellant was accused of violating the provisions of section 288 of the Penal Code. Following entry of a not guilty plea, he was tried before the court sitting without a jury and found guilty. A motion for a new trial was denied, and this appeal is prosecuted from such order of denial and the judgment of conviction.

Stating the proven facts in the light most favorable to the prosecution, as we are required to do following a verdict or decision of guilt, we find in the record evidence that the prosecutrix, a ten-year-old girl, on August 26, 1941, was seated with a girl friend in the Slauson Playground, watching a croquet game. Defendant was standing in back of the girls, leaning against a fence. It appears from the testimony that the two girls were sitting upon board seats, and the defendant shortly thereafter seated himself opposite them on the other side of the seats. The children were sitting on the top row and the defendant was sitting on the bottom seat. He commenced a conversation with the girls, asking them if they were sisters. The complaining witness was suffering from a sore jaw, and the defendant asked her several times about it and how the injury had occurred. He then put twenty cents in the hand of the prosecutrix, held her hand tightly, and then put his right hand on her leg below her knee, asking her if she cared, to which she made no reply. Defendant then put his hand further up under her dress, asking if "Mona Lee" (the name of the prosecutrix' girl companion) "would let him." The complaining witness testified that defendant put his hand "quite a ways up my dress" and upon her bare skin. While engaged in these acts defendant admonished the children not to tell anyone. About that time a woman passed by with a dog, whereupon defendant left to get into his automobile. Just as he was about to start the vehicle, Miss Clara S. Keeler, chief director of the playground, came upon the scene and asked defendant what his idea was in giving the girl the money, to which he replied that the child had asked for it. In answer to the query of Miss Keeler, defendant stated that he had heard the children state that they were hungry and that he gave them the money with which to purchase something to eat. Upon her return home, the prosecutrix complained to her mother, as a result of which defendant was apprehended. The foregoing testimony of the prosecutrix was corroborated by her companion, who testified that she saw defendant put his hands on the complaining witness' knee and thereafter move his hands up under her dress.

In his own behalf, defendant testified that he was a crane operator employed by the Bethlehem Steel Company. He said that he was passing by the playground and saw "activities going on"; that he had nothing particular to do, so he stopped and watched the croquet game for a few minutes, after which he went over and watched a ball game. He admitted sitting upon a seat in the grandstand and said that he had been there but a few minutes before the girls in question arrived. He testified that they engaged him in conversation, telling him that they were going to have a play that afternoon and did not want to go home to eat; that they were hungry; that the older girl seemed about to cry because her face was hurt; that he asked her what was wrong and was informed that she was suffering from a gumboil. He further testified that the children left the vicinity in which he was seated on three separate occasions, telling him they were starting for home, but each time they returned; that the prosecutrix told him she wished she had a dime so that she could eat, whereupon he gave her twenty cents. He denied touching the complaining witness in the manner testified to by her and her companion.

[1,2] It is first contended that the record is barren of any proof that the conduct and actions of the defendant were coupled with the intent specified in section 288 of the Penal Code. This claim is devoid of merit. The intent or intention with which an act is done is manifested by the circumstances surrounding the same. Even though a reviewing court might be of the opinion that the circumstances could also be reasonably reconciled with defendant's innocence, it may not interfere with the determination of the trial court or jury if the same circumstances reasonably justify the verdict of the jury or decision of the court. In the case at bar the evidence is clearly sufficient to justify the trial judge's conclusion that the acts of the defendant were done with the intent upon his part of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or his victim. The conduct of the defendant is typical of the behavior of this type of sexual pervert, viz., offering money or gratuities of some kind to the child; inquiring as to her relationship with her companion; solicitude for her wellbeing and health; then the stealthy approach toward fondling the child by placing his hands upon her limb at a point around the knee; inquiring as to her attitude toward such conduct; and finally moving his hand up on the child's leg until he was touching her bare skin at a point "quite a ways up my dress"; and admonishing her not to tell anyone what had occurred. The experience of recognized authorities who work in the field of psychiatry as applied to sex abnormalities is authority for the statement that similar characteristics are present in the majority of people who resort to perverted conduct for the gratification of their sexual and sensual desires. The inferences arrived at and the deductions made by the trial judge as to the defendant's intent and purpose under the facts here presented were reasonably and amply justified by the evidence.

[3,4] Finally, appellant asserts that "the verdict and decision of the court are contrary to law, for the reason that he did not have a fair trial in that Mona Lee was coached by Mrs. Keeler and Mrs. Sparks as to what she would testify." This argument is predicated upon affidavits filed in support of a motion for a new trial. The purport of the affidavits is that the affiants therein named heard Mrs. Keeler tell one of the child witnesses for the prosecution, "Remember what I told you to say and that he gave her twenty cents," and that after the child had completed her testimony and returned from the courtroom, she said to Mrs. Sparks, "They did not cross me up although they tried but couldn't. I told what you told me to say." Certainly no prejudice resulted to appellant if it be conceded that the child was told to testify that he had given the complaining witness twenty cents, because he himself admitted and testified that he did give money to the children. It may also be conceded that the statements contained in the affidavits would tend to impeach the particular child witness named therein, who was not the prosecutrix, but we are not apprised, nor was the trial court, of any showing that the evidence referred to in the affidavits could not with due diligence have been produced at the trial, or that any effort was made

to produce it. The motion for a new trial on the ground of newly discovered evidence was therefore properly denied. People v. Kemp, 139 Cal.App. 48, 52, 53, 34 P.2d 502.

The judgment and the order by which the defendant's motion for a new trial was denied are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.

52 Cal.App.2d 615

CAMPBELL v. CLIFFORD.

Civ. 13560.

District Court of Appeal, Second District, Division 1, California.

June 10, 1942.

1. Venue 🔑**7**

The venue statute provision dealing with venue of an action founded on a contract requires that all actions arising on contracts shall be tried in county in which defendant resides, or in which contract was made, unless defendant has contracted specially and in writing as to county in which his obligation is to be performed, in which event such county is also a proper county for trial of the action. Code Civ.Proc. § 395.

2. Venue 🔑**7**

As regards question of venue, the obligation of a contract is incident to its making, is incurred at time contract is made, and follows contract until contract is extinguished. Code Civ.Proc. § 395.

3. Venue 🔑**7**

A letter signed and mailed by defendant in San Francisco, standing alone, was insufficient to overcome allegation of complaint, in action for breach of employment contract, that contract between parties was made in Los Angeles and that all obligations arising under it were incurred in such county so as to support venue therein, where letter raised inference that whatever agreement parties had on subject of plaintiff's employment had been consummated while defendant was in Los Angeles, and not that letter was intended to supersede all negotiations which preceded or accompanied its execution. Code Civ.Proc. § 395; Civ.Code, § 1625.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by S. E. Campbell against C. T. Clifford for breach of a contract of employment and to recover on the common count for indebtedness allegedly due plaintiff for work, labor and services in managing defendant's business. From an order denying change of place of trial, the defendant appeals.

Affirmed.

John L. McNab, of San Francisco, and A. I. McCormick, of Los Angeles, for appellant.

McCutchen, Olney, Mannon & Greene and Jo Henderson, all of San Francisco, for respondent.

YORK, Presiding Justice.

This is an appeal from an order denying defendant's motion for change of place of trial from Los Angeles County to the City and County of San Francisco. Said motion was made, submitted and decided upon appellant's affidavit of merits and residence, and respondent's complaint and counter-affidavit.

The complaint contains two causes of action, and expressly alleges that appellant, at all material times, was and is a resident of the City and County of San Francisco.

As part of the first cause of action it is alleged: "III. That on or about the 20th day of November, 1936, at Los Angeles, California, plaintiff and defendant made and entered into an employment contract to be effective as of January 1, 1936, wherein and whereby plaintiff promised to furnish to defendant plaintiff's services as district manager of defendant's said business, in the territory administered from defendant's Los Angeles office, and in consideration thereof defendant promised to pay to plaintiff at Los Angeles, California, as plaintiff's compensation for said services, in lieu of salary, forty-five (45) per cent of the net profits * * *. That said contract was evidenced by a letter dated October 17, 1936, from defendant to plaintiff, which was received by plaintiff on or about November 20, 1936, a true copy of which—entitled 'Exhibit A'— is attached hereto and hereby incorporated herein.

"IV. That ever since said employment contract was made until August 13, 1941, plaintiff did fully and faithfully perform his duties as said district manager * * * That on August 13, 1941, plaintiff did leave the employ of defendant, because of defendant's breach of said employment agreement, as hereinafter mentioned."

The second cause of action is in the form of a common count alleging the indebtedness of appellant to respondent "in the sum of $30,000 on an account for work, labor and services in managing defendant's business in Southern California, performed at the request of the defendant at Los Angeles, California, between the 31st day of December, 1939, and the 13th day of August, 1941."

The prayer is for an accounting; for judgment in the sum of $30,000 and other relief.

The letter attached to the complaint and marked "Exhibit A," follows:

"Oct. 17, 1936

"S. E. Campbell, Los Angeles Office. Dear Sir: Answering yours of October 16, I had in mind since my return from Los Angeles the confirmation of the agreement between us on the basis of 45% net profit to you and 55% of net profit of your territory to the company, but I have not had sufficient time since my return to give the matter the necessary thought to determine how we are going to run our books in order to apportion properly, or, in other words, charge to your territory, Federal, State, and perhaps other taxes which may be levied in the future. As you realize, it will require a very heavy tax program, and perhaps mostly on profits, to overcome the deficit accumulated by the present spending policy of our different Governments.

"We must devise some manner of determining these taxes in dollars and cents prior to the declaration of departmental profits in arriving at the net result of the different departments; otherwise the company's share might not be sufficient to pay the taxes. It might seem ridiculous, at this time to infer that 55% of the net profits would not be sufficient to pay the taxes, but if you will consider at the moment the speed at which taxes have been mounting, and the fact that taxes to offset such expenditures and deficits would undoubtedly be applied to profits, you will readily understand that while the income tax might never reach 55%, it will reach very large figures.

"Since my return from Los Angeles, I have been unable to make up for the lost time; consequently I have not been able to give the matter much thought, but I will do so at the very earliest opportunity. In the meantime, this letter should serve as protection to your estate provided you and I should slip to the Great Beyond prior to our being able to put all details in writing governing our understanding that the net profits accruing from your territory each year shall be credited to your account on the basis of 45% of the net profit, with all that is advanced to you during the year, in the form of salary and expenses, being considered an advance to you and being deducted from the credit to your account of 45% of the net profit. The declaration of these profits shall be based upon contracts completed during the calendar year or that portion of the calendar year which you would remain in the employ of the company. Yours truly, C. T. Clifford."

Appellant avers in his affidavit of merits that his residence is the City and County of San Francisco; that the above letter "was written and mailed by him in the City and County of San Francisco, State of California, and shows on its face an acceptance by defendant of an offer made by plaintiff subject to the terms and conditions recited in said letter."

Respondent's counter-affidavit avers that "the 'agreement' and 'understanding' purportedly confirmed by Exhibit A * * * were made and entered into in a conversation had between plaintiff and defendant in the City of Los Angeles during the spring of 1936."

That portion of section 395 of the Code of Civil Procedure which deals with the venue of actions arising upon contract reads as follows (as amended in 1939):

"* * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

[1, 2] In interpreting said section 395, supra, it was stated by the court in Armstrong v. Smith, 49 Cal.App.2d 528, 532, 533, 122 P.2d 115, 117, 118: "What the legislature has in substance said is that all actions arising on contract shall be tried in the county in which the defendant resides, or in which the contract was made, unless the defendant has contracted specially and in writing as to the county in which his obligation is to be performed, in which event such county is also a proper county for the trial of the action. * * * The obligation of a contract is incident to its making. It is incurred at the time the contract is made and follows it until the contract is extinguished. The obligation arises as soon as the contract takes breath and may be breached at any time while it has life. While it is the law, in conjunction with the contract, which casts the obligation, the law does not wait until it is breached to cast it. This is done when the contract is made. So with the contract before us, all obligations arising under it were incurred at the time and in the county in which it was made."

[3] Appellant urges that the letter (Exhibit A) is the contract containing the obligation upon which the instant action is founded, because the complaint alleges that (1) the contract is evidenced by said letter and not the oral understanding or agreement; and (2) the contract was entered into on or about November 20, 1936, and not in the spring of 1936; also, that the execution of the letter by appellant and its mailing superseded all negotiations which preceded or accompanied its execution. Civ. Code, § 1625. Appellant further argues that he became liable for the performance of his obligation (evidenced by his letter, Exhibit A) at the time and place he signed and mailed said letter in answer to a letter of respondent to him; that this occurred in San Francisco and not at Los Angeles.

Respondent maintains that the contract was made in Los Angeles and that said letter (Exhibit A) constitutes merely a confirmation thereof.

The letter in question fails to disclose either the type of business or the nature of the contract which purportedly then existed between said parties, but is a dissertation upon the manner in which the books should be kept so as to properly apportion taxes and charge them against the business arising in the Los Angeles territory. A careful reading of said letter immediately raises the inference that whatever agreement or understanding the parties had on the subject had been consummated while appellant was in Los Angeles. In order to substantiate his claim that the letter was an acceptance of an offer made by respondent and contained in a letter dated October 16th, it would seem that appellant might have incorporated in his affidavit of merits some idea of what said letter of October 16th contained in the way of an offer.

Exhibit "A," standing alone, is insufficient to overcome the allegations of the complaint and the conclusion of the trial court, that the contract between the parties was made in Los Angeles, and that all obligations arising under it were incurred in said county.

For the reasons stated, the order appealed from is affirmed.

DORAN, and WHITE, JJ., concurred.

PANOS v. GREAT WESTERN PACKING CO.*

Civ. 13469.

District Court of Appeal, Second District, Division 1, California.

June 12, 1942.

Hearing Granted Aug. 10, 1942.

1. Judgment 🔑735

Generally, matters not in issue in a previous action are not "res judicata". Code Civ.Proc. § 1911.

2. Judgment 🔑725(1)

The statutory provision that what was actually and necessarily included in a judgment or was necessary thereto is deemed to have been adjudged, affords a defense by way of "abatement", generally characterized as an "estoppel by judgment", as distinguished from the doctrine of "res judicata." Code Civ.Proc. § 1911.

See Words and Phrases, Permanent Edition, for all other definitions of "Abatement", "Estoppel by Judgment" and "Res Judicata".

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* Subsequent opinion 134 P.2d 242.

3. Judgment ⇨720

Where the circumstances are such that a judgment may not be relied on as a bar, but is pleaded or proved merely as an estoppel as to some matter coming again in question in a subsequent action on a different claim or cause of action, the adjudication is conclusive only as to those matters which were directly in issue and in fact determined. Code Civ.Proc. § 1911.

4. Judgment ⇨715(1)

In order that a judgment in one action may constitute an "estoppel" against the parties thereto in a subsequent action, it must be made to appear, either on the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. Code Civ.Proc. § 1911.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

5. Judgment ⇨725(1)

A fact which was fundamental to a judgment, and without which it could not have been pronounced, is necessarily "res judicata." Code Civ.Proc. § 1911.

6. Judgment ⇨715(1)

If a fact sought to be introduced in a subsequent action would have been material evidence on the issues presented in a prior action, then that fact is merely of probative value, evidence which should have been presented in support of the issue in the former action, but if such a fact would not have been material on the issues set forth in a prior action, and yet is material to the issues in a subsequent action, the issues framed in the second action are different from those set forth in the former, and the doctrine of "res judicata" does not apply. Code Civ.Proc. § 1911.

7. Judgment ⇨715(3)

Judgment for defendant in personal injury action based on negligence of defendant in permitting third person to come on defendant's premises and cause plaintiff's injury, wherein plaintiff, on discovery that it was the negligence of defendant's servants which caused injury, offered proof of negligence of defendant's servant, but wherein offer of proof was refused, was not "res judicata" of subsequent personal injury action based on negligence of defendant's servants. Code Civ.Proc. §§ 597, 1911.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Tom Panos against the Great Western Packing Company to recover for injuries. From an adverse judgment, the plaintiff appeals.

Judgment reversed, and cause remanded for trial.

Romaine Hogan, of Los Angeles, for appellant.

Jennings & Belcher and Louis E. Kearney, all of Los Angeles, for respondent.

DORAN, Justice.

This is an action for damages for personal injuries. Defendant's affirmative defense raised the issue of res judicata, which was heard and determined pursuant to the provisions of section 597, Code of Civil Procedure. Judgment was for defendant. The court found "that each and all and every allegation contained in the 'Separate, Third and Distinct Answer and Affirmative Defense' set forth and appearing in the answer to the 'Amended Complaint' are true and correct." A motion for a new trial was denied and the appeal followed.

In the first action it is alleged: "That then and there, said defendant Great Western Packing Co. negligently and carelessly maintained and operated the said premises in that it knowingly, and as was customary, permitted Walter Lee, one of the defendants herein, to come in and upon said premises and take possession of a large parcel of meat and use certain machinery known as a trolley, which was then owned and operated by said defendant Great Western Packing Co. on said premises for the conveyance of large parcels of meat from the refrigerator to the place of delivery to the customer, and in so doing, the said defendant Wilson Lee obtained a large parcel of meat, attached to said trolley and with great speed, negligently and carelessly, pushed said meat over said trolley and caused it to collide with plaintiff herein and strike him on the left side of the face, left shoulder, and left side of his body, and knock him down and upon a handtruck * * *."

In the instant action it is alleged: "That on the 6th day of December, 1939, at or about the hour of 9:45 A. M., defendant was the sole owner of and solely maintaining, and solely operating a public place of business at 3115 East Vernon Avenue, Los Angeles, California, for the sale of meat to the public. That plaintiff is informed and believes and therefore alleges that then and there defendant operated an overhead trolley, conveying meat from the refrigerator through the east door thereof and south on to the platform where the plaintiff and the public were purchasing meat and in so doing carelessly, negligently, and recklessly operated the said trolley so as to cause the meat, by it being conveyed, to strike plaintiff on the left side of his head and left shoulder and knock him down upon a hand-truck on the floor of the said premises."

It is contended by appellant that the only issues tendered in the first action were: 1. Defendant negligently maintained its premises by permitting a third party, Lee, to come thereon. 2. Defendant negligently permitted Lee to take possession of a large parcel of meat on defendant's premises. 3. Defendant negligently permitted Lee to take possession of defendant's machinery for conveying meat, with which the said Lee struck the plaintiff.

In the trial of the issue of res judicata in the present action it was urged by defendant that the judgment in the previous action is a bar, not only as to the issues litigated, but also as to issues which could have been litigated. That such a rule prevails and is controlling in certain circumstances may be conceded. Whether it applies to the situation here presented, however, is open to question, for it is evident from an examination of the record, that the question as to whether defendant Great Western Packing Co. struck the defendant was not determined in the first action. In the sense that anything and everything is possible, it likewise may be conceded that it could have been determined in that action, but the test for the application of the defense of res judicata is somewhat more limited. It is contended by appellant, and which contention is sustained by the record, that at the first trial plaintiff (appellant here) sought to introduce evidence that incidentally threatened to reveal Great Western Packing Company's *direct* liability, but that Great Western Packing Co. successfully excluded such evidence on the ground that, as to the alleged acts of negligence on its part, the question was immaterial.

Respondent now argues that: "If plaintiff felt at the time of the trial of the previous action that he was unduly hampered by the single, adverse ruling of the court therein, as shown in Plaintiff's Exhibit 'A' herein, he could have sought leave during the course of the trial of such action to amend his pleadings to expand the factual allegations underlying his claimed right to recover judgment. If he was unaware, as he now claims, of all of the facts of his case in said action number 448,894, he could easily have determined them, if by no other means, by taking the depositions of the various defendants in such action prior to the time of trial. That is the usual and customary procedure and the right to take such depositions is given to the plaintiff by section 2021 of the Code of Civil Procedure.

"Again, if appellant in the previous case was injured by any adverse ruling of the court (which we do not concede), or if he suffered surprise or accident with respect to the facts at the time of trial, his remedy lay not in filing a new action but in moving for a new trial, after judgment in the previous action, upon appropriate grounds and upon proper showing under section 657 of the Code of Civil Procedure, and by appeal if relief were denied him erroneously. However, having permitted the judgment in the previous case to become final, as he did, such judgment is a bar to the present suit even if such judgment were erroneous (which we do not concede)." However, the foregoing argument is without merit, as will hereinafter appear.

It should be noted again for the sake of emphasis that in the first action the plaintiff relied on the alleged negligence of the defendant in permitting one Walter Lee to come upon the premises, etc. In other words, that the defendant only indirectly caused the injury complained of. In the second action the plaintiff alleged that the defendant actually committed the acts which directly caused the injury complained of. Appellant contends that during the first trial the court sustained a motion by the defendant Great Western Packing Co. for a directed verdict; that thereafter, as the trial progressed against another defendant and after the defendant packing company was out of the case, it developed, and plaintiff learned for the first time that it was defendant Great Western Packing Company's servants that committed the acts causing the injury complained of. Proof of the foregoing was offered by appellant upon the hearing in the present action pursuant to section 597 of the Code of Civil Procedure, but the offer of proof was refused. It should be noted here that, assuming appellant's contention in this regard to be true, a situation was there presented where the facts were peculiarly within the knowledge of defendant and the plaintiff's good faith in the premises is not disputed.

[1] Although there appears to be considerable confusion in the many decisions on the subject, the well settled general rule appears to be that matters not in issue in the previous action are not res judicata. Section 1911 of the Code of Civil Procedure reads as follows: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

[2] The latter provision affords a defense by way of abatement, generally characterized as an estoppel by judgment, as distinguished from the doctrine of res judicata. As to whether the first action is res judicata, generally that question may be determined by an examination of the pleadings and the judgment; whereas the latter may not be disclosed by the pleadings and the judgment, but nevertheless may be made available and possible by the introduction of extrinsic evidence drawn from the transcript of the proceedings had upon the former trial.

[3-5] In a comprehensive review of the subject in 15 California Jurisprudence the following appears at page 137: "Where the circumstances are such that a judgment may not be relied upon as a bar, but is pleaded or proved merely as an estoppel as to some matter coming again in question in a subsequent action on a different claim or cause of action, the adjudication is conclusive only as to those matters which were directly in issue and in fact determined. 'In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action.'" And at page 139 thereof: "A fact which was fundamental to the judgment—without which it could not have been pronounced—is necessarily res judicata."

Considerable confusion appears to exist by reason of the expression in some of the cases to the effect that a judgment may operate as an estoppel with respect to all matters which might have been litigated in the former action; and which would appear to extend the rule almost without limitation; but in that connection the Supreme Court has pointed out that: "The general rule that a judgment is conclusive, not only as to that which is actually determined, but also as to every other matter which the parties might have litigated in the action, is not always applicable literally. Mr. Freeman on this subject says: 'It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counterclaims, cross-bills, and equitable defenses, *or either of the parties may have acquired new rights pending the litigation,* which might, by permission of the court, have been pleaded by supplemental complaint or answer, and therefore might have been litigated in the action. But as long as those several matters are not tendered as issues in the action, they are not affected by it.'" (Italics included). Brown v. Brown, 170 Cal. 1, 6, 147 P. 1168, 1170.

Hardenbergh v. Bacon, 33 Cal. 356, was concerned with the question of agency. A former action was set up as a bar to the second action, in connection with which the court made the following observation, at page 375 of 33 Cal.: "It is unnecessary to enter into an analysis of the facts in that case, or to inquire into the effect of a judgment on demurrer to the complaint, when there is no issue of fact; and it need only be observed that the agency of Bacon was not alleged; and as it was not alleged it could not have been proven by the plaintiff or found by the Court. Had that fact been stated it would have essentially changed the action. In this action the agency is the leading fact, and if that fact had not been averred, or, if averred, had not been found by the Court below, the plaintiff must of necessity have failed. Although many of the facts in the former action are identical with those in this, the causes of action are not the same, and, therefore, the former recovery is no bar to this action."

In Takekawa v. Hole, 17 Cal.App. 653, at page 655, 121 P. 296, at page 297, the court declared: "It is settled law that in a judgment of any character pleaded in bar it must appear that the parties are the same and the subject-matter the same." And in the same case, at page 656 of 17 Cal.App., at page 297 of 121 P., the court further noted, with regard to the matter there presented, that: "The right to the relief in the second action was based upon entirely different facts from those set out in the first action."

In Horton v. Goodenough, 184 Cal. 451, at page 460, 194 P. 34, at page 38, is to be found the following on the same subject: "If the issue, as to which estoppel is claimed, is one which had to be determined by the jury in order to arrive at the verdict they reached, the verdict and consequent judgment are a final determination of the issue binding upon the parties in all subsequent litigation. On the other hand, if the issue were not one which the jury had to decide to arrive at their verdict, as, for example, if in the other action there were other issues presented by the defendant's answer which made out a good defense even though this particular issue were determined favorably to the plaintiff's contention, then it is not possible to say that this issue has in fact been determined one way or the other, and there is no estoppel with regard to it." And further, the court in the same action continued, at page 461 of 184 Cal., at page 38 of 194 P.: "'It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.' See, also, 1 Freeman on Judgments, §§ 276 and 276a; 23 Cyc. 1536, 15 R.C.L. 980.)"

In Southern Pacific Co. v. Edmunds, 168 Cal. 415, page 418, 143 P. 597, at page 598, the court declared: "The rule undoubtedly is that a former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined; the presumption being that all such issues were presented and decided. Bingham v. Kearney, 136 Cal. 175, 68 P. 597; Rucker v. Langford, 138 Cal. 611, 71 P. 1123. As to matters, however, which might have been litigated and decided in a former suit as within the scope of the issues, but which were not actually or expressly in issue and adjudicated, only a presumption is indulged in that they were decided. This presumption is, however, a disputable one, and may be overcome by showing that, although a particular matter was involved in the former action, it was by consent of the parties withdrawn from consideration at the trial and did not at all enter into or constitute any part of the verdict of the jury or final determination of that action. If this is the situation here, defendant certainly cannot invoke the doctrine of res adjudicata against the assertion by plaintiff in this action of a right to the credit claimed. He cannot assert the conclusiveness of the former judgment on that matter, if he consented with plaintiff that it might be withdrawn from consideration by the jury as an issue in the former action, and it was in fact withdrawn." And again in Bank of Visalia v. Smith, 146 Cal. 398, at page 402, 81 P. 542, at page 543, is to be found: "A finding made by a court of a fact upon which there is no issue in the case before it, and which does not enter into or form the basis of the judgment rendered in the action, is not admissible in another action between the same parties as evidence of that fact, either as an admission or by way of estoppel. House v. Lockwood, 137 N.Y. 259, 33 N.E. 595; Black on Judgments, § 619; Freeman on Judgments, § 251. It is the judgment, and not the preliminary determination of the court or jury, which creates the estoppel. Only that which is the matter directly adjudged, or which appears upon the face of the judgment to have been so adjudged, is conclusive between the parties. Code Civ.Proc., §§ 1908, 1911."

Purcell v. Victor Power & Min. Co., 29 Cal.App. 504, at page 510, 156 P. 1009, at page 1011, concerned the question of a special defense by way of estoppel and there the court declared: "It is elementary, and indeed necessarily, true that the force of an estoppel by judgment resides in the judgment itself. It is not, in other words, the finding of the court or the verdict of the jury which concludes the parties, but the judgment entered thereon. See 23 Cyc. 1218, and cases named in the footnote.

"In Foster v. The Richard Busteed, 100 Mass. 409, 1 Am.Rep. 125, the rule of res adjudicata is stated as follows: 'To be a bar to future proceedings it must appear that the former judgment necessarily involved *the determination of the same fact,* to prove or disprove which it is pleaded or introduced in evidence. *It is not enough that the question was one of the issues in the former suit. It must appear to have been precisely determined.*' [cases cited.]"

In an earlier case the Supreme Court noted that, "A record is not conclusive as to the truth of any allegations which were not material and traversable; but as to things material and traversable it is conclusive and final." Wixson v. Devine, 67 Cal. 341, at page 345, 7 P. 776, at page 778.

Referring again to the confusion that exists by reason of the use of the expression, what "might have been litigated," the Supreme Court in that regard has declared as follows: "'* * * The general expression, often found in the reports, that a judgment is conclusive of every matter which the parties might have litigated in the action, is misleading. What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint. It may be that the plaintiff might have united other causes of action with that set out in his complaint, or that the defendant might have interposed counterclaims, cross-bills, and equitable defenses, or either of the parties may have acquired new rights pending the litigation, which might, by permission of the court, have been pleaded by supplemental complaint or answer, and therefore might have been litigated in the action. But, as long as these several matters are not tendered as issues in the action, they are not affected by it.'" Metropolis, etc., Sav. Bank v. Barnet, 165 Cal. 449, at page 453, 132 P. 833, at page 835, quoting from Freeman on Judgments, 4th Edition, section 249. To the same effect, see Concannon v. Smith, 134 Cal. 14, at page 17, 66 P. 40, at page 41 wherein the court refers to the quotation from Freeman on Judgments to the effect that an adjudication is final and conclusive not only as to matters actually litigated but also as to every other matter which the parties "might have litigated and have had decided as incident to or essentially connected with the subject-matter of the litigation," and states that this passage is quoted by the learned author from Harris v. Harris, 36 Barb., N.Y., 88, but notes also that the same learned author has qualified the statement by the quotation already given above, taken from Metropolis, etc., Sav. Bank v. Barnet, supra, to the effect that such a statement is misleading. See, also, Maddux v. County Bank, 129 Cal. 665, 62 P. 264, 79 Am.St.Rep. 143.

From a consideration of the foregoing authorities it is evident that the literal application of the expression, "what might or could have been litigated in the former action," is not the test as to what constitutes res judicata, nor as to what amounts to and operates as an estoppel. And that the true rule, as expressed and sustained by the foregoing authorities, is based on sound reason there can be no question, for in the absence of the limitations therein referred to, the scope of the doctrine is extended to the realms of speculation. The following authorities relied on by respondent are not in conflict with the views herein expressed: Caminetti v. Board of Trustees, 1 Cal.2d 354, at page 356, 34 P.2d 1021; Price v. Sixth District Agricultural Association, 201 Cal. 502, at page 511, 258 P. 387; Sutphin v. Speik, 15 Cal.2d 195, at page 202, 99 P.2d 652, 101 P.2d 497; Sullivan v. Triunfo Gold & Silver Mining Co., 39 Cal. 459, at page 464; Hellman v. Los Angeles Railway Corp., 135 Cal.App. 627, at page 631, 27 P.2d 946, 28 P.2d 384; Lamb v. Wahlenmaier, 144 Cal. 91, at page 95, 77 P. 765, 103 Am.St.Rep. 66; Triano v. F. E. Booth & Co., Inc., 120 Cal.App. 345, 8 P.2d 174.

The lack of uniformity arising over the doctrine of res judicata, as applied to "what might have been or could have been decided" in a prior action, appears in part to result from a failure to distinguish between what are merely additional probative facts and what constitutes a new issue or issues. This distinction is clearly pointed out in Sullivan v. Triunfo Gold & Silver Mining Co., supra, 39 Cal. at page 464, a case having to do with the legality of a corporate assessment. It is there stated: "* * * the question of the legality of the first assessment mentioned in the complaint, the one which was levied July 6, 1865, was considered [in a prior action], and it was held to be legal; and it is claimed by the defendants that that question is res adjudicata by virtue of that decision. The plaintiff insists, that in this case, he has stated a new fact, which did not appear in the former action; that it was not averred in the complaint in that case, but in this, that the assessment was not levied for the purpose of paying the proper and legal expenses of the corporation. It is averred, in each case, that the assessment was illegal and invalid, and the ground upon which the assessment was contested in the former case was, that it was levied for the purpose of paying debts contracted by the trustees, exceeding the limit prescribed by the by-laws of the company. This is an objection to the assessment, or a fact tending to show the ultimate fact in issue, the illegality of the assessment. What the plaintiff now claims as a new fact, is but a new objection to the assessment, or, at most, another *probative fact* tending to prove the ultimate fact of illegality. The fact affirmed on the one side, and denied on the other, was that the assessment was illegal; its illegality was the point of the issue. The issue might depend upon one or more than one fact, and if upon several facts, it was incumbent on the party who would claim their benefit, to present them in support of the issue." (Italics added.)

[6] The distinction between probative facts and new issues is even more clearly drawn through applying a practical test. If a fact sought to be introduced in a subsequent action would have been material evidence upon the issues presented in a prior action, then that fact is merely of probative value, evidence which should have been presented in support of the issue in the former action. However, if such a fact would not have been material upon the issues set forth in a prior action, and yet is material to the issues in a subsequent action, it is clear that the issues framed in the second action are different from those set forth in the former.

Unqualified language appears to have crept into some of the decisions, which, although only a partial statement of the rule but nevertheless applicable to the facts and questions under consideration therein, is misleading, as certain decisions referred to herein have indicated. Mr. Justice Field in Cromwell v. Sac County, 94 U.S. 351, 352, 24 L.Ed. 195, used the following language on the subject of res judicata:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

[7] Returning now to an analysis of the record herein, it is obvious that the basis of liability for the cause of action as alleged in the second action is not the same as that relied upon in the first action. The proof required in each is entirely different. Hence on the face of the pleadings and the judgment the defense of res judicata is unavailing. Nor does respondent's separate and affirmative defense in the second action allege anything to the contrary, for the sole allegation therein relied on is, "that the subject matter of said action so filed and decided was identical with the subject matter of this action so far as this defendant and plaintiff herein are concerned; that the issues in said previously tried action are identical with the issues of this action so far as the parties named are herein concerned". Such allegation is a mere conclusion.

Nor is the basis of the cause of action in the second action a matter "within the scope of the issues" relied upon in the first action, that raises the presumption referred to in Southern Pacific Co. v. Edmunds, supra.

At the trial of the within action pursuant to section 597, Code of Civil Procedure, no effort was made by respondent to sustain the burden of proof imposed by the separate and affirmative defense set forth in the answer. § 1981, Code Civ.Proc. The complaint and judgment in the former action were alleged as a bar under the doctrine of res judicata. No facts were alleged by way of estoppel. Nor does the record reveal any showing made by respondent at the trial in this regard.

In the first action the issue was the liability of defendant packing company for negligently permitting a third party to come upon its premises and handle its overhead meat trolley. Upon this issue evidence of negligence of defendant's servants in handling the meat on the trolley was immaterial. The second action involved the issue of the negligence of defendant's servants as imputed to defendant packing company; and upon this issue the evidence of the negligence of defendant's servants in handling the meat was clearly material. The evidence in one case is not merely probative evidence of a fact material to the other. The cause of action in the second case is thus demonstrated to be different from that in the first case. And the situation here presented serves as an illustration of what was meant by the statement found in Freeman on Judgments, hereinbefore referred to, that the general expression, to the effect that a judgment is conclusive of all matters which might have been litigated, is misleading.

It follows, therefore, that the trial court's finding in favor of respondent upon respondent's affirmative defense of res judicata is not supported by the record and is unfounded. For the foregoing reasons, the judgment is reversed and the cause remanded for trial upon the issues joined by the pleadings.

YORK, P. J., and WHITE, J., concurred.

WILLSON v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.*

Civ. 13334.

District Court of Appeal, Second District, Division 1, California.

June 12, 1942.

Hearing Granted Aug. 10, 1942.

1. Courts 🔑475(4)

An action by beneficiary of a testamentary trust against trustee, in which complaint alleged that defendant issued and assigned to plaintiff a participating certificate which was void because no permit therefor had been obtained from Commissioner of Corporations, was not maintainable in superior court, where there was no allegation of extrinsic fraud, since the probate court had jurisdiction to pass upon the acts of trustees. Gen.Laws 1931, Act 652, § 104; Probate Code, §§ 1120, 1123.

2. Courts 🔑198

Jurisdiction of the probate court has been broadened by statute so as to give that court jurisdiction over all controversies which might arise between trustees and those claiming to be beneficiaries under the trust. Probate Code, §§ 1120, 1123.

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* Subsequent opinion 134 P.2d 800.

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Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Birdetta Willson against Security-First National Bank of Los Angeles. From a judgment against plaintiff after demurrer to the complaint had been sustained without leave to amend, plaintiff appeals.

Affirmed.

Walter R. Powers and Lewis C. Teegarden, both of Los Angeles, for appellant.

Newlin & Ashburn, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

Appeal from a judgment against plaintiff after an order sustaining a demurrer without leave to amend.

The complaint alleges that the plaintiff is the sole beneficiary of a testamentary trust of which the defendant bank was trustee; that in 1931 the trustee sold securities belonging to the trust for which the trustee received $10,000; that for this $10,000 the trustee purchased a promissory note for $50,000 secured by deed of trust; that the defendant transferred the note and trust deed to itself and created a participation trust; that thereafter the defendant issued a $10,000 participation trust certificate therein and transferred it to itself as testamentary trustee, see § 104, Bank Act, Deering's Gen. Laws, vol. 1, 1931, act No. 652, as it then read; that after a renewal of the participation certificate in the name of the testamentary trustee, it was finally assigned to plaintiff.

Then the complaint alleges that no permit was ever issued by the Commissioner of Corporations authorizing the issuance or sale of said participation certificate, and that therefore it was and is void, and that by reason of the conduct of the defendant, the plaintiff was damaged.

In a second cause of action, it is additionally alleged that the defendant made certain representations to plaintiff relative to the value of the participation certificate, including a representation that it was sold under a valid permit by the corporation commissioner, all of which representations were false, fraudulent and untrue; that the plaintiff believed these representations and thereby failed to discover the true state of facts concerning the issuance of the participation certificate, also to her damage.

For a third cause of action it is additionally alleged that the defendant became indebted to the plaintiff.

[1] It will be noted that all of the allegations in the three causes of action in the complaint have to do with the acts and conduct of defendant as trustee of a testamentary trust. Section 1120 of the Probate Code provides that the probate court shall retain jurisdiction of a testamentary trust for the purpose of determining to whom the property shall pass, of settling accounts and passing upon the acts of the trustee.

Section 1123, Probate Code, provides a decree rendered under the provisions of this chapter when it becomes final shall be conclusive upon all persons in interest.

There are no allegations of extrinsic fraud in the complaint, or of any other matters, which would give the superior court equitable jurisdiction, and it must be apparent that therefore the demurrer to the complaint was properly sustained.

[2] It is true that nothing beyond the jurisdiction specifically granted by the Code may be exercised by the court in probate. In re Estate of Hubbell, 121 Cal.App. 38, 8 P.2d 530. But, as stated, the language of the statute includes the acts and conduct of the trustee as set forth in the complaint here in question. In Re Estate of Smith, 4 Cal.App.2d 548, 552, 41 P.2d 565, 567, it is said: "We believe the language employed [in § 1120, Prob.Code] was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust." Nothing in Re Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120, is contrary to the decision hereunder, because all of the acts and conduct of the testamentary trustee as alleged in the complaint in this case fall within the expressed jurisdiction in probate conferred by section 1120 of the Probate Code.

Having come to this conclusion, further questions discussed in the briefs as to res adjudicata, judicial notice, necessity for the certificate of the corporation commissioner, constitutionality of section 104 of the Bank Act, statute of limitations, and grounds of special demurrer, need not here be discussed.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

52 Cal.App.2d 730

SCALETTA et al. v. SILVA et al.

CARLSEN et al. v. SILVA.

Civ. 6762, 6763.

District Court of Appeal, Third District, California.

June 16, 1942.

Rehearing Denied July 10, 1942.

Hearing Denied Aug. 13, 1942.

1. **Automobiles** 🔑244(36)

Evidence supported finding that negligence of driver of automobile, who approached scene of accident on the wrong side of the paved portion of the highway and failed to dim his glaring headlights, with the result that his automobile struck a glancing blow against approaching automobile, which thereafter collided with a truck following first motorist was the "proximate cause" of the second collision.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

2. **Automobiles** 🔑244(44)

Where automobile driving on the wrong side of the paved portion of the highway and with glaring headlights struck a glancing blow against approaching automobile which was thereafter caused to collide with a following truck, evidence warranted a finding that the truck driver was free from negligence.

3. **Automobiles** 🔑245(15, 81)

Where motorist, driving on the wrong side of the paved portion of the highway and with glaring headlights, struck approaching automobile a glancing blow, which was thereafter caused to collide with a following truck, whether driver of the latter automobile, who, in attempt to avoid an abutment after she had turned far to the right on the highway, turned back onto the highway and collided with truck, was guilty of negligence, or contributory negligence, was a question for the jury.

4. **Automobiles** 🔑242(8)

Where motorist driving on the wrong side of the highway and with glaring headlights struck automobile of approaching motorist a glancing blow, causing her to thereafter collide with a following truck when she turned back onto the highway to avoid an abutment after she had turned far to the right, burden was on the first motorist to prove that the second motorist was guilty of contributory negligence for failing to stop her automobile instead of turning it back upon the highway.

5. **Negligence** 🔑72

One who was confronted with a sudden emergency may not be held accountable for the same degree of care, or the exercise of the same sound judgment which would be required under ordinary circumstances.

6. **Appeal and error** 🔑1001(1)

A finding of the jury on contributory negligence supported by evidence is binding on the District Court of Appeal.

7. **Automobiles** 🔑244(10)

In actions for injuries from collision between automobiles one of which subsequently collided with a truck, truck driver's testimony that defendant's automobile appeared to be straight ahead of his truck did not overcome testimony of motorist striking truck that defendant motorist was on wrong side of pavement.

8. **Appeal and error** 🔑999(3)

In actions for injuries from collision between automobiles, one of which subsequently collided with a truck, District Court of Appeal was bound by jury's conclusion that truck driver's testimony that defendant motorist appeared to be straight ahead of truck did not overcome positive testimony of motorist striking truck that defendant motorist was on wrong side of pavement.

9. **Damages** 🔑132(3)

$10,000 to girl student for three fractured vertebrae and other spinal injuries was not excessive on ground that another person injured in same automobile collision was awarded only $5,000 for two broken ribs, a fractured breast bone, five-inch cut on one leg, and abrasions and bruises, since there is no reasonable comparison between fractured ribs and a broken back, and the latter award might be deemed inadequate.

10. Damages ⚷208(2)

The amount of money which will adequately compensate one for particular injuries received as the result of an accident and pain and suffering incident thereto rests in the sound discretion of the jury, and this discretion may not be interfered with unless it clearly appears that the award is so grossly excessive as to shock the conscience and to appear to have been the result of passion and prejudice.

◆

Appeal from Superior Court, Merced County; James D. Garibaldi, Judge.

Consolidated actions by Lucien Scaletta and another against J. J. Silva and others, wherein defendants Mr. and Mrs. D. N. Carlsen, filed a cross-complaint, and by Robert Carlsen, a minor, etc., and others, against J. J. Silva, for injuries and damages sustained in an automobile collision. From adverse judgments, J. J. Silva appeals.

Affirmed.

H. K. Landram, of Merced, for appellant.

Giannini & Damico, of San Jose, and Chas. V. Barfield, of San Francisco, for plaintiffs and respondents in case No. 6762.

C. Ray Robinson, of Merced, and Milo E. Rowell, Jr., of Fresno, for defendants and respondents in case No. 6762, and for plaintiffs and respondents in case No. 6763.

THOMPSON, Justice.

The defendant, J. J. Silva, has appealed from judgments which were rendered against him in two consolidated automobile damage cases growing out of successive collisions.

The appellant contends that Mrs. Carlsen, one of the defendants in the first action, was guilty of contributory negligence as a matter of law, for failure to reasonably regulate the speed of her automobile, in view of the admitted fact that, at the time of the accident, she was confronted with the glaring lights of an approaching machine; that the judgment in favor of the plaintiffs in the first action is inconsistent with Mr. Scaletta's testimony absolutely absolving the appellant from all charge of negligence in driving his automobile on the wrong side of the highway at the time of the accident; and that the $10,000 judgment in favor of Gloria Joyce Carlsen is excessive, as shown by the fact that the award of $5,000 to Mrs. Carlsen for injuries asserted to have been much more serious than those sustained by Gloria were assumed by the jury to have fully compensated the mother. In other words, it is contended that neither judgment is sustained by the evidence and that the $10,000 award is excessive. No other awards are challenged as excessive.

The automobile casualty occurred at 7 o'clock in the evening of September 29, 1940, on Pacheco Pass Highway in Merced County, two miles west from Los Banos. It was dark, but it was not raining. At the point where the accident occurred, the highway is substantially level and extends in an easterly and westerly direction. The paved portion of the roadway is eighteen feet in width, with graveled shoulders on either side. Approaching from the east the highway crosses Los Banos Creek over a long bridge with concrete abutments on either side. The surface of that bridge is two or three feet above the level approaches at either end. Three hundred and fifty feet westerly from the Los Banos bridge there is a concrete culvert which is protected on both sides of the roadway by wooden railings and abutments. Attached to the end posts which support the railings, red reflectors were placed as warnings of the presence of the railings and culvert.

J. J. Silva was driving his Ford automobile westerly along that highway in the vicinity of that bridge. He was accompanied by his wife and daughter. Lucien Scaletta was driving a heavily-loaded Ford truck belonging to Bassoni & Company, a copartnership, of which he was a member, at a distance of about a thousand yards behind the Silva car. At the same time, Mrs. D. N. Carlsen was driving a La Salle Sedan, belonging to her husband and her, in an easterly direction, on her proper side of the highway. She was accompanied by her son Robert, who sat by her side on the front seat, and by her daughter, Gloria Joyce, who was reclining on the back seat. Each of the machines had its headlights turned on. None of them appears to have been running more rapidly than thirty-five or forty miles an hour. As Mrs. Carlsen's car approached the culvert she observed the lights from the Silva car as it came over the Los Banos Creek bridge. She did not then see the culvert or the railings with the warning signals thereon. Suddenly she observed that the Silva machine was running toward her with the left-hand wheels several feet over the white line on her side of the highway. She promptly turned to her right onto the shoulder of the roadway, and at the same time she slackened the speed of her car. The glaring headlights of the Silva machine blinded her vision. She repeatedly signaled to Mr. Silva to dim his lights, which he failed to do. Just then she discovered the reflector on the culvert railing, immediately in front of her machine, and abruptly turned back upon the paved portion of the highway to avoid colliding with the abutment. The appellant's car was then quite near and still traveling far over on her side of the roadway. In the emergency which confronted her, Mrs. Carlsen found scant space within which to pass between the appellant's car and the railing of the culvert on her side of the roadway. In attempting to do this the left front mudguard of her machine struck, or side-swiped the left rear mudguard of the Silva machine. Both of these mudguards were conspicuously indented. This impact caused Mrs. Carlsen to lose control of her vehicle, and it ran across the highway behind the Silva machine, violently crashing into the Scaletta truck, which was then closely following behind the Silva automobile. The Silva car was only slightly damaged. Silva drove on, claiming that he did not know he had collided with the Carlsen machine. As a result of the last collision, both the Carlsen car and the Scaletta truck were badly demolished. Mrs. Carlsen and her daughter Gloria Joyce were seriously injured. Her son Robert was only slightly injured. Mr. Scaletta also received personal injuries.

Regarding the circumstances leading to the accident, Mrs. Carlsen testified: "We were driving along at a moderate rate of speed and I saw a car approaching with blinding headlights, and Bob became alarmed because they were undoubtedly on my side of the pavement, and I signalled him * * * to dim his lights and he disregarded the warning and I signalled two or three times, and at that time he was still far enough away I felt that he would get over on his own pavement, and, however, when I realized he wouldn't, I sounded the horn and then it was necessary to get off the pavement onto the shoulder of the road, which I did. And then I proceeded along on the shoulder * * * and my headlights picked up the culvert [reflector signal] and I had to get back on the road to avoid going into the culvert. * * * He was on my side of the road. * * * I remember trying to avoid him and [to avoid] going into the culvert. * * * Well I don't remember anything after that."

As a result of the last collision Mrs. Carlsen was rendered unconscious. She suffered two broken ribs, a fracture of the breastbone, a severe gash in one leg and numerous bruises and contusions.

The foregoing statement of Mrs. Carlsen is substantially corroborated by the testimony of Robert. Gloria said that just prior to the accident their car "slowed down and then I felt us going back and forth in the soft shoulder." She said they then turned back onto the pavement and she immediately felt the impact of side-swiping the first car, and that "within an instant" the second collision occurred. Gloria was violently thrown from the seat and she sustained a broken spine and other serious injuries.

Photographs taken of the location on the highway, opposite the railing of the culvert where the accident occurred, distinctly show the skid marks of the Carlsen car far over on its proper side of the center white line, clearly indicating that Mrs. Carlsen applied her brakes before colliding with the Silva car. It is true she testified at the trial that she did not remember whether she applied her brakes before the accident occurred. But these photographs furnish substantial evidence from which the jury was warranted in finding that she did apply her brakes. Her lack of recollection of applying the brakes may be accounted for by her excitement due to the central emergency or to the fact that she was rendered unconscious by the injuries which she received. Gloria also testified that they slowed down before the collision occurred.

Mr. Scaletta, the driver of the truck, and the Bassoni partnership, of which the plaintiff is a member, brought suit against J. J. Silva and Mr. and Mrs. Carlsen, for personal injuries sustained by him and for damages to their truck, as the result of the defendants' concurrent negligence. To that complaint Mr. and Mrs. Carlsen filed an answer denying the essential allegations of the pleading. They also filed a cross-complaint against Mr. Scaletta, the Bassoni partnership and J. J. Silva for personal injuries sustained by Mrs. Carlsen, and for damages to their La Salle automobile caused by the concurrent negligence of both Scaletta and Silva. Subsequently Robert and Gloria Joyce Carlsen, by their guardian ad litem, and D. N. Carlsen, individually, brought an independent suit against J. J. Silva, Lucien Scaletta and the Bassoni partnership, for damages to the Carlsen sedan and for personal injuries received by their children. These suits were consolidated and tried with a jury. At the close of the evidence, on motion, a nonsuit was granted in the first suit, in favor of the cross-defendants, Lucien Scaletta, the Bassoni partnership, and the individual members thereof. The record discloses no negligence on their part. Several verdicts were returned and two judgments were accordingly rendered as follows:

Judgment was rendered against J. J. Silva, in favor of Lucien Scaletta, for personal injuries received by him, in the sum of $500, and for costs of suit;

Judgment was rendered against J. J. Silva, in favor of the Bassoni partnership, and the individual members thereof, for damages to their truck in the sum of $975.50, and for costs of suit;

Judgment was rendered against J. J. Silva, in favor of the cross-complaïnants Mr. and Mrs. Carlsen, based on their cross-complaint, for personal injuries received by Mrs. Carlsen, in the sum of $5000, and for costs of suit; and

Judgment was rendered against J. J. Silva, in the second suit, in favor of the guardian of the minor children of Mr. and Mrs. Carlsen, Robert and Gloria Joyce, for personal injuries received by each, in the sum of $10,000 to compensate Gloria, and in the sum of $200 to compensate Robert, together with the costs of suit.

Motions for new trials were denied. From the foregoing judgments J. J. Silva has appealed.

[1] There is ample evidence to support the implied finding of the jury that J. J. Silva, the defendant and cross-defendant in those suits, was guilty of negligence which became the proximate cause of the accident. The preceding quoted evidence sufficiently shows that Mr. Silva approached the scene of the accident on the wrong side of the paved portion of the highway and that he failed to dim his glaring headlights after repeated signs from Mrs. Carlsen to do so. The jury was warranted in finding that these glaring headlights obscured her view and prevented her from seeing the exact location of his automobile which contributed to the cause of the first collision. Certainly the jury was justified in finding that the first collision would not have occurred except for the fact that Silva's car was traveling with its left-hand wheels several feet over on the wrong side of the paved portion of the highway. The second collision occurred as a result of the first impact. These facts sustain the finding of negligence on the part of the appellant.

[2] It is reasonable to assume that the blinding lights of Silva's machine, and the impact with his car, caused Mrs. Carlsen to lose control of her own automobile, resulting in her second collision with Scaletta's truck, which followed closely behind the Silva car. The findings and judgment are fully supported in determining that Scaletta was free from negligence. No evidence of negligence on his part is disclosed by the record. The court therefore properly granted a nonsuit in favor of Scaletta and the partnership, upon the cross-complaint in the first action.

[3-6] It was the sole province of the jury, under the circumstances of this case, to determine the questions as to whether Mrs. Carlsen was guilty of either negligence or contributory negligence. In view of the conflicting evidence, we may not say, as a matter of law, that she was guilty of negligence in the first action, or of contributory negligence with reference to her cross-complaint in the first action or of negligence of either character under the complaint in the second suit. There is substantial evidence that when she first observed Mr. Silva's automobile approaching with glaring headlights, on the wrong side of the paved portion of the highway, she repeatedly signaled him to dim his lights. She had a right to assume that, upon warning from her, he would comply with the law and return to his proper side of the highway. She exercised reasonable precaution in repeatedly warning him in that regard, and in then reducing the rate of speed of her machine and in promptly driving off the paved portion on the shoulder of the highway. She had not previously seen the abutment or the culvert which she was approaching. When she was suddenly confronted with that danger, warned by the reflector on the post of the railing, she promptly turned her car back upon the paved portion, and applied her brakes.

This is indicated by the skid marks on her side of the paved portion. She assumed she could safely pass between the southerly railing and the Silva machine. The evidence shows she was running at a "moderate rate of speed." She even slackened her speed and applied her brakes at that time. There is no evidence that she might have avoided the accident by stopping her machine on the shoulder when she discovered the imminent danger and the presence of the reflector on the post. She may have been too close to that obstacle to have stopped without crashing into the railing. The burden was on the appellant to prove that she was guilty of contributory negligence for failure to stop her automobile instead of turning it back upon the highway. She was confronted with imminent peril. In that emergency she may not be held accountable for the same degree of care or the exercise of the same sound judgment which would be required under ordinary circumstances. Hill v. Peres, 136 Cal.App. 144, 148, 28 P.2d 944. The jury found that she was free from contributory negligence in that regard and we are bound by that determination.

[7, 8] The appellant, J. J. Silva, contends that the judgment against him in the first action, and in favor of Scaletta and the partnership, for injuries sustained by Mr. Scaletta, as well as for damages to their truck, is inconsistent with the testimony of Mr. Scaletta, who, they contend, completely absolved Mr. Silva from all negligence. It is asserted Scaletta testified that Silva's machine which was preceding his truck was not traveling on the wrong side of the highway. There is no merit in this contention. We are of the opinion Scaletta's evidence may not reasonably be so construed. He testified in that regard as follows:

"Q. Now Mr. Scaletta, you said that you saw the light, the tail light of a car on the highway ahead of you? A. Yes. * * * I was just coming off of the big bridge * * * when I first knew there was a car up ahead of me. * * *

"Q. And what portion of the highway was that tail light on at that time? A. Well, that I can't say because, it was dark so that I couldn't see the whole car, but the tail light seemed to be ahead of me. * * *

"Q. Yes, and on what portion of the highway was it? A. Well, it must have been in line with me.

"Q. Yes. Well, in other words, it was directly ahead of you was it not? A. Well, yes, more so.

"Q. And on your side of the highway? A. Well, if the lights was ahead of me, I imagine it was on my side. * * * I never kept my eye on it. I knew it was there and I never paid any more attention to it, whether it stayed there or not."

Mr. Scaletta did not positively testify that the Silva machine was traveling on the northerly side of the paved portion of the highway. His truck was then traveling behind the Silva car at a distance of one hundred yards or more. In effect, he merely said the machine appeared to be straight ahead of his truck. But he did not continue to watch it. He "never paid any more attention to it." He did not pretend to know whether it continued to travel in that same line or not. He did not state its position with relation to the white center line. Such evidence may not be held to overcome the positive testimony of both Mrs. Carlsen and her son Robert that Silva's machine was approaching their car on his wrong side of the paved portion. At least we are bound by the conclusion of the jury in that regard.

[9, 10] We may not hold, as a matter of law, that the award of damages, in the sum of $10,000, as compensation for the injuries sustained by Gloria Joyce Carlsen, is excessive. No other award of damages is challenged as excessive. Gloria sustained three fractured vertebrae and other spinal injuries. She was confined to a hospital for a considerable period of time. She was required to wear a plaster cast for several weeks, even after she returned to school. She suffered great pain during several months. On account of her injuries she was required to abandon six of her regular units at school.

The fact that Mrs. Carlsen sustained two broken ribs, a fractured breast bone, a five-inch cut on one leg and a number of abrasions and bruises, for which she was awarded only the sum of $5000 damages furnishes no evidence that the award of $10,000 for the injuries received by Gloria on account of her broken back is excessive. There is no reasonable comparison between fractured ribs and a broken back. The latter is much more apt to leave serious and permanent results. Moreover, the award to Mrs. Carlsen might be deemed to be inadequate. It has been frequently held that the amount of money which will adequately compensate one for particular injuries received as the result of an accident, together with the pain and suffering incident thereto, rests largely in the sound discretion of the jury. This discretion may not be interfered with unless it clearly appears that the award is so grossly excessive as to shock the conscience and to enforce the conclusion that it was the result of passion and prejudice on the part of the jury. Rannard v. Harris, 121 Cal.App. 281, 286, 8 P.2d 864; Armstrong v. Ford, 30 Cal.App.2d 347, 351, 86 P.2d 385; 20 Cal.Jur. 101, § 65.

The judgments are affirmed.

ADAMS, P. J., concurred.

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52 Cal.App.2d 720

JOHNS v. PETERSON.

Civ. 12036.

District Court of Appeal, First District, Division 1, California.

June 16, 1942.

1. Trusts 🔑225

Where instrument creating a trust provided that the trustee was to be reimbursed for certain expenses except for encumbrances placed upon the trust property by the trustee, the trustee was not entitled to reimbursement for an encumbrance placed upon the property by her.

2. Trusts 🔑181(1)

Where trust instrument provided that trustor and son should occupy a dwelling on land constituting the corpus of the trust during trustor's lifetime and that the land should be sold on trustor's death and proceeds of the sale distributed in a specified manner, and on trustor's death trustee recovered, but did not collect, judgment in ejectment against the son, trustee was properly charged with the stipulated value of the property on date trust was to be terminated, the rental of the house formerly occupied by the son, and the judgment rendered in the ejectment action.

3. Trusts 🔑225

Ordinarily a trustee is entitled to be reimbursed for costs expended in performance of the trust if such amounts are just and reasonable. Civ.Code, § 2273; Probate Code, § 1122.

4. Trusts 🔑184

Where trust instrument provided that trustee was to be reimbursed for value of improvements made upon the trust premises on termination of the trust, and trustee and beneficiary received the benefit of certain expenditures for improvements and $293.62 expended by trustee for repair of house on the realty constituting the trust corpus increased the value of the estate by $704 received as rental for the house, expenses of the repairs were a proper credit to the trustee. Civ.Code, § 2273; Probate Code, § 1122.

5. Trusts 🔑305

In beneficiary's action against trustee for accounting and enforcement of a trust, it is the duty of the trial court to pass upon the reasonableness of expenditures by the trustee.

6. Trusts 🔑227

In beneficiary's action against trustee for an accounting and enforcement of a trust, the matter of reduced attorney's fee incurred by trustee in ejectment action against beneficiary was for the sound discretion of the trial court, taking into consideration the interests of the beneficiaries under all the circumstances.

7. Trusts 🔑305

In beneficiary's action against trustee for accounting and to enforce a trust which had expired by the terms of the trust instrument, equity retained jurisdiction by formal order to terminate the trust if through mistake or inadvertence the decree had not so provided.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Thomas D. Johns against Wilda L. Peterson for enforcement of a trust and for an accounting. From a judgment for plaintiff, defendant appeals.

Reversed with instructions.

Charles E. Hobart, of Los Angeles, for appellant.

Maurice C. Sparling and Spencer C. Olin, both of Los Angeles, for respondent.

WARD, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff in an action for the enforcement of a trust and for an accounting.

The subject of the trust was a piece of real property conveyed by the mother of the parties herein, trustor, to her daughter, trustee. The deed of trust provided that the trustor and her son, plaintiff herein, should have the right to use and occupy a dwelling house situated on the rear of the land during the lifetime of the trustor; that the daughter should have the right to erect a dwelling house for herself on the front part of it, and in connection therewith a double garage for the joint use of the parties.

The trustee was to pay all taxes, assessments and mortgage encumbrances against the property from the date of the creation of the trust. On the death of the trustor, the property was to be sold at a price to be agreed upon by the son and daughter or fixed by arbitration. There was also to be agreed upon at the same time and in the same manner, the value of any improvements placed by the daughter on the property from the inception of the trust. It was provided that at the sale the daughter might be the purchaser of the property. There was a further provision "That from the proceeds of the sale of said property, after payment of any taxes and encumbrances then against same, said second party [the daughter] shall first be reimbursed for all taxes, assessments and encumbrances (except encumbrances placed upon said property by said second party) upon said property paid by the second party after the date of this agreement, including taxes and assessments upon the improvements placed upon said property by the second party; and the second party shall also from said proceeds be reimbursed the value of said improvements as agreed upon or as appraised, as hereinbefore provided"; that a grandson should receive $100, and that any balance remaining be divided equally between trustor's son and daughter. A subsequent amended agreement provided that should the mother die prior to the 1st day of January, 1938, the sale of the property should not take place until such date.

Following the death of the mother, defendant brought a suit in ejectment against the plaintiff, as the result of which she was awarded a judgment of $73.24, consisting of $28.24 costs, and $45 rental value of the property at $7 a month. Thereafter she expended $293.62 in the repair of the house formerly occupied by her mother and brother and received rental therefrom varying from $20 to $24 a month. In connection with this ejectment suit, defendant also incurred legal fees of $250.

In the accounting herein, the court charged the trustee with the following:

Value of property, stipulated on January 1, 1938, to be	$4,350.00	
Rental of house in rear after repair	704.00	
Judgment rendered in ejectment suit (uncollected)	73.24	$5,127.24

and credited her as follows:

Payment on prior encumbrance (at the date of the trust instrument there was an encumbrance on the property of)	$ 340.00	
General taxes	547.58	
Special assessments, insurance, attorney's fees for drawing trust instrument, escrow charges, repairs to house in rear subsequent to Jan. 1, 1938, sprinkler system, etc.	$ 355.47	
Part attorney's fee in ejectment suit ($100 disallowed)	150.00	
Legacy to grandson of trustor	100.00	
Stipulated value on Jan. 1, 1933, of improvements made to property by trustee daughter	2,500.00	
Expenses in ejectment suit, including rental value as above	73.24	$4,066.29

leaving a balance of $1,060.95 to be divided between the plaintiff and defendant, of which the item of $73.24, with which the trustee is charged, represents an uncollected judgment.

Defendant contends that the uncollected judgment should not be charged against her; that plaintiff made it necessary for her to bring the ejectment suit, and that although she is subsequently credited with the amount of the judgment, representing costs and rental, the net result is a disallowance of the $28.24, costs incurred. Further, that she should have been credited with the full amount of the attorney's fees, $250, incurred by her in connection with such suit. Defendant takes exception to the disallowance of $293.62 covering repairs, etc., to the house in the rear following the ejectment suit, for the greater part of which bills were furnished, particularly since she is charged with the increased rental received as a result of such expenditures.

She further calls attention to her interpretation of paragraph 5 of the trust instrument, contending in this regard that the language "That from the proceeds of the sale of said property, after payment of any taxes and encumbrances then against same, said second party shall first be reimbursed," etc., provides for the payment of an encumbrance of $1,659.75 placed by her on the property and in existence on January 1, 1938. She urges that the disallowance of this item constitutes error.

[1] In the matter of such encumbrance upon the property, the trust instrument specifically further provides that the trustee is to be reimbursed "except [for] encumbrances placed upon said property by said second party [appellant]."

[2] There would appear to be no just complaint of the items making up the amount of $5,127.24 with which the trustee is charged.

[3, 4] Ordinarily a trustee is entitled to be reimbursed for costs expended in the performance of a trust (Civ. Code, § 2273); In re Gartenlaub's Estate, 185 Cal. 648, 198 P. 209, 16 A.L.R. 520, if such amounts are just and reasonable (Prob. Code, § 1122). The amount of $293.62 covering repairs to the rear house after the ejectment suit in 1936, particularly when as a result the value of the estate was increased by $704 collected as rental, would appear to be a proper credit. Also, while under the trust instrument the daughter was to be reimbursed "the value of said improvements as agreed upon or as appraised," nevertheless both parties received the benefit of these expenditures as well as those made subsequent to January 1, 1938, and enumerated in the preceding account and which, with the exception of the cost of the sprinkler system the parties stipulated to allow, by an enhanced value of the property with which the court charged the trustee.

[5, 6] It was the duty of the trial court to pass upon the reasonableness of expenditures, and the matter of the reduced attorney fee was for the sound discretion of the trier of the facts, In re Bauer's Trust, 17 Cal.App.2d 426, 62 P.2d 150; In re Spencer's Estate, 18 Cal.App.2d 220, 63 P.2d 875, taking into consideration the interests of the beneficiaries under all of the circumstances.

With regard to the item of $73.24 credited to the trustee, since only $28.24 thereof represented costs of bringing the ejectment suit, it would appear that the trustee has received in this regard an excess of credit of $45.

From the above it will be clear that the total amount to be credited the trustee would be the sum of $4,314.91, leaving a balance to be divided between plaintiff and defendant of $812.33, of which the item of $73.24, as above stated, represents an uncollected judgment.

[7] Appellant contends that the court should have terminated the trust and made a complete and final disposition of the entire matter in this proceeding. Incidentally, until the hearing on the motion for a new trial, it does not appear that there was any insistence to have the court do this, the main burden of the complaint being a claim that plaintiff was entitled to a money payment from the trustee which she, for an unjustifiable period, had neglected to make. Respondent concedes the judgment herein as res judicata. His brief contains the following statement: "Payment of the judgment in plaintiff's favor, entered upon said accounting, would constitute all that he was entitled to receive under the terms of the Trust Agreement, and would be an effective bar to any further litigation by him." Equity retains jurisdiction to settle any remaining issue upon an appropriate application, or, in this case, by formal order to terminate the trust if through mistake or inadvertence the decree has not so provided. Murphy v. Sheftel, 121 Cal.App. 533, 9 P.2d 568; Walsh v. Majors, 4 Cal.2d 384, 49 P.2d 598.

The only matters requiring modification of the judgment, in view of respondent's acquiescence in the conclusion that the whole matter is res judicata, are the failure to credit her with the sum of $293.62, and the overcredit to her of $45.

The judgment is reversed, with instructions to the trial court to mend its findings and conclusions as herein indicated, and upon such revised findings of fact and conclusions of law to enter judgment, each party to bear his or her own costs on this appeal.

PETERS, P. J., and KNIGHT, J., concurred.

CLINKSCALES et al. v. CARVER. *

Civ. 2813.

District Court of Appeal, Fourth District, California.

June 12, 1942.

Hearing Granted Aug. 10, 1942.

1. Automobiles 🔑243(3)

Where county board of supervisors passed resolution ordering establishment of boulevard stops as provided by ordinance, the ordinance had not been legally adopted, and ordinance provided that boulevard stops should be established at such places as should be designated by the board, in action for injuries sustained in collision at intersection which had not been so designated, but at which stop sign had been placed, the ordinance was properly excluded from evidence. Vehicle Code, § 552, St. 1935, p. 187; St.1923, p. 563, § 145.

2. Highways 🔑166

Where county board of supervisors passed resolution ordering establishment of boulevard stops as provided by ordinance, the ordinance had not been legally adopted, and ordinance provided that boulevard stops should be established at such places as should be designated by the board, and nothing further had been done by the board, the resolution was not sufficient to authorize a stop sign at an intersection of Highline road and Oat Canal road. Vehicle Code, § 552, St.1935, p. 187; St.1923, p. 563, § 145.

3. Highways 🔑166

Where Vehicle Code provided the manner in which a boulevard stop sign might be authorized and erected, but the procedure provided had not been followed, erection of stop sign was not authorized. Vehicle Code, § 552, St.1935, p. 187; St.1923, p. 563, § 145.

4. Automobiles 🔑246(9)

In action for personal injuries sustained in collision at intersection at which boulevard stop sign had been erected without official authorization, where defendant testified that he did not stop at stop sign, instruction, which assumed that the stop sign was legally established and informed jury that, if defendant failed to make boulevard stop at intersection, he was guilty of negligence, was erroneous. Vehicle Code, § 552, St.1935, p. 187; St.1923, p. 563, § 145.

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Personal injury action by Lois A. Clinkscales and others against Herman Roland Carver. From a judgment for plaintiff, defendant appeals.

Reversed and remanded for a new trial.

Hickcox & Provence and Ross T. Hickcox, all of El Centro, for appellant.

Syril S. Tipton and John J. Ford, both of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising out of an automobile collision which occurred at the intersection of Highline road and Oat Canal road in Imperial County. Highline road runs north and south and Oat Canal road runs east and west.

On the morning of May 20, 1937, the defendant was proceeding north on Highline road and shortly after he entered this intersection his car collided with one being driven west on Oat Canal road by Richard Clinkscales, the husband and father of the respective plaintiffs. It appears from the evidence that there was a stop sign on Highline road at its intersection with Oat Canal road; that the defendant was familiar with this sign but did not make a stop there on this occasion; and that although he looked in both directions he did not see the other car coming. There is also evidence that Clinkscales' car was on the southerly or his left-hand side of Oat Canal road at the time the collision occurred. Clinkscales died as a result of the collision. A jury returned a verdict in favor of the plaintiffs, and the defendant has appealed from the judgment.

The main questions here raised relate to whether the boulevard stop sign was legally placed on Highline road at this intersection, and the court's instructions in connection therewith. This stop sign was placed at this point sometime in 1936 by a road foreman who had been given permission to do so by the supervisor for that district. At that time a contracting firm was hauling gravel from a pit located on the Oat Canal road. This road foreman testified "I put it there in order to give the gravel trucks the right of way."

The respondent contends that the erection of this stop sign had been authorized by the board of supervisors of Imperial County. In this regard, it appears that on

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* Subsequent opinion 136 P.2d 777.

January 4, 1927, the board of supervisors passed a "resolution" which reads:

"It is hereby resolved, found and ordered that the general safety of the public and the proper and reasonable regulation and control of traffic on the public roads and highways in this county and outside of incorporated cities and towns require the establishment of 'boulevard stops' at all roads intersecting all county and state highways in Imperial County outside of incorporated cities and towns, and such 'Boulevard stops' are hereby established at said intersections as provided and authorized by Ordinance No. 82 of this County." Ordinance No. 82, therein referred to, had been passed on July 10, 1926. Section 1 thereof provided for the establishment of "boulevard stops" at such places or points on the public highways of the county "as shall be designated by this board." Section 2 provided that such boulevard stops should be at the intersections "of roads or highways with boulevard or other main traveled roads or highways or at such other place or places where the general safety of the public * * * may require." The court admitted the resolution passed on January 4, 1927, into evidence but refused to admit into evidence Ordinance No. 82 for the reason that this ordinance had not been properly published.

[1-4] The court instructed the jury that by virtue of this resolution of the board of supervisors and the Vehicle Code, St.1935, p. 93, any person operating a motor vehicle northerly on Highline road at this intersection was required to stop before entering the intersection; that the right of way at this intersection was controlled by section 552 of the Vehicle Code, "which provides that a driver approaching an intersection protected by a boulevard stop sign shall yield the right-of-way to other vehicles"; and that if the defendant here failed to make the boulevard stop at this intersection he was guilty of negligence. The effect of these and other instructions given was to tell the jury that this stop sign was legally posted in accordance with the provisions of the Vehicle Code, that persons traveling on Oat Canal road had the right of way at this intersection, and that the appellant's admitted failure to stop at this stop sign constituted negligence as a matter of law. At the time the resolution which was admitted in evidence was passed by the board of supervisors on January 4, 1927, section 145 of the Vehicle Act, St.1923, p. 563, provided that such boulevard stops might be authorized by an "ordinance" duly adopted by the board of supervisors. While this resolution referred to Ordinance No. 82, that ordinance had not been legally adopted. Moreover, the resolution which was passed orders the establishment of boulevard stops "as provided and authorized by Ordinance No. 82." If that ordinance were in effect it merely provides that such boulevard stops shall be established at the intersections of roads or highways with "boulevard or other main traveled roads or at such other places where the general safety * * * may require," and that such boulevard stops shall be established at such places or points "as shall be designated by this board." It is conceded that nothing further had been done by the board and it follows not only that Ordinance No. 82 was properly excluded from evidence, but that the resolution passed on January 4, 1927, was not sufficient to authorize the stop sign at this particular place and, so far as shown by the record, no authority for placing a stop sign at this point appears except the permission given by one supervisor. The Vehicle Code had provided for the manner in which boulevard stop signs might be authorized and erected, and the procedure provided had not been followed. It follows that there had been no official authorization for the erection of this stop sign at this point (Lindenbaum v. Barbour, 213 Cal. 277, 2 P.2d 161), and the court's instructions, to which we have referred, were erroneously given. It cannot be questioned that these instructions had a material effect upon the question of the appellant's negligence and upon the question of contributory negligence on the part of the driver of the other car. The appellant testified that he did not stop at this stop sign and the jury was not only instructed that this was negligence per se, but the assumed fact that this was a legally established stop sign may well have been a determining factor in the jury's determination of the related questions as to contributory negligence on the part of the deceased and the proximate cause of the accident.

The respondent argues that it was negligence, as a matter of fact, for the appellant to disregard this stop sign even though it had been placed there without proper authorization. Assuming that such a conclusion might have been justified, the fact remains that the action was not tried or presented to the jury upon such an issue. In effect, the court instructed the jury that the appellant was guilty of negligence as a matter of law, and there was no occasion for the jury to pass upon his negligence as a matter of fact. Under the circumstances here appearing, the errors were material and prejudicial and the action must be remanded for a new trial.

The judgment is reversed.

MARKS and GRIFFIN, JJ., concurred.

MURPHY et al. v. KRUMM et al.

Civ. 2958.

District Court of Appeal, Fourth District, California.

June 12, 1942.

Rehearing Denied July 7, 1942.

Hearing Granted Aug. 10, 1942.

Appeal and error 🔑800

Where, after filing of plaintiffs' notice of motion to dismiss defendants' appeal for failure to pay filing fees and to file brief within time, defendants paid filing fee and filed brief, so that when motion to dismiss was made in open court the filing had been paid and the brief had been filed, motion to dismiss was denied.

* * *

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Leland S. Murphy and others against Theodore Krumm and others. From the portions of the judgment against them, plaintiffs appeal, and from the portion of the judgment adverse to them, defendants appeal. On plaintiffs' motion to dismiss appeal of defendants.

Motion denied.

Ernest Clewe, of Oroville, and U. F. Lewis, of Redlands, for plaintiffs.

Theo. G. Krumm and R. Bruce Findlay, both of San Bernardino, for defendants.

PER CURIAM.

This is a motion by plaintiffs to dismiss the appeal of defendants on the following grounds: (1) Failure to pay the filing fee within the time prescribed by law; (2) Failure to file transcripts on appeal within the time required; (3) Failure to file the opening brief within the time required.

Plaintiffs have appealed from the portions of the judgment against them and defendants have appealed from the portion of the judgment adverse to them.

The parties stipulated that both appeals might be heard on a single record and a single set of briefs. The clerk's and reporter's transcripts were filed in this court on October 4, 1941, upon the filing fee of plaintiffs having been paid.

Under date of October 27, 1941, the parties entered into a stipulation, approved by this court, giving defendants until November 30, 1941, in which to file their brief, the plaintiffs thirty days in which to answer and file their opening brief, and defendants thirty days in which to file their reply brief.

The notice of motion to dismiss the appeal was filed on May 18, 1942, specifying that the motion to dismiss would be made before this court on June 9, 1942. A certificate of the county clerk on motion to dismiss was filed on May 28, 1942.

Defendants paid their filing fee on May 28, 1942, and filed their opening brief on June 5, 1942, so that when the motion to dismiss was made in open court on June 9th, the filing fee had been paid and the brief had been filed.

Under the rules announced in the following cases the motion to dismiss must be denied. See Toth v. Metropolitan Life Ins. Co., 113 Cal.App. 55, 297 P. 564; North v. Evans, 114 Cal.App. 714, 300 P. 893; Snodgrass v. Hand, 125 Cal.App. 265, 13 P.2d 769; Lisle v. Ragle, 10 Cal.App.2d 758, 52 P.2d 608; Graybiel v. Consolidated Ass'ns, Ltd., 14 Cal.App.2d 547, 58 P.2d 665; Steiner v. Davis, 21 Cal.App.2d 334, 69 P.2d 184; Hall v. Wolford, 22 Cal.App.2d 537, 71 P.2d 596; Southern Counties Thrift Co. v. Rairdon, 43 Cal.App.2d 149, 110 P.2d 679.

The motion is denied.

52 Cal.App.2d 739

GRIFFITH CO. v. KELLY.

SAME v. FLY et al.

Civ. 2847, 2848.

District Court of Appeal, Fourth District, California.

June 16, 1942.

Hearing Denied Aug. 13, 1942.

Limitation of actions 🔑5(3)

The two-year limitation on the enforcement of improvement assessment liens having been eliminated by amendment, actions to foreclose such liens are governed by the provisions of the Code of Civil Procedure with respect to limitations on civil actions, and hence actions to foreclose improvement assessment liens which were not commenced until more than ten years after the assessments became liens on the realty were barred by limitations. Gen.Laws 1923, Act 8199, §§ 23, 27; Gen.Laws Supp. 1925–27, Act 8199, §§ 23, 27; Code Civ.Proc. § 312 et seq.

Appeals from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Separate actions by Griffith Company against Herbert C. Kelly, and against Eva A. Fly and others, to foreclose liens of assessments levied under the Improvement Act of 1911. The cases were tried together. From judgments in favor of plaintiff, defendants appeal.

Judgments reversed.

Herbert C. Kelly, of San Diego, for appellants.

Solon S. Kipp and W. E. Starke, both of San Diego, for respondent.

MARKS, Justice.

These are actions to foreclose liens of assessments levied under the Improvement Act of 1911. Each assessment was for an amount less than $25, so no bonds could be issued against the property assessed. The cases were tried together and present identical questions on this appeal, namely, are plaintiff's causes of action barred by the statute of limitations?

The assessments became liens on the various parcels of property on January 13, 1930. The action against Kelly to foreclose the liens was filed on October 20, 1940, and against Eva A. Fly and others on October 24, 1940. All defendants pleaded various statutes of limitations both by demurrers and answers. Judgments were rendered for plaintiff and these appeals followed.

Prior to its amendment in 1927, section 23 of the Improvement Act of 1911 provided in part as follows: "Said warrant, diagram and assessment, shall be recorded in the office of said superintendent of streets. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; * * *" Stats.1923, p. 115; Deering's Gen.Laws, 1923, act 8199.

Section 27 of the same act provided in part as follows: "At any time after the period of thirty-five days from the day of the date of the warrant, the contractor or his assignee may sue, in his own name, the owner of the land, lots or portions of lots, assessed on the day of the date of the recording of the warrant, assessment, and diagram, or any day thereafter during the continuance of the lien of said assessment, and recover the amount of any assessment remaining unpaid, with interest thereon at the rate of ten per cent per annum until paid." Stats.1923, p. 117.

These sections were amended in 1927. Stats.1927, p. 1407, 1408; Deering's Gen. Laws, 1925–1927 Supp., act 8199. The amended portion of section 23, important here, read as follows: "Said warrant, diagram and assessment, shall be recorded in the office of said superintendent of streets. When so recorded the several amounts assessed shall be a lien upon the lands, lots, or portion of lots assessed, respectively, and such lien shall so continue until it be discharged of record."

As amended the applicable portion of section 27 provided as follows: "At any time after the first day of July next succeeding nine months following the date of recording of such assessment, the contractor or his assignee may sue in his own name the owner of the land, lots or portions of lots assessed on the day of the date of the recording of the warrant, assessment and diagram, and recover the amount of any assessment remaining unpaid together with interest and any penalties allowed hereunder; provided, that if any state, county or municipal taxes or other special assessment or assessments be delinquent on said property then such action may be brought at any time after ninety days after the recording of such assessment."

Plaintiff argues that as the legislature omitted the two-year limitation from the amendment of section 23 and retained the provision of section 27 permitting the contractor to sue "at any time after" the time specified, a clear intention was manifested to do away with any statute of limitation so that the action could be brought within an unlimited number of years after the cause of action accrued.

Defendants draw a contrary inference from the amendment. They argue that the legislature must be charged with knowledge of the provisions of the Code of Civil Procedure limiting the time in which civil actions may be brought. They point to section 312 of that code (unamended since 1897) which provides as follows: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute." From this they argue that the omission, from the 1927 amendment of section 23, of the two-year limitation on the time an action to foreclose these liens could be filed, shows the clear intention of the legislature to provide that such actions must be filed within the period prescribed in the Code of Civil Procedure.

If plaintiff is correct in its argument that there is now no limitation on the time in which actions of this kind may be filed, the judgments must be affirmed. On the other hand, if the arguments of defendants are sound, the judgments must be reversed, for about ten years elapsed between the time plaintiff's cause of action accrued and the time of filing the complaints.

We have been cited to and have found no decision on this precise question under the provisions of the Improvement Act of 1911. There are decisions under other statutes which, by analogy, seem to be decisive of the problem.

Section 4 of an act, approved February 27, 1893, which provided a system of street improvement bonds to represent the cost of street work and improvement (Stats.1893, p. 33; Deering's Gen.Laws, 1923, act 8208.) contained the following: "* * * said assessment shall be a first lien upon the property affected thereby, until the bond issued for the payment thereof, and the accrued interest thereon, shall be fully paid."

This provision was construed in the case of Woods v. Hyde, 64 Cal.App. 433, 222 P. 168, 170, where the precise question before us was decided under similar arguments of counsel. The court concluded that as six years had elapsed between the time the cause of action accrued and the time the bondholder took steps to foreclose the liens, his right of recovery was barred by the provisions of the Code of Civil Procedure. In reaching this conclusion the court said:

"The rule established in this state, however, makes a distinction between the existence of a right and the exercise of a remedy. In other words, a person may be possessed of a right and by reason of inaction or failure to proceed lose his remedy. The provision of section 4 of the act referred to is very similar in purpose and expression to section 3716 of the Political Code relating to liens created by taxes. That section reads:

" 'Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.'

"The right of a city or county or state to its taxes under this section would seem to be extinguishable only by actual payment, and such seems to be the rule. But the existence of the remedy has no such indefinite period of time and is not made to rest upon the fact of actual payment. The leading case upon this question and the one followed by the Supreme Court of this state is that of the State of Nevada v. Yellow Jacket Silver Min. Co., 14 Nev. 220. All phases of the running of the statute as against the remedy or proceedings for enforcing their collection were thoroughly considered. The Nevada statute is practically identical with that of this state, and it was there held that while the lien continued the remedy by action was barred."

A similar question was before the court in City of San Diego v. Higgins, 115 Cal. 170, 46 P. 923, under the provisions of section 3716 of the Political Code, already quoted. In this case the city sought to enforce a lien for taxes more than five years after the lien had attached. It maintained that as the lien was perpetual there was no statute of limitation against the city's action under the provisions of the Political Code. Both the trial judge and the Supreme Court agreed that the action was barred by the provisions of subdivision 1 of section 338 of the Code of Civil Procedure. It was there said: "It might be, as suggested in San Francisco v. Luning, 73 Cal. 610, 15 P. 311, that the lien existed 'without any provision for its enforcement, in which case it is simply a right without a remedy.'" See, also, Dranga v. Rowe, 127 Cal. 506, 59 P. 944; Clark v. City of San Diego, 144 Cal. 361, 77 P. 973; Los Angeles County v. L. A. Junk Co., 8 Cal.App.2d 136, 47 P.2d 309.

Chambers v. Gallagher, 177 Cal. 704, 171 P. 931, 933, involved a construction of a provision of the Inheritance Act of 1893 (Stats.1893, p. 193), which, in section 1, provided that "all administrators, executors, and trustees shall be liable for any and all such taxes until the same shall have been paid." The state comptroller brought the action against an executor to recover the inheritance tax more than twelve years after the estate had been distributed. He argued that the obligation was made continuing by the statute and that there was no limitation on the time in which he could bring the action on behalf of the state. In disagreeing with this contention the Supreme Court said: "In cases where the law also allowed a personal action to be maintained for the recovery of such taxes, we have uniformly held that the statute of limitations applies to such actions; that such tax is a liability created by statute, which, under section 338, subdivision 1, aforesaid, is barred after the expiration of 3 years from the time when the right of action accrued. [Citing cases.] The same principle applies to a demand for inheritance tax under the act of 1893, and its amendments prior to 1902." The same conclusion was reached in Chambers v. Gibson, 178 Cal. 416, 173 P. 752.

Following the reasoning of these authorities the conclusion follows that the limitation on these actions provided in section 312 et seq., of the Code of Civil Procedure must be applied here. That section expressly provides that the limitations contained in the following sections must be applied except "where, in special cases, a different limitation is prescribed by statute." Prior to the amendments of 1927, the Improvement Act of 1911 contained such a different period of limitation. When that special period of limitation was removed from the statute the express provisions of section 312 of the Code of Civil Procedure were placed in effect and the limitations contained in the following sections must govern here.

Plaintiff argues that the Improvement Act of 1911 is a special statute, complete in itself, and must be looked to for the procedure creating, extinguishing and foreclosing liens created under it for street improvements. See Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 45 P. 1057; Crummey v. Popp, 79 Cal.App. 230, 249 P. 29; Walker v. Van Valkenburgh, 111 Cal.App. 538, 295 P. 1068. This is generally true but cannot be applied literally to actions to foreclose liens created under it. That act is silent as to the details of the procedure to be followed in such actions so reference must be had to other statutes to determine such procedure. Otherwise there would be no statutory provision governing the remedy of foreclosure by court action.

The judgments are reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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52 Cal.App.2d 701

HIGH v. PACIFIC GAS & ELECTRIC CO.

Civ. 3010.

District Court of Appeal, Fourth District, California.

June 12, 1942.

Rehearing Denied July 7, 1942.

See 127 P.2d 588.

1. Appeal and error ⚿1003

Verdict for plaintiff cannot be disturbed, unless District Court of Appeal can conclude that evidence supporting the judgment is inherently improbable or unworthy of belief.

2. Gas ⚿20(2)

In action against gas company for injuries sustained by plaintiff at gasoline filling station when gas escaping from gas company's gas service pipe allegedly exploded, wherein gas company contended that it was gasoline fumes that exploded, evidence sustained judgment for plaintiff.

3. Evidence ⚿595

A jury is authorized to make any logical and reasonable deduction from the evidence.

4. Appeal and error ⚿996

Any attempt on the part of an appellate court to draw an inference of fact from evidence constitutes a usurpation of the province of the trial court.

5. Appeal and error ⚿996

The fact that some inference, other than that which has been drawn by a jury, may appear to an appellate tribunal to be the more reasonable affords no sufficient reason for disturbing the jury's inference.

6. Appeal and error ⚿994(2)

Uncertainties and contradictions in witness' testimony went to the witness' credibility as a witness and the weight to be given his evidence, and those questions could be argued to the jury, but could not prevail on appeal after the jury apparently accepted as true portions of that witness' testimony supporting the verdict and disregarded the uncertainties and contradictions in it.

7. Appeal and error ⚿1047(3)

In action against gas company for injuries sustained in explosion, wherein company had transcript containing portions of witness' testimony, concerning his smelling the odor of gas, introduced in evidence, it was not prejudicial error to deny company's motion to strike out such evidence.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Cecil Cleo High against the Pacific Gas & Electric Company to recover for injuries sustained by the plaintiff in an explosion. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Thos. J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, for appellant.

T. H. Werdel, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding plaintiff damages for injuries received in an explosion which occurred in a service station owned by C. M. McCormick and which was situated at Greenfield on Highway 99 in Kern County. The jury returned a verdict in favor of plaintiff in the sum of $6,500. This was reduced by the trial judge to $4,500 on motion for new trial.

Defendant thus states the questions involved in this appeal upon which it relies for a reversal of the judgment. "1. Did respondent produce any evidence that any natural gas leaking from appellant's gas service pipe caused the explosion resulting in injuries to respondent? Answer: No. 2. Does not the evidence of both parties prove that this explosion was caused by gasoline vapors? Answer: Yes." This presents the sole question of the sufficiency of the evidence to support the verdict and judgment. Incidentally, there is argued the question of error in refusing to strike out evidence of a witness who had smelled gas in the service station near the place of the explosion, on the ground that it related to a time too remote from the time of the explosion.

In our statement of facts we will set forth those which tend to support the verdict and judgment.

The service station was situated at the southwest corner of Union Avenue (Highway 99) and Taft Avenue. It faced on the highway. Defendant's gas main extended north and south in Highway 99, and its service pipe, about sixty feet long, led into the station and paralleled its south wall about 43 inches from it at a depth of about thirty inches. The ground was permeable loam. The service pipe was installed in 1931. The service station had been remodeled, the work having been completed about three weeks prior to the explosion which occurred at about 7:15 o'clock on the evening of June 8, 1940.

There were eleven underground storage tanks for gasoline and diesel oil in the station grounds south of the station. During the remodeling the vent pipes from these tanks were brought to the south wall of the building in newly dug trenches which crossed over the gas service pipe. The vents were carried up the side of the building and were enclosed in a false flue which was made of a wooden frame covered with plaster. There were openings from this flue so that the gasoline and gas fumes could escape into the partitions and walls of the service station. Two of the vent pipes did not extend to the top of the flue. One ended about eighteen inches and the other between eight or ten feet below the top. The shorter vent pipe connected with a storage tank into which three hundred gallons of gasoline had been dumped about fifteen minutes before the explosion.

During the remodeling the area south of the service station had been covered with cement which reached to the south wall. The high point of this cement slab was where it joined the false flue, the cement sloping both south and southeast from that point. The bottom of the flue rested on dirt. The explosion occurred when plaintiff turned a switch to light the service station. The switch was in a room adjoining the flue. The explosion blew out the walls of this and other rooms and blew plaintiff through a wall.

Plaintiff offered evidence that the smell of gas had been noticeable near the south wall of the service station for several years prior to the explosion; that complaint of this escaping gas had been made to a meter reader and collector of the predecessor of defendant; that the last complaint was made about two years before the explosion.

McCormick testified as follows:

"Q. Directing your attention, Mr. McCormick, to this area south of this room we have here, what has been described as the west wall of the old kitchen running from here a little bit east of what is now the present rooms A and B, and then the north room as I draw the pencil on Plaintiff's Exhibit 1, and south towards the most easterly wall of the old kitchen and then at this end of the room which is marked W-12 as drawn by one of the witnesses, the location of your old stove in that kitchen—I will ask you Mr. McCormick *if immediately preceding this accident and for some time prior thereto,* if, in the location of the outside wall of that old stove, that is immediately outside of this south wall, if you had noticed gas fumes there? A. Yes sir.

"Q. And I will ask you if you ever reported those fumes to any of the gas company employees? A. I reported it to the meter reader and the gas collector.

"Q. Did anyone from the Gas Company ever come out and make an investigation? A. I saw one fellow testing it, and I believe they were out there three or four times, but I never saw but the one fellow testing it, and I do not know who he was.

"Q. And what did they do when they made their investigation? A. They checked the fittings around the meter and checked the meter, and of course the meter would not show anything. We had no leaks that could be found. It had been that way for two years and was getting worse.

"Q. On how many occasions would you say you reported it to the Gas Company? A. I talked several times with Mr. Walford and with the meter reader, and we kept checking to find out ourselves, but we could not find it." (Emphasis added.)

Plaintiff testified as follows:

"Q. When you have indicated that you smelled natural gas, the odor of natural gas, on the previous occasions you have indicated, it was in the region of the old meter box, is that correct? A. Yes.

"Q. And was it around that area, around there, about a considerable distance or quite a distance, or what? A. Well, most anywhere in the garage part back there, you could smell it.

"Q. You are referring to the old garage? A. Yes sir.

"Q. And at that time then within that area where you smelled that gas there was no cement slab at that time—that was prior to the reconstruction? A. No sir, there was no cement.

"Q. And after the cement slab was placed, your testimony is you didn't smell any natural gas? A. That is right."

On the day following the explosion defendant caused the gas service pipe to be uncovered and tested for leaks. One test was made by applying soap suds to the surface of the pipe. Any escaping gas would cause bubbles to arise in the soap suds. McCormick testified that he saw bubbles on the portion of the pipe immediately south of the room in which the explosion occurred. This evidence was corroborated by other testimony.

Defendant's witnesses testified to several tests of this pipe. They admitted finding small leaks from a point forty-three feet east of the west end of the pipe to its connection with the main in Highway 99. They found no leaks in the west forty-three feet of the pipe.

Defendant also caused the ground around the service pipe and the walls of the service station to be tested with a combustible gas indicator which is an instrument that causes a red dial to become exposed when gas vapors in combustible quantities are discovered. A witness for plaintiff testified that the red dial was exposed when the test was made of the ground over the service pipe near the place of the explosion. According to defendant no combustible gases were found either at that point or in the walls or partitions of the service station. Apparently the instrument could not distinguish between gasoline vapors or gas in combustible quantities.

Experts for both parties agree that gasoline vapors are heavier than air and descend when released; that gas is lighter than air and rises when it escapes confinement; that both vapors will spread when the opportunity is presented. They agree that both gasoline fumes and gas when mixed with proper proportions of air are highly explosive. Here the agreement of the experts ends, and their testimony as to the probable cause of the explosion, whether from gas escaping from the service pipe, or gasoline vapor escaping from the short vent pipe, is in sharp and irreconcilable conflict.

It was the opinion of plaintiff's expert that the explosion was in all probability caused from gas. It was his theory that gas escaped from the leaks in the service pipe, rose into the soft and permeable earth, followed the newly dug trenches (containing the vent pipes) under the concrete slab to its highest point at the false flue and escaped into the bottom of that flue in the soft dirt around the vents, rose in the flue and escaped through the openings and cracks in it into the walls and partitions of the service station where it was ignited by a spark from the switch on one of these walls when contact was made by plaintiff attempting to turn on the lights.

This witness had several reasons for his belief that the explosion was caused by the ignition of the escaping gas rather than from the ignition of gasoline fumes. The one of his several reasons which is most easily understood by a lay mind is this: That the ceilings of the small room containing the switch, and the room adjoining it, were lower than the ceilings of the other rooms of the service station, thus forming an enclosed well; that the ceiling of this well was covered with oil smudge and lint, both of which were easily ignitible; that there was much exposed wood on the inside of this well; that gasoline fumes explode with a flash which will ignite easily combustible material and char wood; that if gasoline vapors had escaped from the short vent pipe during the process of filling the gasoline tank those vapors would have filled this well and would have exploded; that the oil smudge and lint were not ignited and there was no charring of the exposed wood in this well. He drew the conclusion that the great probabilities were against the theory of the explosion having been caused by gasoline fumes and in favor of its having been caused by gas escaping from the service pipe.

Defendant's experts were more positive that the explosion could not have been caused by escaping gas but was caused by gasoline vapors being forced from the storage tank during the filling operation and out of the end of the short vent pipe whence they settled in the flue and spread into the walls and partitions of the service station to be ignited by the spark from the electric switch.

[1, 2] Thus we have two conflicting theories of the cause of the explosion, with the jury accepting one as true and rejecting the other. While we might conclude from a study of the cold record that the theory advanced by the witnesses for defendant seems more probably correct and supported by better reason we cannot disturb the verdict and judgment unless we can reach the conclusion that the evidence supporting the judgment is inherently improbable or unworthy of belief. This we cannot do.

[3-5] The correct rule that must guide us is set forth in Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886, 890, as follows:

"The rule is not, as is sometimes contended and occasionally stated by the courts, that in order for an inference to be established by circumstantial evidence it must be the only inference which can fairly or reasonably be drawn from the circumstances relied on, or that if other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced from it.

"As stated in Robertson v. Weingart, 91 Cal.App. 715, 723, 267 P. 741, said principle is more applicable as a rule to guide a jury in its deliberations upon the facts, than it is a rule to guide the appellate court in passing upon the sufficiency of the evidence. Peters v. McKay & Co., 136 Cal. 73, 68 P. 478. * * *

"A recent pronouncement of this court in the case of Hamilton v. Pacific Elec. R.

Co., 12 Cal.2d 598, 600, 602, 86 P.2d 829, 831, states the true position of an appellate court in cases where several inferences may be drawn from the evidence presented to a jury or trial court:

"'It may be confidently declared that founded upon the evidence, the jury not only is authorized to make any logical and reasonable deduction, but also that the jury is the exclusive judge of the weight and value of the inference that may be drawn by it; furthermore, as corollary thereto, that any attempt on the part of an appellate court to draw an inference of fact constitutes "a usurpation of the province of the trial court". The fact that some inference other than that which has been drawn by a jury may appear to an appellate tribunal to be the more reasonable, affords no sufficient reason for disturbing the inference in question.'" See, also, Robertson v. Weingart, 91 Cal.App. 715, 267 P. 741; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660.

[6] Defendant attacks the evidence of McCormick as so contradictory and uncertain as to be unreliable. There are many uncertainties and some contradictions in his testimony. Under the circumstances here those matters went to his credibility as a witness and the weight to be given his evidence. Those questions may be argued to the jury but cannot prevail here after that body evidently accepted as true portions of his evidence supporting the verdict and disregarded the uncertainties and contradictions in it. The latter went principally to the times he smelled the odor of gas, whether before or after a date in 1938, or both before and after that date. While the witness may have been confused under severe cross-examination and certainly contradicted himself, we believe that the jury could have construed all his evidence as indicating that he smelled the gas both before and after the specified date.

The question of the ruling of the trial court on the motion to strike the evidence of McCormick on his smelling the odor of gas, is confused in the record which shows the motion was first made in chambers and that the trial judge said: "I will grant the motion and strike this out." It does not appear that this ruling was ever made in open court nor was it communicated to the jury. Thereafter McCormick testified that he had noticed the smell of gas after 1938.

[7] Defendant had portions of McCormick's evidence transcribed and introduced this transcription in evidence. At the close of the case it moved to strike this evidence out. This motion was denied. We do not regard this ruling as prejudicial. Brunig v. Pacific Gas & Electric Co., 140 Cal.App. 254, 35 P.2d 226.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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52 Cal.App.2d 745

STROSNIDER v. POMIN et al. (EDWARDS et al., Interveners).

Civ. 12091.

District Court of Appeal, First District, Division 1, California.

June 18, 1942.

Rehearing Denied July 18, 1942.

Hearing Denied Aug. 13, 1942.

1. Easements 🔑32

Where defendants' predecessors in title granted plaintiff's predecessors a right of way across their land without limitation as to time or of use and subsequently defendants granted a confirmatory deed of the right of way acknowledging that improvements erected in encroaching upon the right of way were not hostile thereto, erection and maintenance of such buildings did not extinguish the easement of the right of way by "adverse possession". Civ.Code, § 811, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Possession".

2. Adverse possession 🔑85(1)
Appeal and error 🔑1008(1)

Occupancy is presumed to be under the grant deed until some unequivocal act gives notice of a changed attitude, and these are questions of fact for the trial court.

3. Easements 🔑32

Where there was common ownership of a right of way between holders of the dominant and servient tenements, to establish claimed title by adverse possession, an ouster was required. Civ.Code, § 811, subd. 3.

4. Tenancy in common 🔑15(5)

A tenant in common has a right to occupy the whole of property, the possession of one tenant being deemed the possession of all, and each may assume that another in exclusive possession is possessing for all and not adversely to others.

5. Tenancy in common 🔑15(5, 10)

One tenant in common does not by exclusive possession gain title by adverse possession against others, but such possession will be presumed to be by permission and rightful in absence of notice to others that it has become hostile.

6. Specific performance 🔑105(3)

Where defendants' predecessors in title granted plaintiff's predecessors right of way across their land without limitation as to time and use, and defendants executed a confirmatory deed and agreed to open and improve the way, and plaintiff did not indicate intent to abandon the way, and there had been no prior need to open the way, plaintiff was not precluded by "laches" from seeking enforcement of agreement, since easements founded upon a grant cannot be lost by mere nonuser, no matter how long nonuser may continue.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

7. Frauds, statute of 🔑139(4)

Where plaintiff brought suit against executor of the estate of original owners to enforce the terms of an agreement to grant a right of way over land of deceased and others, and defendant as one of the heirs in apparent charge of the property for the other heirs promised to open and improve the right of way if the suit were dismissed and on his performance, plaintiff did dismiss the suit, agreement was fully executed and was not unenforceable under the statute of frauds in that it was an agreement to create an easement, or on the ground that the authorization by the other heirs for the defendant heir to act as their agent was also required to be in writing. Code Civ. Proc. § 1973; Civ.Code, § 2309.

8. Specific performance 🔑121(3)

Where plaintiff dismissed suit as against estate of deceased to enforce an agreement to grant plaintiff a right of way across defendants' land in consideration of an heir's agreement to open the right of way and improve it if suit were dismissed, and on the heir's performance, plaintiff dismissed the suit and thereafter barriers were erected across the right of way, evidence justified decree directing defendants to remove obstructions therefrom on the ground that defendants acted fraudulently and in bad faith.

9. Appeal and error 🔑1170(3)

In suit for specific performance of agreement to grant and improve a right of way where the pleadings misled neither the court nor the litigants as to the issues involved, that matters in one cause of action were alleged by reference did not result in a "miscarriage of justice" authorizing setting aside of judgment. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

◆

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by R. H. Strosnider against Ernest Pomin and others, to compel specific performance of an agreement in a grant of right of way to build a private road thereon and a subsequent agreement to open and improve the right of way and for damages, wherein C. F. Edwards and others intervened. From an adverse judgment, defendants appeal.

Affirmed.

H. J. Kleefisch, of San Francisco, for appellants.

Thomas Maul, of Placerville, for respondent.

Richard Barry, of Placerville, for interveners.

WARD, Justice.

This is an appeal by defendants from a judgment declaring the plaintiff and the interveners to be the owners of a right of way over certain lands belonging to defendants, which right of way it was decreed be constructed and forever maintained by the defendants, who were further directed to remove all obstructions therefrom.

The facts of the case are as follows: Frank and Marian Pomin, the predecessors of appellants, for many years conducted a resort on Lake Tahoe. In the year 1913, in connection with certain land they were conveying to respondents' predecessors, they granted the latter by separate agreement a forty-foot right of way over lands retained by them, covenanting at the same time to make and maintain a private road thereon "as a way of passing over the lands of said first parties [Frank and Marian Pomin] to the shores of Lake Tahoe." By the same agreement they covenanted to deed to respondents' predecessors upon demand an additional small triangular parcel of land. In the years that followed, respondents' predecessors did little toward improving their property, and the road was not built. In fact from time to time Marian and Frank Pomin erected buildings which encroached upon the right of way. In 1923, four years after the first of such improvements were made, the Pomins, pursuant to and in confirmation of the terms of the 1913 agreement deeded the triangular piece of land above mentioned, including in such deed the right of way in question "to be used in common by the parties hereto, and their heirs, executors and assigns." Upon the death of Frank Pomin in 1935, the resort property was distributed to his widow, subject to the above right of way. Marian Pomin died shortly thereafter, the appellants herein (brother and sisters of Frank Pomin) succeeding to the property pursuant to an agreement with other heirs. The decree of distribution in the matter of Mrs. Pomin's estate failed to make any reference to the right of way, although in the decree of distribution in the matter of the estate of one of her heirs to the property, the easement in question was provided for.

Following the death of Marian Pomin, plaintiff, who as the result of intermediate conveyances had acquired title to most of the property originally held by his predecessor parties to the 1913 agreement, brought suit against the executor of the estate of Marian Pomin to enforce the terms of such agreement and to quiet title to the property in question. Ernest Pomin, one of the appellant heirs, and in apparent charge of the property,—although it is claimed he had no authority from his sisters to act in this connection,—promised to open and improve the right of way if the suit were dismissed. He did remove the encroachments, graded the road and opened it. Shortly thereafter he and his sister, appellant Ida Pomin, by leave of court, filed a complaint in intervention in the above mentioned suit against the executor, copy thereof being served on plaintiff herein. About a month later, the plaintiff dismissed the action against the executor, and shortly thereafter the decree of distribution in the matter of the estate of Marian Pomin was made and filed. Thereafter Ernest Pomin erected a fence across the right of way, posted a "No Trespassing" sign, and refused to allow any of the respondents further use of the easement. Such action resulted in the present suit.

The action was brought to compel the appellants to specifically perform the terms of the 1913 agreement, confirmed by the deed of 1923, and the oral agreement of Ernest Pomin in 1937 to open and improve the right of way, and for damages. Owners of certain lots in a subdivision, "Tahoe Cedars," who had become beneficiaries in this easement of right of way, intervened.

The points urged by appellants relate to certain issues, upon which the court found against them and awarded nominal damages, namely, that the easement granted in 1913 was, in 1936, upon the death of Marian Pomin under whom they claim, extinguished by operation of law—by assent of owners of the servitude, by their acts, and by adverse possession and nonuser; that the relief sought is barred by the statute of frauds, by the statutes of limitation, laches and adverse occupancy. In brief, they contend here, as they did in the trial court, that the easement granted by agreement in 1913 and by deed in 1923 was extinguished by the building and maintenance by Frank and Marian Pomin of obstructions across the right of way, and that the oral agreement of plaintiff and Ernest Pomin in 1937 was invalid primarily because the latter had no written authority to make any contract affecting the property on behalf of the co-owners and because the agreement by plaintiff and Ernest Pomin was also not in writing. Certain objections are presented to the sufficiency of the pleadings and of the evidence to sustain the findings.

The main issue involved herein is whether the Pomins, by the erection and maintenance of buildings on the right of way, had extinguished the easement by adverse possession. Such buildings seem to have been constructed and maintained without discussion by the respective parties. In the early days, Tahoe Cedars was sparsely settled; there was no fixed roadway, and the residents of that tract walked over the Pomin property to the lake without regard to a right of way, and also without discussion of the matter by the parties.

[1, 2] Defendants cite subd. 3, § 811 of the Civil Code to the effect that a servitude is extinguished "By the performance of any

act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise," and argue that, having hoisted the flag of hostility over the right of way by the erection of buildings and a fence, the Pomins thereby performed an act incompatible with the exercise of the right of way and continued this hostile attitude until the easement was extinguished by operation of law. The easement was granted without limitation as to time or of use. The facts indicate the parties knew that for practical purposes a roadway would not be required until the Tahoe Cedars tract had been developed to such an extent that a road to the lake across the Pomin land would become necessary to conveniently serve the interests of those using the tract. That the erection of the obstructions was permissive and not hostile is indicated by the 1923 deed, executed several years after the erection of buildings, in pursuance of the 1913 agreement. In the 1923 deed, the Pomins granted, bargained, sold and conveyed to the same grantees or their successors not only the parcel of land agreed in 1913 to be conveyed, but a right of way "as a way for the passage of pedestrians and vehicles over the above described land to the shores of Lake Tahoe from the lands adjacent to and abutting thereon." This would seem to indicate an acknowledgment by appellants' predecessors that they made no claim hostile to respondents' rights, and that respondents would be entitled to demand the road when they had need therefor. Since appellants' predecessors, by executing the confirmatory deed to the easement, acknowledged that the improvements erected prior thereto were not hostile to the rights of respondents, a reasonable inference may be drawn that neither did those later erected encroaching upon such easement constitute an adverse user. In Storrow v. Green, 39 Cal.App. 123, 178 P. 339, wherein the servient owner during a period of years erected a fence and tennis court, grew grass and planted trees on a right of way, it was held that he would be presumed to be in possession of the property by permission until by some word or act he gave notice of a change from peaceful to hostile possession, and that the mere fact that plaintiff in that case made no attempt to use the right of way indicated no acknowledgment of hostile possession in the defendant, and that defendant could not claim the land by adverse possession. Thomas v. England, 71 Cal. 456, 12 P. 491. Occupancy is presumed to be under the grant deed "until some unequivocal act gives notice of a changed attitude, and these are questions of fact for the trial court." San Juan G. Co. v. San Juan R., etc., Ass'n, 34 Cal.App.2d 159, 171, 93 P.2d 582, 589; Hutton v. Ormando, 3 Cal.2d 305, 43 P.2d 1100; Nelson v. Sweitzer, 22 Cal.App.2d 382, 71 P.2d 85.

[3-5] In the present case there was a common ownership of easement between appellants' and respondents' predecessors in interest. Under such circumstances, ordinarily the rule is that, to establish title by adverse possession, there must be an ouster. In Johns v. Scobie, 12 Cal.2d 618, 623, 624, 86 P.2d 820, 822, 121 A.L.R. 1404, the court said: "It is a fundamental rule that each tenant in common has a right to occupy the whole of the property. The possession of one is deemed the possession of all; each may assume that another in exclusive possession is possessing for all and not adversely to the others; and consequently one tenant in common does not, merely by exclusive possession, gain title by adverse possession against the others. Such possession will be presumed to be by permission and rightful, unless notice is brought home to the others that it has become hostile." Under the facts of this case there appears to be lacking a claim of exclusive ownership on the part of appellants' predecessors.

Having determined that Frank and Marian Pomin may not be classed as adverse claimants in possession, we come to appellants' next contention; that the present action is barred by the statute of limitations. This contention is disposed of by our conclusion that the possession of the Pomins was not adverse.

[6] On the question of laches, no intention to abandon was ever indicated by respondents or their predecessors. In Parker v. Swett, 40 Cal.App. 68, page 74, 180 P. 351, page 353, where there had been a failure for twenty-five years to exercise a right to install a pipe line, the court said: "* * * an easement founded upon a grant cannot be lost by mere nonuser, no matter how long that nonuser may continue." City of Vallejo v. Scally, 192 Cal. 175, 219 P. 63.

Prior to the death of Marian Pomin it does not appear that there was need to open the roadway as the development of Tahoe Cedars had not reached such a stage that use of the easement was necessary. That the rights of respondents thereto were recognized by appellants' predecessors up to the time of making the decree of distribution in the estate of Frank Pomin is demonstrated by the instrument which distributed the resort property to the widow Marian Pomin subject to the right of way.

The contention particularly emphasized on this appeal is that the easement was extinguished at the death of Marian Pomin, following which, as stated, Ernest Pomin and his sisters came into possession of the property.

[7] Appellants argue that the agreement between Ernest Pomin and the plaintiff was barred by the statute of frauds in that an agreement to create an easement, to be enforceable, must be in writing, and that authorization by the sisters of Ernest Pomin to act as their agent in recognizing such easement must likewise be in writing. Code Civ.Proc., § 1973; Civ.Code, § 2309. It is also contended that Ernest Pomin entered into the contract due to a mistake in law, in this, that at the time he believed respondents had a right to the easement; that because of this mistake of law he should be relieved therefrom. The latter contention depends upon the assumption that the easement was extinguished by adverse possession of the Pomins, an assumption which we have already determined to be unjustified.

The contract between plaintiff and Ernest Pomin was fully executed. The suit was dismissed and the road opened, the sisters paying their share of the expense of such opening as fixed by Ernest Pomin. In connection with the whole transaction it appears that Ernest Pomin was "looking after" the interests of the sisters and that whatever he did "was all right." The court found that Ernest Pomin "was acting for and on behalf of the other defendants [his sisters]" and "that said representations, agreements and promises of the said Ernest Pomin, one of the defendants, who was acting on behalf of the other defendants and with their knowledge and consent as well as on his own behalf, were made fraudulently and in bad faith and with the sole purpose of inducing and causing the plaintiff to dismiss the said suit." The evidence shows that in a letter dated November 4, 1937, addressed to plaintiff, Ernest Pomin promised to take out "stumps," etc., requested that the pending suit be dismissed and assured plaintiff "of my future cooperation with you and Tahoe Cedar lot owners for their use of the road." Within a month Ernest Pomin wrote plaintiff: "We have the stumps out and the rocks lined up on the county line. Your suit against the estate is the only thing that is holding up the final closing of the estate, and looks like the Pomins side of the estate is getting the blunt of the expense. I know if you would withdraw your suit would stop a lot of expenses for us. I know we can fix up any differences between us in regards to the right of way." After the dismissal of the action against the executor, Pomin placed a fence across the improved roadway. Relative to the matter, there is the following testimony by Ernest Pomin:

"Q. And you knew that he dismissed the suit because you opened the road and thought you were going to keep it open, didn't you? A. That was the idea.

"Q. You figured that you had made him a promise that you would open the road and keep it open? A. To my knowledge, it has never been opened up.

"Q. You figured you had already done that in the Fall of 1937? A. Yes, sir.

"Q. And you figured that he thought the road would be open from then? A. Yes, sir.

"Q. You don't think that he would have dismissed the suit if you had not kept it open, do you? A. I don't think he would.

"Q. That is what induced him to dismiss the suit, wasn't it? A. Yes, sir."

[8] The court found that Ernest Pomin acted "fraudulently and in bad faith." We are unable to disturb such finding and do not feel it necessary further to discuss the supporting evidence. So far as his sisters are concerned, in order to enforce the easement no reliance need be placed on the oral agreement.

Finally appellants claim that plaintiff under the guise of an action to quiet title and obtain declaratory relief sought to compel specific performance under the agreement of 1913 and the deed of 1923 without having pleaded the necessary facts; and that the complaint in intervention did not state a cause of action.

[9] On the first point the action was one to quiet title to an easement and to enjoin interference with its enjoyment; on the second it appears that matters of substance in one cause of action were alleged

by reference. The objections raised by appellants are technical. The pleadings may not be models of perfection, but neither the court nor the litigants were misled as to the issues involved. After an examination of the entire record, we are not convinced that the technical errors complained of resulted in a miscarriage of justice. Const.Calif., art. VI, § 4½.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

52 Cal.App.2d 715

ZWERIN et al. v. RIVERSIDE CEMENT CO. et al.

Civ. 13432.

District Court of Appeal, Second District, Division 3, California.

June 14, 1942.

1. Appeal and error 🔑930(1), 989

The District Court of Appeal considered only the evidence which favored the verdict, and resolved all conflicts in the evidence against the appellants.

2. Automobiles 🔑245(14)

Driver of a truck on an arterial highway, who entered an intersection at approximately the same time as automobile from a side street, which moved slowly out into the highway without stopping until it was directly in front of the truck when it stopped with the result that the truck collided with the automobile, notwithstanding the attempts of the driver of the truck to avoid the collision, was not negligent as a matter of law. Vehicle Code, §§ 552, 577, St. 1935, p. 187, St.1939, p. 1608.

3. Automobiles 🔑171(5)

If truck proceeding along through highway entered intersection of through highway with another highway on which automobile was traveling, before the automobile entered the intersection, even by an instant of time, the truck driver had the right of way under statute. Vehicle Code, § 552, St.1935, p. 187.

4. Automobiles 🔑171(5)

Even if truck which was proceeding on through highway was not in intersection before automobile which was being driven on highway which intersected the through highway, the truck driver still had the right of way under statute if the truck was approaching so closely on the intersection as to constitute an immediate hazard when the driver of the automobile entered the intersection. Vehicle Code, § 552, St.1935, p. 187.

5. Appeal and error 🔑999(3)

Whether an approaching vehicle constitutes an immediate hazard, within meaning of the section of the Vehicle Code providing that the driver of any vehicle which has stopped at entrance to through highway shall yield right of way to vehicles on through highway where the vehicles are approaching so closely to the highway as to constitute an immediate hazard, is ordinarily a fact question concerning which the jury's conclusion is binding on appeal. Vehicle Code, § 552, St.1935, p. 187.

◆

Appeal from Superior Court, Los Angeles County; Arthur Coats, Judge.

Action by Kenneth Zwerin and Doris Zwerin against the Riverside Cement Company and one Maxie to recover for injuries sustained by the plaintiffs and for damage to Kenneth Zwerin's automobile. From an adverse judgment, the plaintiffs appeal.

Judgment affirmed.

William F. Herron, of San Francisco, for appellants.

Jennings & Belcher, of Los Angeles, for respondents.

SHAW, Justice pro tem.

This action was brought by the plaintiffs to recover damages for personal injuries received by them in a collision between a De Soto automobile owned and driven by the plaintiff Kenneth Zwerin and a truck owned by the defendant corporation and driven by defendant Maxie. The complaint was based on negligence of Maxie, alleged to be the employee of the corporation. The plaintiff Kenneth Zwerin sought also a recovery for damage to his automobile. The defendants denied all the allegations of the complaint, and pleaded contributory negligence of plaintiff Kenneth Zwerin, alleging also that he was acting as the agent of plaintiff Doris Zwerin. The jury returned a verdict in favor of defendants, on which judgment was entered, and plaintiffs appeal from this judgment.

[1] The appellants concede that the trial court made no errors in ruling on evidence or instructing the jury, their only point being that the evidence is insufficient to support the verdict. They contend that the evidence establishes, as a matter of law, that the defendant Maxie was negligent and that the plaintiff Kenneth Zwerin was not negligent. The plaintiff Doris Zwerin is the mother, and on the occasion in question was the guest, of the plaintiff Kenneth Zwerin, and no ground appears on which his negligence, if any, can be imputed to her. The defendant Maxie, it was stipulated, was acting as employee of defendant corporation and driving its truck at the time of the accident. If the evidence is sufficient to support the jury's implied finding that Maxie was not guilty of any negligence which was a proximate cause of the accident the judgment must be affirmed as to both plaintiffs; otherwise it must be reversed as to plaintiff Doris Zwerin at least. We therefore address ourselves first to the question of Maxie's negligence. In passing upon it we follow the established rule on appeal, considering only the evidence which favors the verdict, resolving all conflicts in the evidence against the appellants, and where conflicting inferences can reasonably be drawn, even from undisputed facts, accepting those which tend to support the verdict. On such a view of the evidence the following facts appear:

The collision happened at about 3 p. m. on a rainy day, October 25, 1940. Both the vehicles involved had windshield wipers in operation, and it does not appear that the rain interfered with the vision of either driver. The scene of the collision was the intersection of Lankershim Boulevard and San Fernando Road. San Fernando Road here runs approximately northwest and southeast and Lankershim Boulevard, running approximately north and south, intersects it from the south but does not continue to the north. San Fernando Road was at the time of the collision a regularly established through highway and a stop sign such as is prescribed by law was located on Lankershim Boulevard about forty feet back of the curb line of San Fernando Road. Plaintiff Kenneth Zwerin was driving his De Soto car northerly on Lankershim Boulevard, intending to turn northwesterly on San Fernando Road, and as he approached San Fernando Road he slowed down but did not come to a complete standstill at the edge of San Fernando Road. He kept on coming very slowly, at a speed of about four or five miles per hour. Defendant Maxie was driving southeasterly on San Fernando Road, with an empty cement truck to which was attached an empty trailer, both together weighing about 25,000 pounds and having a combined length of forty-five or fifty feet. Both had air brakes. Maxie was driving about thirty-five miles per hour as he approached Lankershim Boulevard, and at a distance of about 200 feet from it he saw the De Soto approaching on Lankershim Boulevard and applied his brakes and kept them applied a little, slowing down to about thirty miles per hour. As the De Soto approached, San Fernando Road was clear of north-bound traffic for several hundred feet to the southeast, so that the car could have crossed San Fernando and turned northwesterly without interference from traffic coming from the southeast. Maxie testified to the events leading to the collision in these words: "A. Well, I was coming down San Fernando Road towards Los Angeles, home, and I seen this car approaching up Lankershim Boulevard, and he was coming very slow, and I swung towards the middle lane to clear him, and he kept coming out and I got pretty close to him, and I thought he was going to go; and so I started to swing behind him, to clear him behind, and he stopped dead still, and I hit him. Q. At the time he brought his car to a stop, where was he with reference to the path of travel of your truck? A. Right in the road of it." At the time the De Soto thus stopped, Maxie, whose truck was then about ten feet away, applied his brakes fully, in an effort to stop, but was unable to do so in time to avoid a collision.

[2-5] Upon the foregoing facts and the reasonable inferences which may be drawn from them, Maxie cannot be held negligent as a matter of law. In reaching this conclusion we give considerable weight to the fact that San Fernando Road, on which he was proceeding, was a regularly established through highway, with a proper sign at the intersection of Lankershim Boulevard.

The duties and rights of the respective parties as affected by that fact are thus declared in sections 552 and 577 of the Vehicle Code, St.1935, p. 187, St.1939, p. 1608, as they stood at the time of the accident: "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway." § 552. "The driver of any vehicle upon approaching any entrance of a highway or intersection signposted with a stop sign as provided in this code, except as otherwise permitted or directed in this code, shall stop before entering the nearest crosswalk or, if none, then at a limit line when marked, otherwise before entering such highway or intersection." § 577. It does not appear that there was either crosswalk or marked limit line at this intersection; hence the proper place for stopping the De Soto, under section 577, was "before entering" San Fernando Road. Section 552 establishes quite different rules regarding the right of way from those governing ordinary intersections, and its applicability here furnishes sufficient ground for distinguishing cases cited by appellants which involved collisions at ordinary intersections. Maxie testified that his truck entered the intersection at approximately the same time as the De Soto. If its entry preceded that of the De Soto, by even an instant of time, section 552 would give him the right of way; but even if his truck was not in the intersection before the De Soto, Maxie still had the right of way if the truck was approaching so closely on San Fernando Road as to constitute an immediate hazard when the De Soto entered the intersection. The rights of the driver of the De Soto were no better for not stopping at the through highway than they would have been if he had stopped. See Inouye v. McCall, 1939, 35 Cal.App.2d 634, 638, 96 P.2d 386. The question whether an approaching vehicle constitutes an immediate hazard is ordinarily one of fact concerning which the jury's conclusion is binding on appeal. Wilkinson v. Marcellus, 1942, 51 Cal.App.2d 630, 125 P.2d 584; Hodges v. McCullom, 1941, 47 Cal.App.2d 41, 44, 117 P.2d 44; Pattisson v. Cavanagh, 1936, 18 Cal.App.2d 123, 126, 63 P.2d 868, 64 P.2d 945; Galway v. Guggolz, 1931, 117 Cal.App. 639, 642, 4 P.2d 290. We think it must be so regarded here.

It may be that, on the rule of "the last clear chance," the one who constitutes an immediate hazard and so has the right of way should nevertheless slow down or otherwise seek to avert a collision when it appears to him that one is impending, but no violation of such a duty appears here. After plaintiff stopped in front of defendant it was impossible for the latter to avoid the collision. Before plaintiff stopped there was no such apparent danger of a collision as would necessarily cast on defendant the duty of trying to avoid it by any other means than those he took. He did swerve, first to the left, then to the right, in the expectation of avoiding plaintiff, and testifying of his efforts in this respect Maxie said: "If he continued at the speed he was traveling, I would have went behind him." This may be, as appellants say, a mere conclusion and not evidence; but if so it is a conclusion which the jury might reasonably have reached from the evidence before them, and supports their finding that Maxie was not negligent. There appears to have been a dodging contest between plaintiff Kenneth Zwerin and Maxie, such as often arises in similar situations, each endeavoring to avoid the other but actually getting in his way instead, and the question, which of them should have sensed the true situation in time to avert the collision, was, under the circumstances, one for the jury.

This conclusion renders it unnecessary for us to consider the question of contributory negligence of plaintiff Kenneth Zwerin.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

52 Cal.App.2d 685

PEOPLE v. BATTILANA.

Crim. 1784.

District Court of Appeal, Third District,
California.

June 11, 1942.

1. Rape 🔑51(4)
Sodomy 🔑6

Evidence *held* sufficient to support convictions of rape by force and violence and threats of bodily harm, fellatio, and the infamous crime against nature. Pen.Code, § 261, subds. 3, 4; §§ 286, 288a.

2. Rape 🔑57(1)

In prosecution for rape, questions whether defendant accomplished sexual intercourse with prosecutrix by means of force or by fear or threats of bodily harm were exclusively for jury to determine. Pen. Code, § 261, subds. 3, 4.

3. Rape 🔑57(1)
Sodomy 🔑7

In prosecution for rape, fellatio, and the infamous crime against nature, weight of conflicting evidence was for jury to determine. Pen.Code, § 261, subds. 3, 4; §§ 286, 288a.

4. Criminal law 🔑1159(4)

It is not reviewing court's province to hold witness' testimony inherently improbable, unless it is so unbelievable and contrary to reason that its falsity may not be doubted.

5. Criminal law 🔑878(4)
Indictment and Information 🔑129(1)

Counts of indictment for, and convictions of, rape by force and violence and by means of threats of bodily harm are not inconsistent. Pen.Code, § 261, subds. 3, 4.

6. Rape 🔑14

Evidence which will justify conviction of rape ordinarily requires proof that complainant exercised all of her power of resistance consistent with surrounding circumstances. Pen.Code, § 261, subd. 3.

7. Criminal law 🔑29

A man may be guilty of two separate offenses of rape, if he accomplishes his purpose by resorting to physical force and also by threatening great bodily harm or by administering narcotics or anaesthesia. Pen. Code, § 261, subds. 3, 4.

8. Sodomy 🔑5

An indictment for sodomy need not describe offense with same particularity required in charging other crimes. Pen.Code, § 286.

9. Indictment and Information 🔑110(25)

An indictment, alleging in language of statute that defendant willfully, unlawfully, and feloniously committed the infamous crime against nature, sufficiently charged such offense, though it added unnecessary statement that crime was committed by having carnal knowledge of prosecutrix's body. Pen.Code, § 286.

10. Sodomy 🔑1

The "infamous crime against nature" is synonymous with "sodomy". Pen.Code, § 286.

See Words and Phrases, Permanent Edition, for all other definitions of "Infamous Crime Against Nature" and "Sodomy".

11. Sodomy 🔑1

While "carnal knowledge" includes "sexual intercourse", sodomy may not be committed without carnal knowledge of victim, as word "carnal", which is derived from Latin word for "flesh" means "pertaining to the body, its passions and its appetites, animal, fleshly, sensual, impure". Pen.Code, § 286.

See Words and Phrases, Permanent Edition, for all other definitions of "Carnal", "Carnal Knowledge", and "Sexual Intercourse".

12. Indictment and Information 🔑196(5)

An objection to count of indictment as uncertain was "waived" by failure to demur to indictment on such ground.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

13. Indictment and Information 🔑75(1)

Since adoption of Penal Code amendment simplifying and liberalizing criminal pleadings, information or indictment may be couched in any words sufficient to give accused notice of offense charged. Pen.Code, § 952.

14. Indictment and Information 🔑117

Criminal pleadings are liberally construed. Pen.Code, § 952.

15. Criminal law 🔑1167(2)

Where three counts of indictment, on each of which defendant was convicted, state good causes of action, failure of fourth count to state public offense does not require reversal of entire judgment.

16. Criminal law 🔑510

Where jury found defendant guilty of the infamous crime against nature and fellatio, thereby apparently determining that prosecutrix was not accessory to or accomplice in such crime, production of evidence corroborating her testimony was unnecessary. Pen.Code, §§ 286, 288a, 1111.

17. Rape 🔑40(2)

In prosecution for rape, where defendant asserted that prosecutrix voluntarily submitted to sexual intercourse with him, evidence of her general reputation for unchastity and specific acts in proof thereof was competent to show probability of her consent to such intercourse. Pen.Code, § 261, subds. 3, 4.

18. Sodomy 🔑6

Evidence of prosecutrix' general reputation for unchastity was inadmissible as proof of fellatio and the infamous crime against nature charged in two counts of indictment. Pen.Code, §§ 286, 288a.

19. Criminal law 🔑1169(2)

In prosecution for rape, fellatio, and the infamous crime against nature, where evidence of specific acts conclusively showing prosecutrix' unchastity was adduced, rejection of defendant's offer to prove prosecutrix' general reputation for unchastity was not prejudicial. Pen.Code, § 261, subds. 3, 4; §§ 286, 288a.

20. Criminal law 🔑1169(2)

In prosecution for rape, fellatio, and the infamous crime against nature, where evidence of specific acts conclusively showing prosecutrix' unchastity was adduced, rejection of defendant's offer to prove that prosecutrix appeared on theatrical stage and elsewhere substantially nude was harmless to defendant. Pen.Code, § 261, subds. 3, 4; §§ 286, 288a.

21. Criminal law 🔑780(3)

In prosecution for fellatio and the infamous crime against nature, trial court properly modified defendant's proffered instruction, declaring that any participant in either of such crimes who "consented to the acts" was an "accomplice", by inserting word "willingly" before phrase "consented to the acts". Pen.Code, §§ 286, 288a, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

22. Criminal law 🔑507(7)

One who consents to perpetration of sodomy or fellatio on herself solely because of physical violence or threats of great bodily harm is not "accomplice" whose testimony as to such offenses must be corroborated. Pen.Code, §§ 286, 288a, 1111.

23. Criminal law 🔑507(1)

The consent to participate in crime, which constitutes one an "accessory to crime," must be knowingly, willingly, and voluntarily given, with full appreciation of nature of act.

See Words and Phrases, Permanent Edition, for all other definitions of "Accessory to Crime".

24. Criminal law 🔑507(1)

An "accomplice" is one who knowingly, voluntarily, and with common intent with principal offender unites in commission of crime, but one cannot voluntarily participate in such intent if he merely consents to do so because of physical force exercised against him or threats of great bodily harm. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

25. Criminal law 🔑507(1)

To be an "accessory to crime", one must willingly, knowingly, and intentionally participate therein of his own free will.

26. Criminal law 🔑507(1)

One participating in crime against his will because of force, fear, or lack of mental capacity to comprehend nature of act on account of infancy, infirmity of mind, or otherwise, is not an "accomplice" within statute requiring corroboration of accomplice's testimony. Pen.Code, § 1111.

27. Criminal law 🔑1023(12)

An order denying defendant's motion in arrest of judgment on verdict of conviction is not "appealable order".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Marcello Battilana was convicted of rape by force and violence and threats of bodily harm, fellatio, and the infamous crime against nature, and, from the judgment and orders denying his motion in arrest of judgment and for a new trial, he appeals.

Appeals from order denying motion in arrest of judgment dismissed, and judgment of conviction and order denying motion for new trial affirmed.

Sam Shortridge, Jr., of San Francisco, and Lawrence Edwards, of Stockton, for appellant.

Earl Warren, Atty. Gen., J. Q. Brown, Deputy Atty. Gen., and Raymond M. Dunne, Dist. Atty., and Robert N. Blewett, Asst. Dist. Atty., both of Stockton, for respondent.

PER CURIAM.

The defendant was convicted on four counts of an indictment for the crimes of (1) rape committed by means of force and violence, (2) rape committed by means of threats of bodily harm, (3) fellatio committed contrary to the provisions of section 288a of the Penal Code, and (4) the infamous crime against nature prohibited by section 286 of the Penal Code. Motions in arrest of judgment and for a new trial were denied. An appeal was taken from the judgment and from orders denying a motion in arrest of judgment and a new trial.

For grounds of reversal it is contended the testmony of the prosecutrix is inherently improbable; that the fourth count fails to state a public offense; that the judgment of conviction of the first and second counts is inconsistent; that the evidence of the prosecutrix, with relation to the crimes charged in the third and fourth counts, lacks corroboration as required by section 1111 of the Penal Code; that the court erred in excluding evidence of the general reputation of the prosecutrix for chastity, applicable to the first and second counts, and of particular conduct on her part tending to show a lack of chastity, and that the court erred in giving to the jury and refusing to give certain instruction.

[1] The prosecutrix was twenty years of age. She was a cabaret dancer by occupation. She was employed in "Matty's Night Club" at Stockton for about a month prior to the date of the alleged offenses which are involved on this appeal. Her employment required her to be present and to dance at the club from 8 o'clock p. m. until 2 o'clock in the morning for the entertainment of customers. She lived in an apartment in the Main Hotel in that city. She met the defendant for the first time at the club two or three weeks before the time of her trouble. He was a regular frequenter of that night club, and occasionally talked with the prosecutrix. Just before closing time on the morning of August 1, 1941, the defendant invited the prosecutrix to have breakfast with him at "Johnnie's Waffle Shop," in the vicinity of the night club, where she was accustomed to eat her meals. She consented to do so. They went together in his car. He drove down the street, past the waffle shop, but failed to stop. When she called his attention to the fact that they had passed the waffle shop, he said that he knew of a better place to eat, in Tracy, which was only a few miles distant, and that he wanted to talk with a friend down there.

On the way to Tracy he drove the car at a reckless rate of speed, boasted of his influential standing with members of the local sporting fraternity, and with the peace officers, told her he was a "big shot" among them, exhibited the handle of a revolver in the glove compartment of his automobile, and inferred that he carried weapons in the trunk compartment of the machine. In other words, he tried to create the impression that he was a bold and dangerous man who was unafraid of law enforcement officers, and that he was able to accomplish his desires regardless of the law.

When they reached the Western Hotel in Tracy he persuaded her to accompany him into the lobby. They entered through the barroom to a back card room where she was seated. He ordered liquor which he drank with another man, she having refused to drink with them. He appeared to be on intimate terms of friendship with the men in and about the barroom and hotel. The prosecutrix remained in the card room for about one-half an hour while the defendant conversed with friends in the barroom, during which time he apparently arranged for the use of a bedroom on the second floor of the hotel. When he came back and indicated that he was ready to go, she supposed they would immediately return to their automobile. When they entered the hall of the hotel and reached the foot of the stairway he declared that they were going upstairs to a bedroom. When she protested, he struck and slapped her and threatened her with violence, saying that if she wanted to get out of that hotel alive she had better submit to his demands. He seized her by the arm and dragged her up the stairway to the bedroom. He tore her clothing from her person and violently threw her upon the bed. During the melee she screamed repeatedly, but he silenced her by striking and threatening her. She received scratches, and bruises and one cut at the corner of her mouth which bled freely. She testified that the reason she did not make a more determined effort to escape was that the men in and about the barroom appeared to be dangerous confederates of the defendant, as he told her they were, and she declared that she was afraid of great bodily harm or death at their hands. She testified that the defendant first secured sexual intercourse with her by means of force and threats of violence, and that he then committed upon her both the infamous crime against nature and fellatio. In the morning he arose, dressed and brought a companion to the door of the bedroom threatening her with punishment if she did not consent to intercourse with him. She however defied him. He did not force her to submit. He then borrowed a dress belonging to the wife of a friend in the hotel, and forced her to put it on and to display herself in and about the barroom for the evident purpose of soliciting prostitution. The prosecutrix asserts and the evidence warranted the jury in believing that the defendant's brutal and lewd conduct toward her was to overcome her resistance and to prepare her for commercialized prostitution from which he might derive a profit.

At the urgent demand of the prosecutrix, the defendant returned with her to Stockton that afternoon. She immediately told her friends in the hotel where she rented her apartment, of her harrowing experience, and upon their advice she promptly visited the office of the chief of police and again related the facts, making the criminal charges against him of which he was subsequently indicted.

The story of the prosecutrix is corroborated by other witnesses with respect to important circumstances. Several disinterested persons, who lived in the Western Hotel at Tracy, testified that they were awakened in the early morning by repeated unusual shrieks of a woman, indicating that she was in great fear or pain. At least one of those witnesses traced the commotion to the bedroom occupied by the defendant and the prosecutrix. Her soiled and bloody garments were produced in evidence, and the contents were analyzed. Several witnesses testified that they afterward observed her cut lip upon which there was the evidence of dried blood. There is ample evidence to support the verdicts of the jury and the judgment which was rendered against the defendant.

It is insisted that the testimony of the prosecutrix is false and inherently improbable and that the judgment should be reversed on that account. We think not. The details of her accusations are so revolting that we purposely refrain from reciting them. It is sufficient to say we have carefully read her entire testimony and that we do not consider it inherently improbable. Abhorrent as the circumstances are, the story produces conviction of the truthfulness of the essential facts related. The prosecutrix is an intelligent woman of mature age. She was previously acquainted with the defendant for only about three weeks. In a rigid and lengthy cross-examination there appears to be no material flaw in her evidence. In many important respects her statements are corroborated by other disinterested witnesses.

[2, 3] Primarily the defendant contends that the story of the prosecutrix is false because she willingly consented to sexual relationship with him. He admits that he did have sexual intercourse with her. The questions as to whether he accomplished that purpose by means of force, or fear or threats of bodily harm were problems exclusively for the determination of the jury. They were all resolved against him. It is true that statements of some witnesses, who were called by the defense, conflict with certain claims of the prosecuting witness. But the weight of the evidence was also for the determination of the jury. Such conflict of evidence, created by the testimony of other witnesses, should not be given undue weight in determining whether the story of the prosecuting witness is inherently improbable. There are some corroborating circumstances disclosed by the record which seem to support the implied finding of the jury that her story was true and probable. For instance, as soon as she escaped from the defendant's control, and returned to her apartment in Stockton, she immediately related her harrowing ordeal to some of her friends. Acting upon their advice, she went with them to the office of the chief of police where she repeated her story and accused the defendant of the identical immoral acts with which he was subsequently charged by the grand jury. It seems reasonable to believe that if she had willingly submitted to the defendant's lascivious conduct it is not

probable she would have voluntarily and promptly revealed to the public officers and to her friends the sordid facts of her ordeal, to her great humiliation, discomfort and disgrace. We are convinced her story is not inherently improbable.

[4] Our courts have frequently declared that it is not the province of a reviewing court to hold the testimony of a witness to be inherently improbable unless it is so unbelievable and contrary to reason that its falsity may not be doubted. It has been held that such evidence must be so apparently false that reasonable minds may not differ regarding that conclusion before a judgment may be interfered with on appeal because of inherent improbability. People v. Jefferson, 31 Cal.App.2d 562, 566, 88 P.2d 238; 8 Cal.Jur. 590, section 582.

[5-7] The separate offenses charged in counts one and two of the indictment are not inconsistent. Count number one charges the defendant with rape committed by means of "force or violence" under subdivision 3 of section 261 of the Penal Code. The second count charges him with rape committed by means of "threats of great and immediate bodily harm" contrary to subdivision 4 of that same section of the code. Clearly the code designates those offenses as separate and distinct crimes. It is apparent that a defendant may be guilty of accomplishing rape by means of actual force and violence as distinguished from mere threats of bodily harm or by the use of narcotics or other similar drugs. The statute contemplates that each of these separate crimes shall be consummated without the voluntary consent of the victim. Evidence which will justify a conviction of rape ordinarily requires proof that the complainant exercised all her power of resistance which was consistent with the surrounding circumstances. Subdivision 3 of that section assumes that the victim actually does resist, and that her opposition is overcome by the physical force of her assailant. The following subdivision of that section assumes that she does not resist, and, upon the contrary, that she is prevented from doing so through fear caused by his threats to inflict upon her great bodily harm, or that she is prevented from resisting by the administering of narcotic drugs or anaesthetic agency. We conclude that an assailant may be guilty of two separate offenses of rape as provided by the third and fourth subdivisions of section 261, if he accomplishes his purpose by resorting to physical force, and by also threatening great bodily harm, or by administering narcotics or anaesthesia. Under such circumstances he may be said to have overcome resistance by force, and to have also prevented further resistance by threats of great bodily harm or by the use of narcotics or anaesthesia. Applying the facts of the present case, there is substantial evidence that the defendant overcame the resistance of the prosecutrix by means of physical force. He seized her by the wrists and dragged her upstairs to the bedroom, where he tore her dress from her person, and struck and beat her, and then threatened her with great bodily harm or even death, if she did not submit to his demands. Moreover, the evidence in this case shows that he repeated the crimes with which he was charged, more than once on that same date. The questions as to whether he accomplished rape upon the prosecutrix by means of physical force, or by threats of great bodily harm, or by both, were problems for the exclusive determination of the jury. Those questions were resolved against him. We are bound by those verdicts. The verdicts on the first and second counts of the indictment are not inconsistent.

[8-11] The appellant contends that the judgment of conviction is void in so far as it applies to the fourth count of the indictment, which purports to charge him with the infamous crime against nature, contrary to the provisions of section 286 of the Penal Code, because it fails to state a public offense, since it is alleged that the crime was committed by having "carnal knowledge" of the body of the prosecutrix. The term "carnal knowledge" has been held to be synonymous with the phrase of sexual intercourse. People v. Carroll, 1 Cal.App. 2, 81 P. 680; People v. Allison, 25 Cal.App. 746, 145 P. 539; People v. Hopwood, 130 Cal.App. 168, 19 P.2d 824.

The fourth count of the indictment reads in part: "The said defendant * * * on or about the 1st day of August, 1941, did wilfully, unlawfully and feloniously commit the infamous crime against nature by then and there having carnal knowledge of the body of one * * * then and there a female person, in violation of section 286 of the Penal Code of the State of California, a felony."

On account of the degrading nature of the crime of sodomy it is uniformly held that it is not necessary to describe the offense with the same particularity which is required in other crimes. In 8 Ruling Case Law, page 335, section 366, it is said in that regard: "* * * by reason of the vile and degrading nature of this crime, it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required."

We are of the opinion the fourth count of the indictment sufficiently charges the defendant with the commission of the "infamous crime against nature," which is specifically prohibited by section 286 of the Penal Code. That count was couched in the identical language of the statute, except that there was added the unnecessary statement that the crime was committed by "having carnal knowledge of the body" of the named prosecutrix. The latter phrase was harmless. Used in connection with the charge of the infamous crime against nature, it could not possibly infer that the defendant was merely accused of having sexual intercourse with the prosecutrix in the ordinary manner. While the code does not specifically define the offense of the infamous crime against nature, it is commonly known to be that of sodomy. People v. Williams, 59 Cal. 397; 58 C. J. 791, § 11; 39 Words and Phrases, Perm.Ed. Sodomy, p. 418. That heinous offense derived its name from the tribe of Sodomites in Palestine, which secured universal infamy from the abominable practice of that unnatural vice as a religious rite, which sin is said to have resulted in the destruction of Sodom and Gomorrah. Neither the defendant nor anyone else could be misled regarding the nature of the crime with which the defendant was charged. The infamous crime against nature is synonymous with that of sodomy. People v. Williams, supra. It is true that carnal knowledge includes sexual intercourse, as the previously cited cases declare. But clearly that is not all that the term "carnal knowledge" includes. It is our opinion that sodomy may not be committed without experiencing carnal knowledge of the victim. (8 R.C.L. 335, § 166.) The word "carnal" is derived from the Latin word meaning flesh. It is defined in The New Universities Dictionary at page 137, as: "Pertaining to the body, its passions and its appetites; animal; fleshly; sensual; impure. * * *"

[12] Certainly that definition covers carnal knowledge of the body of another person by either natural or unnatural copulation. If the language of this challenged count was merely uncertain, that objection was waived by failure to demur to the indictment on that account.

[13, 14] The foregoing cases, relied upon by the appellant as upholding his contention that count four of the indictment fails to state a public offense, may be distinguished and are therefore inapplicable to the present indictment. The Hopwood case was determined on the authority of People v. Carroll, supra, and People v. Allison, supra, which were decided before the amendment to section 952 of the Penal Code was adopted in 1929, which change in the law greatly simplified and liberalized criminal pleadings. Since that amendment the information or indictment may be couched "in any words sufficient to give the accused notice of the offense of which he is accused." People v. Pierce, 14 Cal. 2d 639, 644, 96 P.2d 784; People v. Price, 46 Cal.App.2d 59, 115 P.2d 225. It is true that the Hopwood case, supra, was decided since the amendment to section 952. But that liberalized section is not mentioned in the opinion. We assume the court failed to take into consideration the liberal construction of criminal pleadings which now prevails. That decision was not approved by the Supreme Court. We therefore conclude those authorities are not controlling of the present case.

[15] But even though it be assumed that count four of the indictment fails to state a public offense for the reason assigned by the appellant, which we do not concede, that does not require a reversal of the entire judgment. The other three counts, upon each of which the defendant was convicted nevertheless state perfectly good causes of action.

[16] By finding the defendant guilty of the infamous crime against nature, and of fellatio, as charged in the third and fourth counts of the indictment, the jury apparently determined that the prosecutrix was not an accessory to those crimes so as to necessitate corroborating evidence pursuant to section 1111 of the Penal Code. People v.

Jensen, 76 Cal.App. 558, 561, 244 P. 1086; People v. Howell, 69 Cal.App. 239, 230 P. 991; People v. Miller, 66 Cal. 468, 6 P. 99; 58 C.J. 794, § 18. In the authority last cited it is said in that regard: "Where the crime is committed without the consent of the prosecuting witness, it is not necessary that the testimony of the witness be corroborated."

The defendant denied that he committed either of the last-mentioned offenses upon the prosecutrix. On the contrary she positively asserted that he committed each of those crimes upon her, at least twice, without her consent, and by means of force, violence and threats of great bodily harm. She testified that "I was so scared of him I didn't know what to do."

Under the circumstances of this case we are of the opinion the determination of the jury that the prosecutrix was not an accomplice to those crimes rendered the production of corroborating evidence unnecessary. But assuming, without so deciding, that she may be deemed to have been an accomplice, the record contains an abundance of corroborating circumstances sufficient to comply with the requirements of section 1111 of the Penal Code.

[17] We are of the opinion that evidence of the general reputation of the prosecutrix for unchastity together with specific acts in proof thereof were competent with respect to the two charges of rape, since the defendant admitted having had intercourses with her, but asserted that she voluntarily submitted to that relationship. People v. Johnson, 106 Cal. 289, 293, 39 P. 622; Valencia v. Milliken, 31 Cal. App. 533, 536, 160 P. 1086; People v. Pantages, 212 Cal. 237, 262, 297 P. 890; 22 Cal.Jur. 392, § 40; 22 R.C.L. 1208, § 42; 52 C.J. 1079, § 109. The reason such evidence is deemed to be admissible is concisely stated in the authority last cited, as follows: "Where want of consent is an element of the offense charged, evidence of the prosecutrix's want of chastity is admissible, not as a matter of jurisdiction, but to show the probability of consent."

In support of that text numerous California cases are cited.

Likewise in 22 Ruling Case Law, at page 1208, it is said in that regard: "Where, however, the defense rests on the fact of consent the character of the prosecutrix for unchastity is competent evidence as bearing on the probability of her consent to the act with which the defendant is charged, and the likelihood of her resisting the advances of any man, on the ground that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue. * * Where the defense is not based on any theory of consent to the act, but upon a denial by the defendant that he had ever had any carnal intercourse whatever with the girl, testimony as to unchastity is wholly immaterial."

[18, 19] The trial court sustained an objection to the defendant's offer to prove that the general reputation of the prosecutrix for chastity was bad. That ruling is assigned as erroneous. That evidence was competent and admissible only as applicable to the charges of rape which are contained in the first two counts of the indictment, for the purpose previously stated. It was not admissible as proof of the offenses charged in the last two counts. The defendant made no offer to limit its application to the charges of rape. Assuming, without so deciding, that the court should have received the evidence for the limited purpose for which it was competent, in spite of the fact that no such limitation of purpose was suggested by the defendant, we are of the opinion the rejecting of that offer was neither prejudicial nor reversible error, for the reason that evidence of specific acts was adduced which conclusively shows that the character of the prosecutrix for chastity was bad. At least four witnesses testified to specific acts which leave no doubt that she was unchaste. That fact seems to have been conceded. That being true, the evidence of general reputation for that trait of character would serve no added purpose. The rejecting of that offer, even if it was sufficiently specific in form, was therefore harmless.

[20] For the same reason the sustaining of an objection to the offer to prove that the prosecutrix appeared on the theatrical stage in San Francisco and elsewhere substantially nude was also harmless.

[21-23] Finally the appellant contends that the court erred in modifying a proffered instruction to the jury which attempted to define the term "accomplice" as it is used in section 1111 of the Penal Code. In effect, that instruction declared that any participant in either of the crimes which were charged in the third and fourth counts of the indictment, who "consented to the acts," is an accomplice. The court proper-

ly modified that instruction by inserting the word "willingly" before the phrase "consented to the acts." The challenged instruction, as amended and given to the jury, read, in effect, "Any participant in the offenses of the infamous crime against nature, or fellatio, who willingly consents thereto, is an accessory." That is a correct statement of the law. It is apparent that the instruction as originally presented was misleading and contrary to law. The very gist of these crimes, as they were charged in the indictment, is that the prosecutrix was forced to submit to both sodomy and fellatio by the physical violence and threats of the defendant to inflict upon her great bodily harm. It is clear that a victim who consents to the perpetration of sodomy or fellatio upon himself, solely because of the infliction of physical violence or on account of threats of great bodily harm, is not an accomplice to the crimes. The consent to participate in a crime, which constitutes one an accessory thereto, must be knowingly, willingly and voluntarily given, with full appreciation of the nature of the act.

[24-26] In the case of People v. Shaw, 17 Cal.2d 778, at page 799, 112 P.2d 241, at page 252, quoting with approval from 8 California Jurisprudence 173, section 253, the court defines the word "accomplice," as it is used in section 1111 of the Penal Code, as follows: "The word 'accomplice' has been defined as including all persons who have been concerned in the commission of an offense. [Citing numerous authorities.] In other words, one is an accomplice who knowingly, *voluntarily and with common intent with the principal offender unites in the commission of the crime.* [Citing several cases.]" (Italics added.)

Paraphrasing the preceding definition, one cannot voluntarily participate in the common intent and purpose with which the principal perpetrator commits a crime, if he merely consents to do so on account of physical force exercised against him, or because of threats of great bodily harm. To constitute one an accessory to a crime he must willingly, knowingly and intentionally participate therein, of his own free will. If he does so against his will, because of force, or fear, or even if he lacks mental capacity to comprehend the nature of the act, on account of infancy, infirmity of mind or otherwise, he is not an accomplice. People v. Dong Pok Yip, 164 Cal. 143, 147, 127 P. 1031.

The jury was fully and fairly instructed on the essential elements of the crimes for which the defendant was tried. We have read the entire charge and find no reversible error therein. There does not appear to have been a miscarriage of justice in this case.

[27] The order of the court denying the defendant's motion in arrest of judgment is not appealable. People v. Dysart, 39 Cal.App.2d 287, 102 P.2d 1091. The proposed appeal from that order is, therefore, ineffectual and for that reason it is dismissed.

The judgment and the order denying defendant's motion for new trial are affirmed.

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52 Cal.App.2d 698

INNES v. McCOLGAN, Franchise Tax Com'r.

Civ. 2829.

District Court of Appeal, Fourth District, California.

June 12, 1942.

1. States 🔑215

Costs may not be awarded against the state.

2. States 🔑191(1)

The state may not be sued without its consent, and permission to sue the state is in the nature of an "offer" which must be accepted as made.

See Words and Phrases, Permanent Edition, for all other definitions of "Offer".

3. States 🔑191(1)

If a statute merely gives permission to sue the state through its officers acting in their official capacity, the action so authorized is subject to existing statutes and rules applicable to such form of action.

4. Taxation 🔑835

Every person liable for taxes is bound to pay them when due, and the state has power to impose upon the taxpayer penalties for noncompliance with his duty, and such costs as are reasonably incurred in enforcement of that duty.

5. Statutes ⚷71

The constitutional provision respecting uniformity of general laws does not forbid all distinctions or classifications, but only those which are not founded on constitutional or natural differences. Const. art. 1, § 11.

6. Statutes ⚷72

That the state may not be sued without its express permission furnishes a natural ground of distinction bearing a reasonable relation to question of recovery of costs in an action under the Personal Income Tax Act to recover state income taxes paid, and hence the statute entitling the prevailing party to costs did not violate constitutional provision respecting uniformity of general laws when applied so as to permit the state to recover costs on appeal from judgment for taxpayer, notwithstanding that taxpayer could not have recovered costs against the state if he had prevailed on appeal. Code Civ.Proc. § 1034; Gen.Laws 1937, Act 8494, § 21; Const. art. 1, § 11.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

On motion to recall and amend remittitur.

Motion denied.

For prior opinion, see 47 Cal.App.2d 781, 118 P.2d 855.

Earl Warren, Atty. Gen., and Lawrence S. Fletcher, Deputy Atty. Gen., for appellant.

Irve C. Boldman, of San Diego, for respondent.

BARNARD, Presiding Justice.

This was an action to recover certain income tax payments made under protest. A judgment for the plaintiff was reversed on appeal. Innes v. McColgan, etc., 47 Cal.App.2d 781, 118 P.2d 855. The respondent has moved to recall the remittitur which was issued and to strike therefrom the words "appellant to recover costs." He contends that costs should not have been awarded against him since they could not have been awarded against the state if the judgment had been affirmed, and that any other interpretation of the rules and statutes would be violative of the constitutional provision as to the uniformity of general laws.

Section 1034 of the Code of Civil Procedure provides that the prevailing party shall be entitled to his costs. The appellant prevailed here, and the clerk entered the cost provision in the remittitur, pursuant to rule XXIII of the rules governing this court. Since the state, through one of its officers, was a party to this action costs could not have been awarded to this respondent had he prevailed. People v. One Plymouth Sedan, 21 Cal.App.2d 715, 69 P.2d 1011; People v. One 1937 Plymouth 6, 40 Cal.App.2d 38, 104 P.2d 372. On the other hand the appellant, as the prevailing party was entitled to costs under the specific provisions of section 1034 unless that section cannot constitutionally be applied under such a situation.

[1-4] Section 1034 is uniform in its application regardless of who is the prevailing party. The inequality or preference here suggested arises from the established rule that costs may not be awarded against the state. That the state may not be sued without its consent is beyond question. Permission to sue the state is in the nature of an offer which must be accepted as made, if at all. If a statute merely gives permission to sue the state, through its officers acting in their official capacity, the action so authorized is subject to existing statutes and rules applicable to such a form of action. The action here in question was authorized by section 21 of the Personal Income Tax Act of 1935 (Stats.1935, p. 1090, Deering's Gen.Laws, 1937, act 8494), as amended. That section authorized the bringing of such an action but in no way excepted it from the operation of existing rules and statutes. Not only was any inequality in the respect here in question, whereby one party might recover costs under circumstances where the other could not, a matter for legislative consideration, but the right to maintain the action depended upon the permission as given which did not include the right to any exemption from existing rules and statutes. It was for the Legislature, if it desired to do so, to remedy any inequality in the respect noted by appropriate provisions in the act granting permission to bring such an action. Not only was permission to bring this action subject to acceptance in accordance with its precise terms, but it may well be that the Legislature intended to leave this added burden upon the taxpayer

by way of an inducement to pay the tax or a penalty for a failure to perform. As the court said in Engebretsen v. Gay, 158 Cal. 30, 109 P. 880, 882, 28 L.R.A.,N.S., 1062, Ann.Cas.1912A, 690: "It is the legal duty of every person liable for taxes to pay the same when due, and the power of the state to impose upon the taxpayer penalties for noncompliance with this duty, and such costs as are reasonably incurred in the enforcement of the same, * * * cannot be doubted."

[5, 6] It may be further observed with respect to the claim of lack of uniformity in these laws that the constitutional provision does not forbid all distinctions or classifications, but only those which are not founded on constitutional or natural differences. Const. art. 1, § 11. Aside from any other consideration the fact that a state may not be sued without its express permission furnishes a natural ground of distinction which bears a reasonable and just relation to the matter here in question.

For the reasons given, the motion to recall and to modify the remittitur which was issued in this action is denied.

MARKS, and GRIFFIN, JJ., concurred.

HUNSTOCK v. ESTATE DEVELOPMENT CO.*

Civ. 13583.

District Court of Appeal, Second District, Division 2, California.

June 17, 1942.

Hearing Granted July 30, 1942.

1. Process 🔑70

A state may by statute provide for substituted or constructive service on persons or corporations subject to its jurisdiction, where state adheres to requirements of due process of law under State and Federal Constitutions.

2. Constitutional law 🔑309(1)

Under requirements of "due process of law" it is essential that a court have jurisdiction over person of defendant, and that defendant receive reasonable and appropriate notice.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

3. Constitutional law 🔑309(1)

A court may not adjudicate upon rights or duties of a person unless such person is given an opportunity to be heard after service of process is had upon him or his duly constituted agent, or his waiver thereof in writing or by personal appearance.

4. Constitutional law 🔑309(2)
Process 🔑70

A statute, which authorizes substitute or constructive process against a resident who can with proper diligence be served personally whether the action is in personam or in rem, does not conform with requirements of "due process of law".

5. Process 🔑64

The phrase "served by delivering a copy", as used in statute with respect to service of summons upon an individual corporation or other entity, means a delivery of the process by the hand of the process server to person personally to be served and, in addition, means that defendant or his agent at time that he receives the process by hand must be adequately apprised by the process server that the act of delivery involves service of process. Code Civ.Proc. § 411.

See Words and Phrases, Permanent Edition, for all other definitions of "Served by Delivering a Copy".

6. Process 🔑48

"Service of process" means its judicial delivery to a party so as to charge him with its receipt and subject him to its legal effect.

See Words and Phrases, Permanent Edition, for all other definitions of "Service of Process".

7. Corporations 🔑507(12)

The mailing of a copy of service of summons directed to a domestic corporation, which the court ordered delivered to the Secretary of State in lieu of service thereof on corporation, did not constitute a "delivery" within statute authorizing court to direct service of summons upon a domestic corporation which fails to file a designation of a natural person as agent for service of process by delivery of a copy of such process to Secretary of State and directing the Secretary of State in turn to give corporation notice of the service by mailing a copy to it. Civ.Code, § 373.

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* Subsequent opinion 138 P.2d 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

8. Appearance ⚷24(13)

A special appearance attacking jurisdiction of trial court is "waived" by going to trial on the merits.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

9. Appearance ⚷10

The mere taking of an appeal does not convert a special appearance into a general appearance, and upon a reversal for want of jurisdiction over the person trial court is not vested with jurisdiction over person of appealing defendant, either retroactively or as to future proceedings, without further service of process.

10. Appeal and error ⚷437

Although statute provides that an action shall be deemed pending from time of filing complaint until its final determination upon appeal, or until time to appeal has passed unless the judgment is sooner satisfied, a judgment is not vacated by an appeal, and, if it is a money judgment, execution may issue in absence of supersedeas. Code Civ.Proc. §§ 350, 1049.

11. Appeal and error ⚷893(1)

An appeal from a judgment, whether at law or in equity, is a review only as to alleged errors of fact or law, and is in no sense a trial de novo.

12. Appeal and error ⚷1

A "writ of error" at common law is regarded by federal courts as a continuance of the original action rather than commencement of a new proceeding.

See Words and Phrases, Permanent Edition, for all other definitions of "Writ of Error".

13. Appearance ⚷10

Where a defendant appeared specially below for single purpose of objecting to trial court's jurisdiction over it as a party defendant, and defendant's appeal was confined to that one question, court below did not on reversal obtain jurisdiction over defendant without further service of process.

14. Appeal and error ⚷151(2)

Where trial court held that defendant who appeared specially for single purpose of objecting to jurisdiction of court over it as a party defendant was a party, and judgment rendered purported to divest defendant of its property, defendant was an "aggrieved party" by the judgment, so as to have right of appeal. Code Civ.Proc. § 938; Const. art. 6, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Aggrieved Party".

15. Appeal and error ⚷1

The right of appeal is not a matter of grace within keeping of Legislature, but is a right granted by Constitution and may be supplied by Supreme Court where legislation is inadequate, or even if Legislature should seek to abolish the right. Const. art. 6, § 4.

16. Appeal and error ⚷10

A defendant who wished to review an order entered on his special appearance adjudging court had jurisdiction over his person did not "waive" his right to take an appeal by having failed to petition for prohibition.

W. J. WOOD, Acting P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Suit by Maude H. Hunstock, individually and as trustee, etc., against Estate Development Company, wherein the defendant appeared specially and moved to quash service of summons and complaint. From a judgment by default in favor of plaintiff, the defendant appeals.

Reversed with directions.

Dryer, Richards & Page, of Los Angeles, for appellant.

Crail, Crail & Crail, of Los Angeles, for respondent.

HANSON, Justice pro tem.

The principal if not the most important and controlling question in this case is whether summons directed to a domestic corporation, which the court ordered delivered to the secretary of state in lieu of service thereof on the defendant corporation, constituted a valid personal service on the corporation where it was mailed to the secretary of state instead of being personally served upon him or any person employed in his office in the capacity of assistant or deputy. A further question is whether, in view of the showing that was made as to plaintiff's inability to serve process on the corporation or a statutory designated agent, the court was authorized to make an order providing for substituted service on it.

The verified return of service filed in the case below disclosed that the summons had been mailed to the secretary of state. Annexed to the return and referred to therein was a letter from the assistant secretary of state stating that the summons had been received through the mail and that he had transmitted it by mail to the corporation at its principal office in this state. Upon the showing thus made, which additionally disclosed that the process had been received by the assistant secretary of state more than thirty days prior thereto, the presiding judge signed a default entry against the corporation. In this entry the court recited that the defendant corporation had been duly served with summons "by delivering to the secretary of state of the state of California one copy of the summons and complaint pursuant to order of the court under section 373 of the Civil Code, and [the defendant] having failed to answer the plaintiff's complaint herein, and the time for answering having expired, the default of the defendant is hereby entered according to law." About twenty-seven months thereafter—and why plaintiff did not sooner seek a default judgment is not shown by the record—the defendant corporation duly served upon the plaintiff and filed in the cause its "notice of special appearance and motion to quash service of summons and complaint," setting forth as grounds therefor, first, that service of summons was not made in accordance with the court order nor was it delivered to the secretary of state or to any person employed in his office in the capacity of assistant or deputy, and, second, that an insufficient showing had been made by affidavit to warrant substituted service.

While the affidavit for substituted service stated the efforts that had been made to serve the president and the secretary of the corporation without success, it did not state that the corporation did not have a head other than the president, a vice-president, an assistant secretary or a general manager, or, except for a statement to that effect in a letter from the secretary of state, that the corporation had not filed with the secretary of state a designation of a natural person residing in this state for the purpose of service of process or authorized to receive service of process, or that with the exercise of due diligence none of such officers or agent could be served with process directed to the corporation.

The motion to quash service was limited to the jurisdictional grounds mentioned and sought no relief as to the merits. The motion being denied and defendant corporation having failed to proceed further in the court below, a judgment of default was rendered against it. Thereafter it took the present appeal from the judgment by default, assigning as the only ground of error that the court was without jurisdiction over the person of defendant to render the judgment in question.

[1-4] That a state may by statute provide for substituted or constructive service on persons or corporations subject to its jurisdiction, where it adheres to the requirements of due process under the state and federal constitutions, is no longer debatable. But under the requirements of due process it is essential that the court have jurisdiction over the person and that the defendant receive reasonable and appropriate notice. Milliken v. Meyer, 311 U. S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L. R. 1357. It is not only fundamental law but the essence of natural justice that a court may not adjudicate upon the rights or duties of a person unless he is given an opportunity to be heard after the service of process is had upon him or his duly constituted agent, or his waiver thereof in writing or by personal appearance. While under the state or federal constitution there is no provision in express words which requires that initial original process shall be served personally upon the defendant, his agent or the person substituted for him by statute, whether the action is in personam or in rem, nevertheless it is well established that a statute which authorizes substitute or constructive process against a resident who can with proper diligence be served personally is not due process. Bardwell v. Anderson, 44 Minn. 97, 46 N. W. 315, 9 L.R.A. 152, 20 Am.St.Rep. 547; per Mitchell, J.; Pigly-Wiggly, etc., Co. v. May Investing Corp., 189 Ga. 477, 6 S. E.2d 579, 128 A.L.R. 1465; Webster v. Reid, 11 How. 437, 13 L.Ed. 761; McDonald v. Mabee, 243 U.S. 90, 37 S.Ct. 343, 61 L.Ed. 608, L.R.A.1917F, 458. In the Webster case the state statute expressly provided that the resident defendants might

be served merely by publication in a newspaper; in the McDonald case the statute provided that a citizen absent from the state was amenable to process published in a newspaper. In both cases it was held the statutes did not accord with due process. The only exception to the rule which has been sustained involved an action instituted in a small claims court where the jurisdiction was limited to cases involving fifty dollars or less. Even in that case it was held that nothing short of the signature of the defendant on a registry return receipt of a registered letter enclosing the process was sufficient. Wise v. Herzog, 72 App.D.C. 335, 114 F.2d 486. Such signature, it may be noted, is analogous to a signed acknowledgment of process, except that the recipient does not necessarily know at the time he signs that process is being delivered to him. Under our statute a summons must be directed to the defendant, signed by the proper official, issued under seal of the court (Code Civ.Proc. § 407) and *served* upon the defendant. At the same time a copy of the summons together with a copy of the complaint must be *"delivered"* in the following manner: "1. If the suit is against a domestic corporation: to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, general manager, or a person designated for service of process or authorized to receive service of process. * * * If no such officer or agent of the corporation can be found within the state after diligent search, then to the secretary of state *as provided in section 373 of the Civil Code.* * * * 7. In all other cases to the defendant personally." Code Civ.Proc., §§ 410, 411. (Italics ours.)

Civil Code section 373 referred to in the foregoing statute provides that a domestic corporation may file with the secretary of state its designation of a natural person as its agent for the purpose of service of process, and that *delivery* of a copy of process to such agent, if directed to the corporation, shall constitute valid service on such corporation. If such a designation is not filed, and it appears by affidavit to the satisfaction of the court or a judge thereof that personal service of process against such corporation cannot be made in the exercise of due diligence upon its officers or agents (of the character named in section 407 of the Code of Civ.Proc.), the "court or judge may make an order that the *service be made* upon such corporation by delivering to the Secretary of State, or to any person employed in his office in the capacity of assistant or deputy, one copy of such process for each defendant to be served. Service in such manner shall be and constitute personal service [for the purpose of the statute] upon such corporation." (Italics ours.) The statute then proceeds to provide that after such delivery of process to the Secretary of State he in turn shall give the corporation notice of the service upon him by mailing a copy to it; that thereafter the corporation shall be required to appear and answer within thirty days after delivery of such service to the Secretary of State, and that the secretary "shall keep a record of all process served upon him under this title." While the statute excepts certain corporations from the provisions thereof, the corporation here involved is not one of them.

In view of the requirements of the statutes just quoted, the problem is whether mailing the process to the Secretary of State, rather than a delivery by hand, is sufficient to meet the requirements of Civil Code section 373. It will be observed that the phrase as there used provides that the court or judge may "order that the *service be made upon such corporation by delivering* to the Secretary of State, or to any person employed in his office in the capacity of assistant or deputy," the requisite copies of the process. The solution of the problem rests not merely upon the phraseology used but it is to be ascertained in the light of the background of the process statutes, the common law and the requirements of due process.

[5, 6] Our basic statute (Code Civ. Proc., § 411) with respect to service of summons upon an individual, corporation or other entity provides: "The summons must be *served by delivering a copy* thereof * * *." Similarly, Civil Code section 373, as has been noted, provides that "*service [is to] be made * * * by delivering* to the Secretary of State, or to any person employed in his office in the capacity of assistant or deputy, *one copy of such process.*" In either case service, in the language of the two statutes, is attained by delivering a copy of the process. What, then, is meant by or encompassed in the use of the word "delivering," or the phrase "served by delivering"? That the phrase in section 411 of the Code of Civil Procedure reading, "served by delivering a copy," means a delivery of the process by the hand of the process server to the person personally to be

served has never been doubted. Moreover, it means more than that. It means that the defendant or his agent at the time that he receives the process by hand must be adequately apprised by the process server that the act of delivery involves the service of process. Generally, this may be done by reading the original process or offering to do so, or in a word or two stating the nature of the paper delivered. But delivery of process is not made under the law by surreptitiously placing it in the recipient's pocket, touching his person with it or even handing it to him without comment. Anderson v. Abeel, 96 App.Div. 370, 89 N.Y.S. 254. In the law, "service" of process has always meant its judicial delivery to a party so as to charge him with its receipt and subject him to its legal effect. Walker v. State, 52 Ala. 192, 193. "Service means serving the defendant with a copy of the process, and showing him the original if he desires it." Baron Alderson in Goggs v. Lord Huntington, 12 Mees & W. 503. In Rathbun v. Acker, 18 Barb., N.Y., 393, it was held that when a statute or ordinance requires "service" on a person it means personal service, unless some other service is specified or indicated. Accordingly, a notice mailed and received by a party, all within the territorial jurisdiction of the court, was held not a compliance with the statute.

[7] As it is clear that under our basic statute (§ 411, supra) the word "delivering" requires that summons be handed to the recipient and that he be apprised as to what is involved in the act of delivering the process, it is not apparent why the similar provision in the statute with reference to delivering process to the Secretary of State may be interpreted differently, or indeed as permitting a mere mailing of process to him when this may not be done under the basic statute. Accordingly, when the Legislature in 1931 enacted Civil Code section 373 and provided therein that a domestic corporation under the conditions named might be served with process by "delivering" it to the Secretary of State or certain of his employees, it knew, or as a matter of law was deemed to know, when it used the word "delivering," that it had attained a special meaning all its own in the law, and that anything short of the service contemplated by Code of Civil Procedure section 411, such as by mailing, was insufficient. General dictionary definitions of "delivery" are not apropos, because since the beginning of the common law "delivery" of process has meant not only manual personal delivery, but a statement to the effect that service of process is intended by the act of delivery. Moreover, it is clear that the Legislature fully understood that "delivery" of summons implied a personal hand delivery. This is indicated by the fact that it affirmatively differentiated between the words "delivery" and "mailing" when it provided that summons should be "delivered" to the Secretary of State but that the secretary in turn was authorized to "mail," rather than "deliver," the documents to the corporation involved, and in providing that the secretary should keep a record of the process served upon him. Moreover, there would appear to be no point in restricting delivery to officials named in the secretary's office if mailing was contemplated. Accordingly it is manifest that mailing the process to the Secretary of State did not comply either with the statute or with the order of the court.

The fact, if it be a fact, that the Secretary of State received the summons and complaint and that the corporation or an official of it in turn received these documents from the office of the Secretary of State, if that be a fact, is of no legal significance. If, for example, a defendant not served with process should order a certified copy of the process from the clerk of court or should request through his counsel from counsel for plaintiff a copy of process, there would in each case be a delivery in the ordinary acceptation of the word, but not the necessary intent involved in making service. So far as the Secretary of State was concerned, he was without power to waive the manner of service or to accept service in behalf of the corporation. Farmer v. National Life Ass'n, C.C., 50 F. 829. The statute requires manual personal service of the process coincident with its delivery, and nothing short of that kind of service is adequate to require the corporation to appear in response to the summons, even though it received such summons through the mail from the Secretary of State. While Code Civil Procedure section 411 expressly provides that a "defendant" may accept service, it necessarily implies that no one may accept for him without express authorization from him. The Secretary of State was not a defendant nor expressly authorized by the defendant to accept process for it; nor does the statute authorize him to do so. Hence the mere statement of the Secretary of State to counsel for plaintiff that the papers had been received was not an acknowledgment that service of process had been made upon the secretary, his assistant or deputy, nor was it a waiver of the necessity thereof. This much is conceded by respondent and so calls for no further discussion.

The fact that personal service on the Secretary of State, his assistant or deputy in a case such as this may involve needless expense, such as the payment of a fee to a process server or the sheriff at Sacramento, and may serve no important purpose, does not permit us by construction to judicially legislate accordingly, if we were so inclined—and we are not. If the Legislature wishes to amend the statute so as to provide that mailing of process direct to the Secretary of State rather than a delivery of process to him, or either, or his acceptance of process, shall be sufficient, the matter is within its province, not ours, subject to the provisions of the constitutions, state and federal. So far the Legislature has not attempted any such procedure, and it will be time enough when it does to determine the validity thereof.

In view of what has been said it is unnecessary to determine whether the affidavits filed were sufficient to warrant the order which the court below made permitting service upon the Secretary of State.

Respondent, however, seems to suggest that the appeal may not be entertained because appellant's remedy was to have moved to set the default aside after the court below ruled against it, and that had it taken that procedure it could have had its day in court and so may not now complain that it did not have it. While respondent submits no argument to sustain any such contention, we assume his theory is that an appeal waives a special appearance and that the error of the court in overruling it may be challenged only by a petition for a writ of prohibition and not by an appeal; and, even if it may be challenged here, that the defendant on a reversal is in court for further proceedings. While we see no merit in any such viewpoint, it is necessary in connection with our disposition of the appeal that we point out in some detail the fallacy of the argument.

In the early stages of the law any appearance by the defendant in a court proceeding was deemed a general appearance and a waiver of service of process upon him or of any irregularities in connection therewith. Accordingly for a defendant to preserve his claim that the court was without jurisdiction over him it was not only necessary for him to stay out of the trial court but he had to await the entry of judgment against him and then seek a review by writ of error or appeal, or institute an action for cancellation of the judgment or defend against its enforcement. Aside from any injury sustained to his credit by entry of the judgment, the defendant ran the risk, where he did not defend on the merits, that the reviewing court might rule against him on the jurisdictional point and thereby leave him with an adverse judgment against him even though he had a good defense to it on the merits. To obviate the rule so as to permit the defendant to challenge the jurisdiction and still defend on the merits, if the challenge to jurisdiction was overruled, the courts invented the "special appearance." Under it the defendant was permitted to make and to preserve his challenge to the jurisdiction without a waiver by an appearance, so long as he limited his challenge simply to that of the court's jurisdiction over him. Cf. Sunderland, Preserving a Special Appearance, 9 Mich.L.Rev. 396. Initially an appeal or writ of error seeking to review the jurisdiction of the trial court over the person was not a waiver of the special appearance for any purpose. The Supreme Court of this state in 1857, in Deidesheimer v. Brown, 8 Cal. 339, took the logical view, and upon sustaining the appeal for want of jurisdiction in the court below directed the trial court to dismiss the case.

[8, 9] The principle that the taking of an appeal is not a waiver of process was followed in Lyman v. Milton, 44 Cal. 630, and Kent v. West, 50 Cal. 185, the latter of which directed the trial court to set aside the service of summons. However, in Desmond v. Superior Court, 59 Cal. 274, without referring to its cases just mentioned or to any other precedent and without suggesting any reason, the Supreme Court departed so far from the basis of the rule, in a collateral direction, so as to hold that a special appearance attacking the jurisdiction of the trial court was waived by going to trial on the merits. This has been the rule in this jurisdiction ever since, and was reaffirmed only a few weeks ago in Raps v. Raps, 20 Cal.2d 382, 125 P.2d 826. However, it has never been held by the courts of this state that the mere taking of an appeal converts a special appearance into a general appearance, or that upon a reversal for want of jurisdiction over the person the

trial court is vested with jurisdiction over the person of the appealing defendant, either retroactively or as to future proceedings, without further service of process. See Steinbach v. Leese, 27 Cal. 295. On principle it would seem that an adjudication by the reviewing court that the trial court was without jurisdiction over the person may not by any process of reasoning be converted into saying it has jurisdiction then or thereafter, without service of process.

As was said by Brandeis, J., in speaking to the point in Bank of Jasper v. First National Bank, 258 U.S. 112, 42 S.Ct. 202, 204, 66 L.Ed. 490: "It certainly may not be assumed that the Legislature [in permitting an appeal from an order overruling a challenge to the jurisdiction of the court over the person] intended that exercise of the right conferred should operate as a general appearance [in the trial court after an affirmance], and thus render moot a consideration of the ruling alone sought to be reviewed." Or, as it was said in Miner v. Francis, 3 N.D. 549, 58 N.W. 343, 345: "We are at a loss to discover how the act of invoking the jurisdiction of an appellate court to correct an error in the proceedings can be construed as a waiver of such error." It often happens that, upon the trial of an action, reversible error is committed by the court while the plaintiff is proving his case. Must the defendant then be regarded as waiving such error because he proceeds, with the chance of reversal if defeated? It is well to put the responsibility for this condition where it belongs.

[10-13] While it is true that the Code of Civil Procedure (§§ 350 and 1049) provides that an action shall be deemed pending from the time of filing the complaint until its final determination upon appeal, or until the time for appeal has passed unless the judgment is sooner satisfied, yet a judgment is not vacated by an appeal, and, if it be a money judgment, execution may issue in the absence of supersedeas. Speaking generally, the judgment is final so far as the trial court is concerned even though it is not a final determination of the rights of the parties pending its review on appeal. For that reason, and that alone, it is not admissible in evidence to sustain an action upon it or in support of a defense in another action. Moreover, an appeal from a judgment, whether at law or in equity, is a review only as to alleged errors of fact or law and is in no sense a trial de novo. Accordingly, while an appeal in this state is often classed as being in effect a mere continuation of the action below, as it is not a new suit, yet it is a direct attack on the judgment below and so is more like a writ of error than an appeal in chancery. Sharon v. Hill, C.C., 26 F. 337; 2 Cal.Jur., § 3. A writ of error at common law is regarded by the federal courts as a continuance of the original action rather than the commencement of a new proceeding. Cohens v. Virginia, 6 Wheat. 264, 410, 5 L.Ed. 256, 257; Nations v. Johnson, 24 How. 195, 204, 16 L.Ed. 628; Benker v. Meyer, 8 Cir., 154 F. 290, 83 C.C.A. 270. While our cases have often said that an appellant by virtue of his appeal submits to the jurisdiction of the court below as to any future proceedings in that court after a reversal, the statement is too broad. Where a defendant has appeared specially below for the single purpose of objecting to the jurisdiction of the court over him as a party defendant, and where his appeal is confined to that one question, the court below does not on reversal obtain jurisdiction over him without further service of process. Clark v. Forbes, 34 Cal.App. 524, 168 P. 155. See also 4 C.J.S., Appeal and Error, §§ 109 & 112.

[14, 15] The view held by a small minority of the courts that one who is named as a party to a suit and is made an apparent party to the judgment may not appeal from it where he has not been served with process or has not appeared generally is without merit. Estate of Meade, 5 Cal. Unrep. 678, 49 P. 5; Hansen v. Klicka, 78 Ill.App. 177; Tuttle v. Claflin, 2 Cir., 88 F. 122, 31 C.C.A. 419. Our statute (Code Civ.Proc. § 938) provides that any party aggrieved may appeal. Where the plaintiff (respondent), as here, contends, and the trial court holds, that the defendant was a party and the judgment rendered purports to divest appellant of its property, it seems clear that the statute may not be construed as excluding appellant from a right of appeal. In this state, unlike in many other states, the right of appeal is not a matter of grace within the keeping of the Legislature. The right here is granted by the Constitution, and may be supplied by the Supreme Court where legislation is inadequate, or even if the Legislature should seek to abolish the right. Const., art. VI, § 4; Estate of Nelson, 128 Cal. 242, 60 P. 772. Moreover, neither the Legislature nor the courts may trammel the right of appeal in view of the provisions of our Constitution. Cases such as Braun v.

Brown, 13 Cal.2d 130, 87 P.2d 1009; San Francisco, etc., Asylum v. Superior Court, 116 Cal. 443, 48 P. 379, and McDonald v. Cutter, 120 Cal. 44, 52 P. 120, do not rule contrary to anything we have said. General language in those cases not necessary to the decisions may not be regarded.

[16] The argument that a petition for prohibition is the sole method afforded to a defendant who wishes to review an order entered on his special appearance adjudging the court has jurisdiction over his person is not sustained by Jardine v. Superior Court, 213 Cal. 301, 2 P.2d 756, 79 A.L.R. 291. In fact, that case recognizes that the remedy of appeal exists, but that where it is shown the remedy is inadequate a writ of prohibition may and should issue. But the case makes it plain that prohibition will not be granted solely because a defendant waives the point of jurisdiction by pleading to the merits. While we think the court indicated rather plainly that it regarded that particular rule as unfortunate, it did not intimate it would be overruled when the point came squarely before it. Its recent decision in Raps v. Raps, supra, would seem clearly to foreshadow it has no thought of doing so. It is enough for us to say on this point that the appellant was not required to petition for prohibition and did not waive its right to take an appeal by having failed to do so.

As the court below was without jurisdiction to enter a default or to render a default judgment, the judgment rendered is a nullity and the motion to quash the purported service of summons should have been sustained.

The judgment is reversed with directions to dismiss the action against the appellant.

McCOMB, J., concurred.

W. J. WOOD, Acting Presiding Justice (dissenting).

I dissent. No claim is made that the Secretary of State did not receive the process or that defendant corporation did not receive the process when it was mailed by the Secretary of State pursuant to the provisions of section 373 of the Civil Code. No claim is made that the corporation has suffered any injury whatever. Under section 373 mailing by the Secretary of State to the party in interest is sufficient. In my opinion there is no justification for requiring manual delivery to the Secretary of State.

It is an established rule of statutory interpretation that words and phrases are to be construed according to the approved usage of the language, and that words of common use are to be taken in their ordinary and general sense. Corbett v. State Board of Control, 188 Cal. 289, 291, 204 P. 823; § 16, Code of Civil Procedure. Statutes should be interpreted "in the light of reason and common sense". Great Western, etc., Co. v. John A. Wathen D. Co., 10 Cal.2d 442, 446, 74 P.2d 745, 746. The word "deliver" is a word of common use and its ordinary meaning is very different from "personal service". If, as has been contended, the members of the Legislature who enacted section 373 are deemed to have had knowledge of the decisions of the tribunals of the state on the subject of the service of process, they are deemed to have been familiar with the statements of the court in Heinlen v. Heilbron, 94 Cal. 636, 640, 30 P. 8, 9: "The 'delivery' which constitutes a personal service under section 1011 need not be made by the individual who is attempting to make the service, but can be effected through a clerk or messenger, or through any agency by which a 'delivery' can be made; and when the notice is so delivered the service becomes a personal service. The fact that the person upon whom the service is to be made resides or has his office in a different place from that of the person making the service, does not require that the service be made by mail, or preclude a personal service, and the person seeking to make the service can avail himself of any agency,—such as Wells, Fargo & Co., or the instrumentality of the post office department,—with as much effect as if he had employed any other messenger. The delivery of the notice through such agency renders the service personal, and the proof of such delivery establishes a personal service." The Heinlen case was cited with approval in Colyear v. Tobriner, 7 Cal.2d 735, 743, 62 P.2d 741, 745, 109 A.L.R. 191, where the court held that notice of termination of tenancy required personal service and that "the post office department, as well as any other type of messenger, may be used to effect personal service."

52 Cal.App.2d 679

SPINNER et al. v. LOS ANGELES RY. CORPORATION.

Civ. 13224.

District Court of Appeal, Second District, Division 3, California.

June 11, 1942.

1. Carriers 🔑316(4)

In action against bus company for injuries sustained by passenger when bus collided with an automobile at intersection with arterial highway which bus entered without making the boulevard stop required by city ordinance, plaintiffs were entitled to the benefit of the doctrine of "res ipsa loquitur" so as to make out a prima facie case of negligence against bus company, notwithstanding action was dismissed on motion of plaintiffs as to unknown driver of the automobile.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Negligence 🔑121(2)

Where plaintiff's proof shows actual cause of an accident as being other than negligence of the party sought to be charged, there is no room for an inference under "res ipsa loquitur" doctrine that such party was negligent and the doctrine hence is inapplicable.

3. Carriers 🔑316(4)

Where plaintiffs alleged concurring negligence of bus company and automobile driver as being proximate cause of injuries sustained by bus passenger, and plaintiffs' proof showed only that, when bus was at approximate center of intersection, the automobile at an unknown distance was approaching from the right, dismissal of action as to unknown driver of automobile did not deprive plaintiffs of benefits of "res ipsa loquitur" doctrine in establishing prima facie case of negligence against bus company.

4. Torts 🔑22, 26(1)

Plaintiff may proceed against joint tort feasors either jointly or severally, and a complaint, although it alleges only joint negligence, states a separate liability against each tort-feasor.

5. Carriers 🔑295(7)

Bus driver entering intersection with arterial highway without making the boulevard stop required by city ordinance was guilty of "negligence per se".

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

6. Carriers 🔑320(30)

Whether bus driver's negligence in entering intersection with arterial highway without making the boulevard stop required by ordinance was proximate cause of injuries sustained by bus passenger when bus was struck by an automobile in the intersection was a question for jury.

7. Judgment 🔑270

Where minute entry of order granting defendant's motion for a nonsuit merely recited that such motion was made and granted, formal judgment thereafter entered was without significance, since the order granting the nonsuit, as entered in the minutes, itself constituted the "final judgment".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Lillian J. Spinner and another against Los Angeles Railway Corporation for injuries sustained by named plaintiff when a bus operated by defendant on which plaintiff was riding as a passenger for hire collided with an automobile at street intersection. From an order granting defendant's motion for a nonsuit, and from judgment dismissing the action, plaintiffs appeal.

Judgment of dismissal vacated and order granting motion for a nonsuit reversed.

Lowell L. Dryden, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiffs, husband and wife, appeal from an order granting defendant's motion for a nonsuit, and from a judgment dismissing the action after granting said motion. Trial was by jury. The action was for damages resulting from personal injuries to the wife, Lillian J. Spinner, hereinafter referred to as plaintiff.

The wife, a passenger for hire, on a bus operated by defendant, a common carrier, was injured as a result of a collision between the bus and an automobile at an intersection. The bus was going west on 59th Place. The automobile was going south on West Boulevard. A boulevard stop sign had been erected, according to law, at the east entrance to said intersection requiring vehicles approaching West Boulevard from the east on 59th Place to stop before entering the intersection. There was no boulevard stop sign at the north entrance to said intersection requiring vehicles approaching 59th Place from the north on West Boulevard to make such a stop.

Plaintiff testified that she was sitting in the right front seat of the bus next to the aisle; that after the impact she was on the floor of the bus; that her knees struck the interior of the bus; that she was injured and was treated therefor by a physician.

Plaintiff's daughter, who was a passenger on the bus, testified: that she was two or three rows from the back of the bus; that at the time the bus entered West Boulevard it did not come to a "complete" stop; that, "Well, it got to the intersection, it hesitated and went on"; that, "It proceeded to the approximate center of West Boulevard, suddenly swinging to the left to avoid the accident. Then it swerved to the right into the curb—on 59th Place"; that after the impact she saw plaintiff on the floor; that at the time the bus swung to the left, when it was about in the center of West Boulevard, a car was coming from the right on West Boulevard north of 59th Place, but she could not say how far away it was.

An ordinance of the city of Los Angeles, offered as an exhibit by plaintiffs, was received in evidence. At the time of such offer, counsel for plaintiffs referred to the ordinance as "showing the due erection of a boulevard stop sign on 59th Place as it enters West Boulevard." Counsel for defendant then said: "I will stipulate that it is a boulevard stop. No question about it." The document so received in evidence does not show that it is a boulevard stop ordinance. By reason of said stipulation, however, it will be considered there was such an ordinance at the time of the collision as that which counsel for plaintiffs said he was offering in evidence.

On motion of plaintiffs the action was dismissed as to defendants sued under fictitious names.

When plaintiffs rested, defendant made a motion for a nonsuit upon the ground there was no evidence tending to prove negligence on the part of defendant, and no evidence that defendant's negligence, if any, was a proximate cause of the injuries. The motion was granted.

[1] Appellants contend that they were entitled to the benefit of the doctrine of res ipsa loquitur, and that the inference created by such doctrine made a prima facie case. This contention must be sustained.

In St. Clair v. McAlister, 1932, 216 Cal. 95, 98, 13 P.2d 924, 925, the plaintiff, a passenger on a bus, was injured in a collision between the bus and an automobile at an intersection, and one of the questions therein was whether the doctrine of res ipsa loquitur applied. The court stated: "It was the duty of the carrier to exercise 'the utmost care and diligence for their safe carriage' of the plaintiff (section 2100, Civ.Code), and upon showing that she was a passenger and was injured while being carried as such, a presumption of negligence arose, as to which it was incumbent on the carrier to show that it was free from negligence. Scarborough v. Urgo, 191 Cal. 341, 216 P. 584. We have no hesitancy in saying that the plaintiff produced proof entitling her to invoke the doctrine contended for by her."

In Dieterle v. Yellow Cab Co., 1939, 34 Cal.App.2d 97, 93 P.2d 171, the plaintiff, a passenger in a taxicab, was injured in a collision between the cab and an automobile at an intersection, and one of the questions was whether the doctrine of res ipsa loquitur applied. The court stated at page 100 of 34 Cal.App.2d, at page 173 of 93 P.2d: "In presenting their [plaintiffs'] case to the trial court they were entitled to the presumption embodied in the doctrine of res ipsa loquitur."

Respondent contends that the doctrine of res ipsa loquitur has no application in this case, in that, plaintiffs pursued their remedy against the carrier alone; and further that plaintiffs proved the sole proximate cause of the accident was the negligence of the driver of the automobile.

The statement that plaintiffs pursued their remedy against the carrier alone is based upon the fact that plaintiff dismissed the action as to fictitious defendants, including Two Doe, alleged in the complaint to be the driver of the other car.

In Holt v. Yellow Cab Co., 1932, 124 Cal.App. 385, 12 P.2d 472, plaintiff, a passenger in a cab, was injured in a collision between the cab and another vehicle. The driver of the other vehicle was not a defendant. It was there argued that the doctrine of res ipsa loquitur should not be applied in such a case involving the actions of the other driver. The court at page 389 of 124 Cal.App., at page 474 of 12 P.2d said: "This contention is without merit. Edwards v. Gullick [213 Cal. 86], 1 P.2d 11. In the case before us, the driver of the other car *was not a defendant,* and in its instructions the court confined the application of the doctrine to a consideration of the operation of the taxi cab. Kilgore v. Brown, 90 Cal.App. 555, 266 P. 297. * * *" (Italics added.)

[2] In support of its contention, above stated, respondent cites the case of Gritsch v. Pickwick Stages System, 1933, 131 Cal. App. 774, 22 P.2d 554. That action was against Pickwick Stages System alone. Plaintiffs were passengers on the stage operated on a marked through highway. At an intersection the stage was struck by an automobile driven by one Hamilton. On page 777 of 131 Cal.App., page 555 of 22 P.2d, it was stated: "The evidence introduced by plaintiffs, as well as that offered by defendant, showed that Hamilton failed to stop before entering the boulevard, that he entered the intersection while driving at a speed of thirty miles an hour, and crashed into the side of the stage." On page 784 of 131 Cal.App., page 558 of 22 P.2d, it was stated: "Bearing in mind that the operator of the Buick was not joined as a party defendant in this case, but that the negligence of the stage alone was charged as the sole proximate cause of the accident, we must conclude that the respondents elected to confine their charge of negligence to the one instrumentality and to thus limit the application of the res ipsa loquitur doctrine to the operator of that instrumentality. Where this is done, and upon plaintiffs' own case it appears that another independent instrumentality was involved in the collision, and that *it is reasonable to infer* from the evidence adduced that the operator of that instrumentality *was alone guilty of negligence,* the primary principle of the doctrine is lacking because it is just as feasible for the plaintiffs to prove the negligence of the operator of the second car as it is for the defendant to explain it." (Italics added.) On page 785 of 131 Cal. App., page 558 of 22 P.2d, it was stated: "But where, as here, the plaintiff sues the carrier alone, and then *proves an independent act of negligence for which the party charged was not responsible,* her case is 'nowise different from a supposititious case where some malefactor might have maliciously' * * * wrecked the stage in the course of its progress along the highway. In other words, when plaintiffs' proof shows the *actual* cause of the collision which is other than negligence of the party sought to be charged, there is no room for an inference that he was negligent under this doctrine." (Italics added.)

[3, 4] It is to be noted that some of the distinctions between the present case and the Gritsch case are: the complaint in the present case alleged concurring negligence on the part of the Los Angeles Railway Corporation and Two Doe, the operator of the other vehicle, and that as a proximate result of the negligence of each plaintiff sustained injuries (not the negligence of the carrier alone as in the Gritsch case); from the proof in the present case "it was not reasonable to infer" that the operator of the other vehicle "was alone guilty of negligence," as it was reasonable to infer in the Gritsch case; plaintiff in the present case did not prove "an independent act of negligence for which the party charged was not responsible"; plaintiffs' proof did not show that "the *actual* cause of collision which is other than negligence of the party sought to be charged," as was shown in the Gritsch case; the proof in the present case was that it was the *carrier that failed to make the boulevard stop,* whereas in the Gritsch case it was not the carrier but the driver of the other car who failed to make the boulevard stop, and he alone was the one shown to be guilty of negligence (the reverse of the situation here); there was no proof in the present case as to the speed of the carrier or of the other car, but there was proof as to the speed of the other car (thirty miles per hour) in the Gritsch case; in the present case, before the collision, the bus suddenly swerved to the left, but in the Gritsch case the stage did not change its course, it was on an arterial highway and was not crossing an arterial highway (as the bus here was) without making a boulevard stop; in the present case the only testimony concerning the other car was that

when the bus swung to the left, a car, an unknown distance away, was coming from the right on West Boulevard north of 59th Place.

It thus appears that the factual situation in the present case is practically the opposite from that in the Gritsch case. The fact that plaintiffs dismissed the action as to Two Doe and thereby did not "pursue" their remedy against the operators of both vehicles, does not alter the charge of plaintiffs that both defendants were guilty of concurring negligence and that the negligence of each was a proximate cause of the injuries. In the Gritsch case it was held that the res ipsa loquitur doctrine did not apply for the reason, among others, that plaintiffs proved that the driver of the other vehicle was alone guilty of negligence. Here the plaintiffs did not prove or attempt to prove that Two Doe was alone guilty of negligence, and such dismissal by plaintiffs did not signify, of course, that plaintiffs considered the dismissed defendant, Two Doe, to be alone guilty of negligence, and did not indicate, as stated in the Gritsch case at page 784 of 131 Cal.App., at page 558 of 22 P.2d, that "* * * it is just as feasible for the plaintiffs to prove the negligence of the operator of the second car as it is for the defendant to explain it." Though a complaint alleges only joint negligence, it states a separate liability against each defendant, and a plaintiff may proceed against joint tort feasors jointly or severally. Shea v. City of San Bernardino, 1936, 7 Cal.2d 688, 694, 62 P.2d 365. In the case now before the court, as stated in Holt v. Yellow Cab Co., supra, at page 389 of 124 Cal.App., at page 474 of 12 P.2d, wherein the driver of the other car *was not a defendant*, "* * * it would seem that this passenger for hire should be entitled to an explanation from the carrier, as to why such a collision occurred * * *."

Under the circumstances here the dismissal as to Two Doe did not affect the right of plaintiffs to the benefit of the doctrine of res ipsa loquitur.

[5, 6] Irrespective of the point hereinabove discussed relative to the doctrine of res ipsa loquitur, the motion for a nonsuit should not have been granted. There was testimony in behalf of plaintiff that at the time the bus entered West Boulevard it did not make the boulevard stop. The defendant was guilty of negligence per se in violating the ordinance which required that such a stop be made. Hurtel v. Albert Cohn, Inc., 1936, 5 Cal.2d 145, 147, 52 P.2d 922. Whether such negligence was a proximate cause of the injuries to plaintiff was a question of fact to be determined by the jury from the evidence. Jennings v. Day, 1935, 7 Cal.App.2d 555, 558, 46 P.2d 193; Kostouros v. O'Connell, 1940, 39 Cal.App.2d 618, 622, 103 P.2d 1028.

[7] The order granting the motion for a nonsuit, as entered in the minutes, was as follows: "Defendant moves for a nonsuit and the motion is granted." Such minute entry did not indicate an intention of the court that a formal judgment of dismissal should be entered. Inasmuch as the order granting the nonsuit, as entered in the minutes, itself constitutes the final judgment, the formal judgment is without significance. McColgan v. Jones, Hubbard & Donnell, 1938, 11 Cal.2d 243, 78 P.2d 1010; Southern Pac. R. Co. v. Willett, 1932, 216 Cal. 387, 390, 14 P.2d 526; Lewis v. Hammond Lumber Co., 1931, 114 Cal.App. 390, 391, 300 P. 49.

The formal judgment of dismissal is vacated, and the order granting the motion for a nonsuit is reversed.

SCHAUER, P. J., and SHINN, J., concurred.

In re BALDWIN'S ESTATE.

LISSNER v. BALDWIN et al.*

Civ. 13570, 13571.

District Court of Appeal, Second District, Division 2, California.

June 18, 1942.

Hearing Granted Aug. 13, 1942.

1. Executors and administrators 🔑314(12)

An order striking from files a request for special notice of hearing on petition for partial distribution of decedent's estate is not "appealable order". Probate Code, §§ 1000, 1202, 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

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* Subsequent opinion 134 P.2d 259.

2. Executors and administrators 🔑314(3, 4)

One appointed in divorce action as receiver of spouses' property was not entitled to petition for ratable distribution of estate of decedent under whose will husband was entitled to legacy and was not a "person interested in the estate" within statute entitling such a person to special notice of petition for partial distribution. Probate Code, §§ 1000, 1010, 1202.

See Words and Phrases, Permanent Edition, for all other definitions of "Person Interested in the Estate".

3. Courts 🔑198, 202(1)

Probate proceedings are purely statutory, probate court has only such jurisdiction as Probate Code prescribes, and procedures set forth therein must be substantially, if not strictly, followed. Probate Code, § 1 et seq.

4. Executors and administrators 🔑314(3)

A person seeking any portion of decedent's estate by distribution is either entitled to all of decedent's title to such portion or not entitled to distribution at all. Probate Code, §§ 1000, 1010.

5. Receivers 🔑69

A receiver of property does not take title thereto, but only right of possession as officer of court.

6. Receivers 🔑1

A "receiver pendente lite" is person appointed to take charge of fund or property to which receivership extends while case remains undecided.

See Words and Phrases, Permanent Edition, for all other definitions of "Receiver Pendente Lite".

7. Executors and administrators 🔑314(2)

The probate court has no power to distribute possessory right to decedent's property, leaving balance of title thereto suspended.

8. Executors and administrators 🔑314(3)

The probate court cannot distribute property of decedent's estate to person acting as representative or agent of decedent's creditor or legatee under decedent's will.

9. Executors and administrators 🔑314(3)

The probate court may distribute property of decedent's estate to assignee, or successor in interest, of legatee under decedent's will only where there is no dispute about fact that person petitioning for such distribution is such assignee or successor in interest.

10. Executors and administrators 🔑314(3)

A superior court order, instructing one appointed by it as receiver of spouses' property in wife's divorce action to take all necessary steps to reduce husband's legacy under his deceased mother's will to possession, did not enlarge probate court's jurisdiction or change receiver's status before such tribunal.

◆

Appeals from Superior Court, Los Angeles County; William J. Palmer and Charles D. Ballard, Judges.

In the matter of the estate of Anita M. Baldwin, deceased. From orders denying a petition by Louis M. Lissner, as receiver of the property of Baldwin M. Baldwin and wife, for ratable distribution, granting a motion by Baldwin M. Baldwin and another, as executors of the estate, to strike out the receiver's request for special notice of a hearing on the executors' petition for partial distribution, and an order for partial distribution to the executors, the receiver appeals.

Appeal from order striking out request for special notice dismissed, order denying receiver's petition for ratable distribution affirmed, and order granting executors' petition for partial distribution affirmed.

Louis M. Lissner in pro. per., and Laurence M. Weinberg, both of Los Angeles, for appellant.

Meserve, Mumper & Hughes and Roy L. Herndon, all of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

Appellant, Louis M. Lissner, is the receiver appointed by the superior court in a divorce action in which Rowena Schneider Baldwin is plaintiff and Baldwin M. Baldwin, her husband, is defendant. In the complaint in that action it is alleged that Baldwin M. Baldwin is the son of Anita M. Baldwin, decedent herein, and as such he is entitled under the provisions of his mother's will to a legacy of $1,500 per month during administration of the estate. Upon the basis of the allegations and pursuant to the prayer of the complaint in the divorce proceedings the court appointed appellant as receiver and instructed him to take into his possession all community property of Baldwin and his wife and all separate property of Baldwin, and further instructed him "to take and pursue all necessary steps in the matter of the estate of Anita M. Baldwin to reduce the claim of defendant Baldwin M. Baldwin for $1,500 per month during the course of administration to possession, and to hold such sums as he may recover in such proceedings in accordance with the order appointing him as receiver." Appellant thereupon, as receiver, filed a petition in the estate proceeding pursuant to section 1010 of the Probate Code, seeking ratable distribution and petitioning the probate court to distribute to him, as receiver, the said legacy of Baldwin M. Baldwin. Appellant also filed in the estate proceeding a request for special notice pursuant to section 1202 of the Probate Code, and motion was made by the co-executors to strike this request from the files. Upon the hearing in the probate court the petition for ratable distribution was denied and the motion to strike was granted. The appeal is from both of these actions of the court.

Subsequently respondents, as co-executors, filed a petition for partial distribution pursuant to section 1000 of the Probate Code, and upon the hearing thereof distribution of the accumulated monthly payments of the legacy from October, 1939, to December, 1940, was ordered to be made to Baldwin M. Baldwin and his sister, Dextra Baldwin Jones. Appellant appeared at said hearing and objected to the order, and now appeals therefrom. The appeals involve the same questions and have been consolidated for presentation here.

[1] It may be said at the outset that the order striking from the files the request for special notice is not an appealable order, Probate Code, § 1240, and therefore that appeal must be dismissed. The action of the court may be considered, however, in connection with the other two appeals, insofar as it is relevant thereto.

Respondents, Baldwin M. Baldwin and Dextra Baldwin Jones (now known as Dextra Baldwin Derx), although the recipients of the legacies, appear throughout the probate proceedings here involved and upon these appeals in their representative capacities of executor and executrix, respectively. Baldwin M. Baldwin has never been served and has made no appearance in the divorce proceedings, it being claimed by appellant that he has absented himself from the state of California to avoid service. The order appointing a receiver and for payment of attorneys' fees, costs and maintenance pendente lite were made in preliminary proceedings and before the receiver had taken any property or funds into custody. Appellant was not served with special notice of the hearing upon respondents' petition for partial distribution, although he was present in court and participated in the hearing after denial of his motion for continuance.

[2] Respondents contend that appellant is not a party entitled to petition for ratable distribution under the provisions of section 1010 of the Probate Code, and is not a person interested in the estate within the meaning of section 1202 of the Probate Code. We think both of these contentions must be sustained.

[3] Probate proceedings are purely statutory. The probate court has only such jurisdiction as the Probate Code prescribes, and procedures set forth therein must be substantially, if not strictly, followed. Texas Co. v. Bank of America Nat. T. & S. Ass'n, 5 Cal.2d 35, 39, 53 P.2d 127; In re Estate of Troy, 1 Cal.App.2d 732, 736, 37 P.2d 471. Section 1010 of the Probate Code reads as follows:

"When the time for filing or presenting claims has expired and all uncontested claims have been paid, or are sufficiently secured by mortgage, or otherwise, but the estate is not in a condition to be finally closed and distributed, the executor or administrator, or any heir, devisee or legatee, or the assignee, grantee or successor in interest of any heir, devisee or legatee, may petition the court for a ratable payment of the legacies, or ratable distribution of the estate, to the heirs, devisees or legatees, or their assignees, grantees or successors in interest, or, where there are priorities, to those of the class or classes having priority; or, if the decedent was a nonresident and left a will which has been duly proved or allowed in the State of his residence, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, or it is for the best interests of the estate, that any part of the estate in this State should be delivered to the executor or administrator in the State of the decedent's residence, the executor or administrator may petition the court for an order authorizing the delivery of such portion of the estate as the court shall deem safe and proper and for the best interests of the estate, to the executor or administrator in the State of the decedent's residence. The clerk shall set the petition for hearing by the court and give notice thereof for the period and in the manner required by section 1200 of this code. Any person interested in the estate or any coexecutor or coadministrator may resist the application."

Two questions at once present themselves: First, is appellant the successor in interest of the legatee under the above section, and, second, does the probate court have jurisdiction to determine the controversy where anyone other than the legatee seeks distribution and his right to do so is disputed? Appellant contends that no such controversy is presented, because the legatee himself, the real party in interest, has not appeared to oppose it. This contention, however, is answered by the section under consideration, which provides that "any person interested in the estate or any coexecutor or coadministrator may resist the application." Both the executor (Baldwin M. Baldwin) and the executrix oppose the application herein.

[4] Is appellant the successor in interest of the legatee, within the meaning of this section? In considering this question it should be borne in mind that nowhere in the Probate Code is the probate court authorized or empowered to distribute any less or any different title than that held by the decedent. The very purpose of probate proceedings is to satisfy the creditors of decedent and then determine who succeeds to his title to the residue. The person seeking any portion of the estate by distribution is either entitled to all of decedent's title to that portion or he is not entitled to distribution at all. The only statute which may be considered as in any way limiting this principle is section 561 of the Code of Civil Procedure; but even under that statute the entire title to the personal property is distributed to the heir but possession is delivered to the attaching officer so that any claims of the attaching creditor against the heir or legatee may be passed upon by another court. No attempt was made to comply with that statute in the instant case and therefore it cannot be here considered. In re Estate of Troy, supra.

[5-8] It has been decided many times that a receiver does not take title. In North v. Cecil B. DeMille Productions, Inc., 2 Cal. 2d 55, 57, 39 P.2d 199, 200, it is said: "A receiver pendente lite is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. * * * *The receiver acquires no title, but only the right of possession as the officer of the court.* The title remains in those in whom it was vested when the appointment was made." (Italics ours.) In People v. United States Fidelity & Guaranty Co., 45 Cal.App.2d 474, 476, 114 P.2d 389, 390, it is said: "The receiver [of a corporation], by virtue of his appointment, succeeded to the powers of the board of directors and thereafter acted in a dual capacity—as the representative or agent of the creditors, and as agent or representative of the corporation." See, also, DeForrest v. Coffey, 154 Cal. 444, 449, 98 P. 27. In fact, appellant himself states in his brief that "we do not claim that appellant succeeded to Baldwin's title to the legacy, but we urge that he was given authority to take possession of the property for the purposes of receivership." It seems clear that the probate court has no power to distribute the possessory right to the property, leaving the balance of the title suspended. Neither can it distribute to a person acting in the capacity of "representative or agent" of either the creditor or the legatee.

[9] Turning to the second question mentioned above, while it is true that the probate court may distribute to the assignee or successor in interest of the legatee, this is only true where there is no dispute about the fact that the person petitioning is such assignee or successor in interest. This is clearly stated in Re Estate of Howe, 161 Cal. 152, 156, 118 P. 515, 517, and the Supreme Court there adds: "When, however, the fact of conveyance is in dispute, or where its validity or effect is an issue upon the distribution, the determination of that question is not a matter within the probate jurisdiction of the court." The basis for this holding is well stated in Parr v. Reyman, 215 Cal. 616, 620, 12 P.2d 440, 442, quoting from Martinovich v. Marsicano, 137 Cal. 354, 356, 70 P. 459, as follows: "'Matters of probate' include the ascertainment and determination of the persons who succeed to the estate of a decedent, either as heir, devisee, or legatee, as well as the amount or proportion of the estate to which each is entitled, and also the construction or effect to be given to the language of a will; but do not include a determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the ancestor, whether such claim arises by virtue of his contract or in invitum; nor is the determination of conflicting claims to the estate of an heir or devisee, or whether he has conveyed or assigned his share of

the estate a 'matter of probate.'" The same statement is quoted with approval in Re Estate of Howe, supra. See, also, McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026.

[10] It cannot, of course, be successfully contended that the order of the court in the divorce proceeding instructing appellant "to take all necessary steps to reduce said legacy to possession" could in any manner enlarge the jurisdiction of the probate court or change the status of appellant before that tribunal.

No new or different questions are presented upon the appeal from the order of the court distributing the legacy to Baldwin M. Baldwin pursuant to the petition for partial distribution. In fact, a duplicate of appellant's printed brief is filed therein. The only claims of invalidity therein are, therefore, first, that the legacy should have been distributed to appellant, leaving nothing to distribute on this second petition, and, second, that the court was without jurisdiction to make this order because appellant had not received special notice in accordance with his request, filed pursuant to Probate Code section 1202, although he was in fact present and participated in the hearing. The first of these objections has been disposed of by our views concerning appellant's petition for ratable distribution. As to the second, assuming, without deciding, that the failure to give the notice to appellant, if he were entitled thereto, would have the effect claimed, it is our conclusion, as already indicated, that he is not entitled to make the request for such notice. It may well be that the plaintiff in the divorce action is, as a creditor of the legatee, entitled to file the request for special notice. In re Estate of Reinicke, 44 Cal.App.2d 271, 112 P.2d 311. However, so far as the record discloses she has filed no such request. Appellant, as receiver, is not a creditor. He is an officer of the court, appointed for a very limited purpose, namely, to take possession of, and hold for further order of the court appointing him, any property which he is entitled to take into his custody. As we have seen, he is not authorized to take custody of any property of the estate of decedent herein and is therefore not interested in this estate. To give him notice would serve no purpose. He neither comes within the wording of the statute nor the reason upon which the requirement of special notice is based.

As this disposes of both appeals it will be unnecessary to pass upon other matters discussed in the briefs.

The appeal from the order striking from the files the request for special notice is dismissed. The order denying the petition of appellant for ratable distribution is affirmed. The order granting the petition of respondents for partial distribution is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

LARRABEE v. TRACY et al.*

Civ. 13567.

District Court of Appeal, Second District,
Division 2, California.

June 16, 1942.

Hearing Granted July 30, 1942.

1. Appeal and error 🔑1099(3)

Where the question whether complainant was entitled to inherit under the terms of a will was in issue and determined on a former appeal from ruling on a demurrer to the complaint, such decision became the "law of the case", and was conclusive on second appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Wills 🔑555(2)

The daughter and sole lineal descendant of testator's cousin, who was deceased at time of execution of will naming cousin as devisee, took such interest in the same manner as cousin would have done had cousin survived testator, which was as devisee under the will.

3. Executors and administrators 🔑1, 75

An executor or administrator occupies the position of highest trust and confidence, not only to creditors and beneficiaries of an estate, but to the court as well, and is required to act in entire good faith.

4. Descent and distribution 🔑71(1)

In questions relating to heirship, the executor must stand indifferent between contestants, and where he initiates questions of heirship, through a report or upon application for construction of the will, he must make a full and complete disclosure to the court.

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* Subsequent opinion 134 P.2d 265.

5. Descent and distribution ⚷71(1)

In determining heirship under a will, the court is entitled to all the information which is available to its executor, in order that it may not only have the facts upon which to base its adjudication but so it may determine what, if any, further notice should be given to parties interested. Probate Code, §§ 1200, 1204.

6. Judgment ⚷461(5)

In action by daughter of deceased legatee to set aside order adjudging that she was not entitled to inherit under the will, which order was made upon executor's ex parte application for construction of the will, evidence supported finding that executor was guilty of such extrinsic fraud in obtaining the order as justified setting it aside.

7. Wills ⚷705

A judgment vacating a decree construing a will was justified where the decree denying substitute legatee's right to inherit was made upon executor's ex parte application without notice to legatee other than notice by posting, and executor had assured legatee, a nonresident, that her rights would be protected, which was not disclosed to the court when question of necessary notice was determined. Probate Code, §§ 1200, 1204.

8. Equity ⚷43

The rule that one may not proceed in equity where the remedy at law is adequate, while well established, is not unvarying and may be invoked only in its proper setting.

9. Descent and distribution ⚷71(7)

Where an order adjudging that deceased legatee's daughter had no interest under a will was made upon executor's ex parte application after giving statutory notice, but in obtaining such order executor was guilty of extrinsic fraud against the daughter, and in addition violated his duty to make full disclosure to probate court, daughter's remedy in seeking to set aside the order was not limited to remedy of appeal, or by motion to set aside the order on the ground of mistake or surprise, but she could maintain an action in equity to set aside the order, since the remedy by motion under the statute is not exclusive but cumulative. Code Civ.Proc. § 473; Probate Code, §§ 1200, 1204.

10. Judgment ⚷363

The remedy provided by statute for relief from judgments taken by mistake or surprise is not exclusive, but "cumulative". Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Cumulative Remedy".

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Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action in equity by Edith Larrabee against Mary Tracy, Ernest P. Wellman, individually and as executor of the last will and testament of Mark H. Rice, deceased, and others, to vacate, and set aside an order of the superior court adjudging that plaintiff was not a substituted legatee under the will. From a judgment for plaintiff, defendant Ernest P. Wellman, individually and as executor, appeals.

Affirmed.

Winterer & Ritchie, of Los Angeles, for appellant.

Robert M. Kaufman and J. B. Mandel, both of Los Angeles, for respondent.

HANSON, Justice pro tem.

This is an appeal by an attorney in his capacity as executor and as residuary legatee of a will made by one of his clients. The trial court found the executor was guilty of fraud in procuring upon his ex parte application a construction of the will by the probate court which eliminated the legal rights of respondent, a substituted legatee. The facts found by the trial court which were sustained by evidence and so far as need here be stated were these:

The decedent Rice's will was drafted by appellant's secretary, who was an attesting witness to it. It was executed in January, 1931, when the testator was sixty-five years old. He died by suicide in August of the same year. By the terms of the will decedent bequeathed one-sixth of his estate to his cousin Kate Chase (the mother of respondent, Edith Larrabee), another one-sixth to another cousin, Mary Tracy, both described in the will as living in Northfield, Vermont, one-third to various local charitable organizations and the remainder to his executor. The executor named is the appellant. The will contained a clause reading as follows: "I hereby generally and specifically disinherit each any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs at law, except otherwise mentioned in this will," and a further clause stating that testator's wife was not "to participate in any manner or form in my estate" because of the provisions made for her in a property settlement agreement.

At the time the will was executed the cousin Kate Chase, named in the will, was dead, but she left surviving her a daughter, the respondent herein, a resident of Hardwick, Vermont. On October 29, 1931, the executor wrote Mrs. Larrabee stating he had been informed that her mother had died several years ago, and that a client of his who was related to her mother "was anxious to get in touch with her mother." He requested that she write him when and where her mother died, and this she promptly did. Not until March, 1932, four months later, did the executor again write Mrs. Larrabee, when he inquired if she knew Mark H. Rice who had formerly lived in Vermont, and, if so, if she knew his relationship to her mother, Kate Chase. His letter said nothing about Rice having died or that he had left a will, or the purpose of the inquiry. Having received a prompt reply to this letter, appellant then wrote Mrs. Larrabee stating that Rice had died leaving a one-sixth interest in his estate to her mother and a like interest to Miss Tracy. He went on to say: "Inasmuch as your mother is now deceased, the one-sixth that would have gone to her, had she been living, we think will revert to you. The estate is now in litigation, so we are unable at this time to distribute the same, but are sending you a copy of the will."

In response to a letter from Mrs. Larrabee dated April 16, 1932, inquiring as to the status of the estate, appellant replied that the estate had been in litigation for six months, owing to a contest by the divorced second wife of the testator; that because of the contest it had been necessary to employ counsel and that "a hard bitter fight was waged for the purpose of protecting the beneficiaries interested. * * * We are enclosing you a copy of the inventory and appraisement of the estate. * * * In addition to this there is a trust fund, which was created by Mr. Rice during his lifetime, which in turn will be distributed to the beneficiaries named in the will, which is your mother and aunt, and the charitable institutions and myself as you will note, in the will."

In 1934, in response to a letter from an attorney at Hardwick, Vermont, written in Mrs. Larrabee's behalf and inquiring as to the present status of the estate, the executor wrote that the estate was in litigation and that it had cost several thousand dollars in attorneys' fees and expenses; that while the litigation had been successful, it was impossible to convert the property into cash at the time. He then went on to say: "Mrs. Larrabee may have told you that her mother and aunt were left one-third of the estate, Mrs. Larrabee's mother's share may revert to her by law of succession, one-third going to charitable institutions in this state and the residuum to myself. Am also the Executor of the Will. * * * You may be assured that everything is being done in the interest of the beneficiaries under the will and am just as anxious for distribution as anyone. * * * If there is any further information that you may desire at any time will be glad to write you."

No further letters went forward from the executor to Mrs. Larrabee or her attorney until in August, 1937, when in response to an inquiry from Mrs. Larrabee his secretary wrote that because of the executor's absence she would endeavor to respond to it. Much of this letter was in defense of her employer to charges contained in Mrs. Larrabee's letter. The secretary stated that the executor planned shortly to file a petition for ratable distribution, and accordingly that Mrs. Larrabee should secure a certified copy of her birth certificate and of her mother's death certificate, so that these might be filed with the petition showing the requisite proof of death of her mother "and your heirship." The letter closed with the statement that the writer would call the executor's attention to the letter on his return.

Under date of September 1, 1937, an attorney at Portland, Maine, wrote the executor in behalf of Mrs. Larrabee, stating that she had received a citation from the board of supervisors of Riverside County, California, with reference to an action affecting property of the estate, and that he was of the opinion that perhaps an appearance should be made. The executor claims to have written a reply to this letter, but the testimony is that it was not received. The purported copy of the letter offered by the executor in evidence recites that the latter was anxious to liquidate the estate as soon as possible, that the Riverside matter was being taken care of by the attorneys for the estate and that he was expecting to file an account current for ratable distribution and a construction of the will, "owing to Kate Chase, one of the beneficiaries, having passed away quite some years prior to the execution of the will by Mr. Rice." Nothing was said in the letter to the effect that the executor would ask a construction eliminating Mrs. Larrabee's right to take under the will.

The executor's third account current, which was verified on September 29, 1937, and filed with the probate court, included therein a petition for a construction of the will, for a ratable distribution and for extraordinary and statutory attorneys' and executor's fees. In this account the executor alleged, on information and belief, that the bequest to Kate Chase had lapsed because she had died prior to the execution of the will and because the will specifically disinherited all persons not specifically named therein; that the testator, by the language used in the will, intended the bequest to Kate Chase to lapse upon her death and not to pass to any of her lineal descendants. No actual notice was given by letter or otherwise to Mrs. Larrabee or her attorney that the third account current had been filed or that it sought a construction of the will eliminating any right on her part to share in the estate. The only notice given was the statutory ten-day notice posted by the clerk of the court upon the bulletin board of the courthouse in Los Angeles County. The petition for construction of the will did not disclose that the executor had been in communication with Mrs. Larrabee or her attorney, or that the executor by his letters had led Mrs. Larrabee to believe that she was entitled to the bequest made to her mother. Moreover, the record does not disclose that any such information was given orally to the probate judge. The first knowledge Mrs. Larrabee had as to what had transpired came from her Los Angeles attorney, whom she employed to look after her interest in the estate subsequent to the time the order was made. This attorney ascertained the facts on December 15, 1937, just one week before the time for taking an appeal from the order would expire.

The facts which we have narrated stand undisputed; and as these, taken alone, are sufficient for a decision of the case and point unerringly to the decision that must follow, we shall have no need to consider other facts which it is claimed were inadmissible, nor the further claim that certain findings are not sustained by the evidence.

Summarized, the contentions presented to us by the executor are as follows: (1) That the testator by the language of his will intended that the named legatee, Mrs. Chase, should take only if she was living; but if she were not, that her daughter or a substitute legatee should not succeed to the legacy; (2) that the only duty owed by the executor to the daughter, Mrs. Larrabee, was to have her right to take as substitute legatee determined by an order of court, without any notice to her other than that of posting a notice in accordance with Probate Code, section 1200; (3) that the executor was not guilty of extrinsic fraud of a character sufficient to avoid the order made by the court on his application, wherein he contended that Mrs. Larrabee was not entitled to take under the will because (a) he did nothing to prevent her from taking timely action to redress her rights, if any she had, and (b) she was obligated to take affirmative action to protect her own rights and not rely upon him to protect them; and (4) that Mrs. Larrabee was guilty of laches and, moreover, failed to take the proper procedure to vindicate her rights.

[1,2] Appellant's contention that the testator intended by the language of his will and his declarations (which were inadmissible) to exclude respondent therefrom may not be made here. After respondent filed her complaint in this case appellant filed a demurrer to it, and as ground therefor contended that a proper construction of the will required a holding that she was not entitled to maintain the action. The trial court sustained the demurrer and judgment was entered thereon. On appeal to this court (Division One) it was determined that respondent was entitled to take under the will and so the case was reversed upon that and other grounds. As the question now raised on this appeal was necessarily in issue and determined on that appeal, the decision became the law of the case and is not open to debate. Reclamation District No. 3 v. Goldman, 65 Cal. 635, 4 P. 676. And even if it were, the contention as made is obviously without merit (In re Estate of Pew, 10 Cal.App.2d 41, 50 P.2d 1045; Larrabee v. Tracy, 39 Cal.App.2d 593, 104 P.2d 61—the instant case on its prior appeal; In re Estate of Tibbetts, 48 Cal.App.2d 177, 119 P.2d 368), and requires no discussion.

[3-5] Before proceeding to a consideration of the remaining contentions of appellant it is well to have in mind certain legal principles which we deem to be controlling. Initially we desire to make it plain that an executor or administrator occupies a position of the highest trust and confidence, not only to the creditors and beneficiaries of an estate but to the court as well, and so he is required to act in entire good faith. While an executor is not technically a trustee, yet his position is analogous to that of a trustee of an express trust. He is the representative not only of the testator but of the creditors, legatees and distributees. Accordingly an executor is a trustee in the broadest sense and is held to the same high and strict accountability of a trustee. In questions relating to heirship he must stand indifferent between the contestants (Roach v. Coffey, 73 Cal. 281, 14 P. 840); but where he initiates questions of heirship, through a report or upon an application for a construction of the will—as an executor may do and a legatee may not, except through a petition for heirship in a separate adversary proceeding—the executor must make a full and complete disclosure to the court. The court is entitled to have all the information which is available to its executor, in order that it may not only have the facts upon which to base its adjudication but so it may determine what, if any, further notice should be given to the parties in interest. Prob.Code, § 1204.

By the statutes of this state the only notice required on the application of an executor to the probate court seeking a construction of a will—that may completely divest a beneficiary thereof of a valuable vested right in the decedent's estate—is that ten days before the hearing, regardless of where the beneficiary may live, the clerk of the court post on the bulletin board of the courthouse a perfunctory notice stating that on a particular day, at an hour and place named, the court will construe the will. When regard is had to the fact that on every court day the clerk in Los Angeles county posts in excess of one hundred notices issuing out of the probate court, on some one of seven permanent metal hooks on the bulletin board, it is evident that a notice is scarcely more than posted before it is buried under an avalanche of other notices. As a practical matter, the possibility of receiving notice posted on such a board is practically nil. Posting in pioneer localities, where the court bulletin board was one of the chief sources of entertainment, may well have yielded information akin to due process. But posting of legal notices today on a bulletin board in a metropolitan center is but paying lip service to a past era when such posting was calculated to and probably did give notice of a kind. But to contend that such posting is in reality calculated to give notice today is a delusion. All that can be said for it is that it keeps up a tradition and is supposed to meet the requirements of due process, which demands that before one may be divested of his property or his legal rights he must be given the type of notice that is reasonably calculated to give him actual knowledge of the proceedings and a reasonable opportunity to be heard. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357. This rule of due process is as applicable in actions in rem or quasi in rem as in actions in personam. Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520. In the Roller case an action in rem was instituted in Texas to foreclose a real estate mortgage against a non-resident Virginian who was the owner of the land and the mortgagor. While process was served personally on the non-resident owner in Virginia six days prior to the hearing in Texas, it was held wanting in due process even though the state statute required only five days' notice.

That the question of the reasonableness of the notice provided for by state statute in in rem proceedings involves a vital element of due process, and that the decision of the state is not binding on the federal court, was held in Scott v. McNeal, 154 U.S. 34, 14 S.Ct. 1108, 1112, 38 L.Ed. 896. In that case a petition for administration was filed in the probate court alleging that Scott had mysteriously disappeared more than seven years before and had not been heard from. Notice by posting as required by statute was duly made, and on the hearing the court found that Scott was dead and appointed an administrator for his estate. The administrator sold the land to defendant McNeal, following strictly the statutory proceedings in that regard, and received from McNeal the sale price. The Supreme Court of Washington held that as the proceedings were substantially in rem the probate court acquired complete jurisdiction by the posting of the notices to enable its administrator to vest complete title in McNeal. In reversing, the Supreme Court of the United States said:

"Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the constitution of the United States, this court is no more bound by that court's construction of a statute of the territory or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. Huntington v. Attrill, 146 U.S. 657, 683, 684, 13 S.Ct. 224, [36 L.Ed. 1123, 1133]; Mobile & O. R. Co. v. Tennessee, 153 U.S. 486, 492–495, 14 S.Ct. 968, [38 L.Ed. 793].

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

"The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' Pennoyer v. Neff, 95 U.S. 714, 733, [24 L. Ed. 565, 572].

"Even a judgment in proceedings strictly in rem binds only those who could have made themselves parties to the proceedings, and who had notice, either actually or by the thing condemned being first seized into the custody of the court."

In connection with the last phrase in the opinion just quoted from it may be observed that it is now well established that the mere fact that property of the defendant has been seized and is in the custody of the court does not authorize an adjudication thereon by the court without further notice to him. Woodruff v. Taylor, 20 Vt. 65, 76. Cf. Roller v. Holly, 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520.

The requirements of due process, it may be observed, are not bettered by the fact that our statute provides that an interested party may by service of notice upon the executor compel him to mail copies of all notices in the estate as they are posted on the bulletin board. So far as due process is concerned, the burden rests on the actor to give adequate notice to one whom it is sought to bind, and not on the latter to act under a statute so he may receive notice. The practical value of this particular statute lies in the fact that a beneficiary who proceeds under it will receive the scant information given by a posted notice. But as the statute takes no account of distances, a beneficiary living in an eastern state would be hard put to make a timely defense or objection. No doubt the Legislature in enacting the statute had in mind that in many instances notice of hearings on many of the accounts, reports, and petitions made in an estate would be of little, if of any, interest to creditors generally, and oftentimes not to the beneficiaries, and so they should be given notice only when they requested it, except so far as the court on a hearing might direct additional notice, as it is empowered to do. Prob. Code, § 1204.

While we have no need here to express an opinion as to whether the court herein did or did not have jurisdiction for want of a service that met the requirements of due process, as the case may well be turned upon simpler issues, yet we have thought it important to say what we have on this subject as there seems to be a rather general notion that any notice prescribed by a state legislature with respect to in rem or quasi in rem proceedings is unfettered by the due process clause of the federal Constitution, Amend. 14. Counsel may find it to their advantage in the long run to request the court to order additional notice, as it may under the statute, and not rely on the minimum notice required by statute.

[6, 7] Assuming for the purposes of this case, without so deciding, that the ten-day posted notice in the circumstances meets the requirements of due process, we turn to the contention that the executor was not guilty of extrinsic fraud and accordingly that respondent is bound by the

order and decree. To sustain this contention appellant argues that his letters to respondent did not represent that she was entitled to take as a beneficiary or that he would protect her interests, if any she had, and that he did nothing to prevent her from taking timely action to sustain her claim. Moreover, he urges that her last letter to him indicates that she was placing no reliance upon him. A most casual reading of the letters discloses that appellant takes an altogether too narrow view of his conduct. It is clear from the letters that appellant was guilty of extrinsic fraud and that the trial court was justified in so finding. But quite apart from the extrinsic fraud, the trial court was justified in vacating the order and decree on the ground that the executor had not made to the court a full and fair disclosure of rights of respondent. The petition for construction of the will did not disclose in substance or at all the representations and statements made by the executor to the beneficiary, or even that he had communicated with her. To the beneficiary he had the obligations of a trustee; to the court, the duty of a full and complete disclosure to aid it in its adjudication and in its concomitant determination as to whether additional notice was not required, either from the standpoint of due process or of natural justice. Whether a failure of this obligation of the executor to the court as an officer of it may be classed as extrinsic or intrinsic fraud, or an exception to the rule of intrinsic fraud, it is nevertheless well established that it is a fraud upon the court and requires no specific label. See note, 5 A.L.R. 672. Here the executor in his capacity of residuary legatee was unjustly enriched by the construction placed by the court upon the will upon his ex parte showing, to the impoverishment of the legatee entitled to her legacy. It was a fraud of the most serious nature. It involved not only a breach of fiduciary duty to the respondent but a breach of duty to the court.

[8-10] The contention that Mrs. Larrabee should have appealed from the order of the court, or at least should have challenged it by a motion under the provisions of section 473 of the Code of Civil Procedure, inasmuch as she had a period of four months after notice of the order to have done so, and that her action in equity, instituted more than eight months after the order was made, should be deemed barred by her laches, is without merit in any aspect. To sustain the contentions thus made appellant invokes the time-honored principle that one may not proceed in equity where the remedy at law is adequate. But this principle, well established in the law, is not an unvarying shibboleth and may be invoked only in its proper setting. It has no application to the facts of this case. Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230. Where, as here, the contention is, and rightly, that the executor was not only guilty of extrinsic fraud against the legatee but that he violated his duty as executor, not only to the legatee but to the probate court as well, redress lies by action in equity as well as by appeal or by motion. Moreover, it was long ago determined that the remedy provided by section 473 of the Code of Civil Procedure is not exclusive but cumulative. Baker v. O'Riordan, 65 Cal. 368, 4 P. 232.

Judgment affirmed, costs to be taxed against appellant in his individual capacity.

MOORE, P. J. and McCOMB, J., concurred.

The SALVATION ARMY (a Corporation) et al., Respondents, v. SECURITY-FIRST NATIONAL BANK OF LOS ANGELES (a National Banking Association) et al., Defendants; Ernest P. Wellman, Appellant.*

Civ. 13569.

District Court of Appeal, Second District, Division 2, California.

June 16, 1942.

Hearing Granted Aug. 10, 1942.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Winterer & Ritchie, of Los Angeles, for appellant.

Dee Holder, Newby & Newby, Howard Hemenway, and W. Cloyd Snyder, all of Los Angeles, for respondents.

HANSON, Justice pro tem.

This is a companion case to Larrabee v. Tracy, 126 P.2d 947, this day decided. As the appeal is submitted on the record in that case and assigns as the only error the holding of the court below that Edith Larrabee is entitled to take as substituted legatee the provision made for her mother, the instant case is controlled by that case and so must be affirmed.

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* Subsequent opinion 134 P.2d 271.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.

* * *

52 Cal.App.2d 605

OTIS et al. v. CITY OF LOS ANGELES et al.

Civ. 13496.

District Court of Appeal, Second District. Division 1, California.

June 10, 1942.

1. Counties 🔑1
Municipal corporations 🔑1, 54

The legal status of a "municipal corporation" is not akin to that of a "county" as a county is a "governmental agency" or "political subdivision" of the state organized for the purposes of exercising some functions of state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government and is a distinct "entity" and not a connected "political subdivision" of the state. Const. art. 11, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "County", "Entity", "Governmental Agency", "Municipal Corporation", and "Political Subdivision".

2. Municipal corporations 🔑1016

Under charter provision granting city of Los Angeles power to sue and be sued, subject only to restrictions that no suit may be brought on claim for money or damages unless demand be first presented, the city could be sued under statute authorizing actions for declaratory relief as against claim that status of city was akin to that of a county which would enjoy immunity from such a suit. Code Civ.Proc. § 1060.

3. Municipal corporations 🔑121

When a city zoning ordinance establishing a residential district and permitting use of premises for specified purposes but prohibiting use for other specified purposes is under attack, court need not consider the validity of the ordinance as a whole, but may direct the attack to the reasonableness of the enforcement of the ordinance against the particular property involved.

4. Constitutional law 🔑225(1)

Owner of property zoned for residential purposes was not denied "equal protection of the law" by act of city in granting zoning variances to other property owners in same district and denying variance to him, notwithstanding that the residential zone depreciated the value of his property.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

5. Municipal corporations 🔑621

Where a zoning ordinance authorizes an administrative board to grant a variance upon such terms and conditions as the board may deem proper, a refusal to grant such a variance will not be disturbed by the court in the absence of a clear and convincing showing of an abuse of the discretion vested in such board.

6. Automobiles 🔑395

On application of owner of property zoned for residential purposes for a variance to permit erection of a gasoline service station thereon, where the evidence as to the advisability of the granting of a zoning variance was in conflict the determination of the administrative board given power to grant zoning variances denying the variance was conclusive.

7. Municipal corporations 🔑601

It is not necessary in order to sustain an ordinance zoning property for residential purposes to show that the public welfare demands the exclusion of business uses for each individual lot in the area zoned.

8. Automobiles 🔑395

Where it appeared from the evidence that the erection of a gasoline service station on property zoned for residential purposes would not be in the best interest of the district, the refusal of the city to grant a zoning variance was not an unreasonable exercise of its "police power".

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

9. Municipal corporations ⚷601

Unless the application of a zoning ordinance is clearly oppressive, it will be deemed to be a proper exercise of the "police power" even though a court may differ from the determination of the zoning authorities.

10. Municipal corporations ⚷122(4)

In action for declaratory relief as respects the application of a residential zoning ordinance of the city of Los Angeles to plaintiff's property and the refusal of the city to grant plaintiff a variance to permit plaintiff to erect gasoline service station on such property, the reasonable value of which had depreciated by the construction of a major traffic artery, evidence sustained judgment in favor of city on ground that erection of such service stations would be detrimental to other property in the district.

11. Municipal corporations ⚷601

If there is a reasonable basis for the belief that a restriction of the use of property to residence purposes has a substantial relation to the public health, safety, morals, or welfare, a zoning ordinance or its administration to accomplish that purpose must be upheld.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge Assigned.

Action by Helen S. Otis and others against the City of Los Angeles and others for declaratory relief as respects the enforcement of a zoning ordinance which prevented the erection of a gasoline service station on plaintiff's property. From a judgment for the defendant and from an order denying a new trial, plaintiffs appeal.

Affirmed.

Arthur W. Kennedy and Saul S. Klein, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., and Frederick von Schrader, Asst. City Atty., both of Los Angeles, for respondents.

WHITE, Justice.

This action was instituted by plaintiffs for declaratory relief in connection with the enforcement of certain provisions of a zoning ordinance of defendant city as it related to property owned by plaintiffs in said city.

Plaintiffs, who are mother and daughter, own certain real property at the southeast corner of Whitley Terrace and Cahuenga Boulevard in the city of Los Angeles, upon which they maintained their home for more than thirty years. Before the acquisition of this property by plaintiffs and the erection of their home thereon, Cahuenga Boulevard was a narrow, dusty road, used considerably by farmers bringing their produce to the city. Whitley Terrace was a narrow street of adobe houses, ruts, and no traffic. About the year 1914 Cahuenga Boulevard was improved with oil and gravel, and as the years went by traffic increased because the pass had been slightly improved in grade. With the growth of population and activity in Los Angeles through the years the traffic increased to a great extent. The erection of Hollywood Bowl, with a seating capacity of about thirty thousand people, and the Pilgrimage Play Amphitheater about two blocks from plaintiffs' property, created an increasingly heavy traffic condition. About the year 1927 the citizens in the Hollywood district proposed what is commonly known as the "Five-Fingered Traffic Plan" for the district. This plan involved five separate traffic lanes converging in the vicinity of plaintiffs' property similarly to the fingers on the hand. In connection with the "Five-Fingered Traffic Plan" an underpass of concrete was built to take the flow of automobile traffic from the north going east on Cahuenga Boulevard. This underpass is several hundred feet from plaintiffs' property and was completed for use about a year prior to the commencement of this litigation. The completion of this plan and the use of the underpass materially increased the traffic. There is testimony in the record that the noise, fumes and constant roar of automobiles using the underpass make plaintiffs' property unsuitable for residential income or for use as a residence. There is also uncontradicted testimony that sixty per cent of the property in the district is now vacant. The taxes on plaintiffs' property amount to approximately $750 per year. Due to the changed conditions in the district by reason of traffic improvements, there are no parking facilities and practically no foot traffic in the neighborhood. It is conceded that Cahuenga Boulevard constitutes one of the main traffic arteries from the Hollywood and Los Angeles districts to the San Fernando Valley area of the city, and as such carries considerable amount of vehicular traffic. In fact, it appears that a traffic count for Cahuenga Boulevard, taken in January, 1938, showed that approximately

32,000 cars passed plaintiffs' property in a twenty-four-hour period, and that from a standpoint of traffic capacity this boulevard is one of the most heavily traveled thoroughfares within the municipality. The report of defendant city's zoning engineer, as it appears in the pleadings, states: "It is only natural that this heavy traffic flow would have a tendency to detract from the desirability of the abutting property for residence purposes. By the same token, however, this heavy traffic is such as to interfere with the conduct of the ordinary types of business uses which might be established along the street frontage."

There are in effect in the city of Los Angeles certain zoning ordinances (Los Angeles Municipal Code [Ord. No. 77,000], ch. 1, art. 2, as amended), providing for ten classes or districts known as zone R-1, etc., and including zone R-4, in which last mentioned zone a large part of the property fronting on Cahuenga Boulevard, including that belonging to plaintiffs, was placed. The ordinance with which we are here concerned restricts the use of property in zone R-4 to residence buildings and provides that no buildings or improvements other than such residence building shall be erected or made therein, and a penalty is provided for violation thereof. Section 15.12 of the ordinance also provides:

"Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of this article, the Board" (board of city planning commissioners) "upon its own motion, or upon verified petition of any property owner filed with the Board, stating fully the grounds of the petition and all facts relied upon by the petitioner, shall have the power to grant upon such terms and conditions as the Board may deem proper, variances from the rules, regulations or provisions contained therein, in harmony with their general purpose and intent and so that the spirit of the Article shall be observed, public safety and welfare secured and substantial justice done. Every such action or decision of the Board authorizing a variation of the application of the regulation herein established must be by resolution of the Board setting forth the written finding of facts required by the following subsection, and must be duly entered in the minutes of the Board.

"(b) In order to justify a variance under the provisions of this section, the three following qualifications must be shown relative to the property or particular use involved in the application for such variance; and the Board's resolution of approval in connection with any such applications must contain a written finding of facts showing wherein the property or particular use involved meets the three following qualifications:

"(1) That there are exceptional or extraordinary circumstances or conditions applicable to the property or buildings involved or the intended use thereof that do not apply generally to the property or class of buildings and uses in the same district or zone and which produce practical difficulties or unnecessary hardships in the way of adhering to the strict letter of this Article.

"(2) That such variance is necessary for the preservation and enjoyment of a substantial property right of the petitioner such as that enjoyed by adjacent owners in the same district and zone; and

"(3) That the granting of such variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the zone or district in which the property is located. * * *"

In conformity with the section of the ordinance just mentioned, plaintiffs filed their application for a zone variance from R-4 use which would permit the erection of a building on part of their property consisting of 94 feet frontage on Cahuenga Boulevard by 80 feet in depth, for the purpose of conducting therein a super-service gasoline station and the business incidental thereto. In their petition to the board plaintiffs alleged that the conduct of said business would in no way interfere with the traffic for the reason that all cars entering into said proposed station would enter from the west-flowing traffic, making a right hand turn into the station and a right hand turn out of the station, flowing into east and south bound traffic; that the use of said property for a gasoline service station would not be detrimental to the public welfare or inimical to other property or improvements in the same zone; that the district in which said property is located has materially changed, and if plaintiffs are not permitted to use the property for other than residence purposes they will be deprived of a substantial property right. Plaintiffs' petition was denied by the board, and thereafter an appeal was taken to the council of the city of Los Angeles, as provided by the ordinance, and the last named tribunal denied such appeal. Thereafter plaintiffs presented their proposed plans and specifications to the defendant department of building and safety, making application for a permit to erect a structure to permit plaintiffs to use their property for business purposes, to wit, a gasoline service station, and this permit was refused. Thereupon this action was filed by plaintiffs. Following trial before the court sitting without a jury, judgment was rendered in favor of defendants. From such judgment and the order denying their motion for a new trial plaintiffs prosecute this appeal.

The trial court found, among other things, that "the establishment, maintenance or operation of a gasoline service station on plaintiffs' real property would seriously interfere with the travel and traffic upon Cahuenga Boulevard and would create a potential traffic hazard thereon." It was further found that plaintiffs' property is improved with a single family residence, which is being used and occupied for that purpose; that such real property is reasonably usable and useful for residence purposes. The court further found: "That plaintiffs' property would be enhanced in value if permitted to be used for the purpose of establishing, maintaining and conducting a gasoline service station thereon, but that plaintiffs are not, and neither of them is, deprived of any property right, and that the establishment, maintenance or conduct of a gasoline service station upon plaintiffs' real property would be materially detrimental and injurious to other property and improvements in the district in which same is situated."

At the trial it was proved that "variances" had been granted as to certain other property adjacent to and in the vicinity of that belonging to plaintiffs. For instance, such variance was granted by defendant city as to the second lot east of the property here in question which permitted the operation and maintenance of a flower stand thereon. Another variance was granted on property between Fairfield and Highland Avenues on the south side of Cahuenga Boulevard; also upon property on the east side of Highland Avenue. These variances, as well as those granted in connection with four other pieces of property zoned as was plaintiffs' property, permitted the use of such property for commercial purposes.

At the trial plaintiffs introduced evidence that their property was suitable for a gasoline station; that it would not create a traffic hazard were it so used; that their property is not salable under the present zoning conditions; that sixty per cent of the property in the district is vacant because of its unsuitability for residence purposes. Testimony was given by two witnesses engaged for many years in the real estate business to the effect that plaintiffs' property is not suitable for residence purposes nor for income residence purposes. Defendant city introduced two expert witnesses, one of whom, after qualifying as a realtor and appraiser, stated that in his opinion the use of plaintiffs' property as a gasoline station would be very detrimental to the property and homes in the district and particularly to the residence property adjoining. This witness resides about four hundred feet from the property here in question. Another witness, L. F. Brinkman, zoning manager for the department of city planning of Los Angeles, in which capacity he had been employed for seventeen years, stated that he made a survey of the district in which plaintiffs' property is situate, and that in his opinion the establishment and maintenance of a gasoline service station would be detrimental to the adjoining property and improvements; that it would be hazardous to traffic on Cahuenga Boulevard for the reason that it is in close proximity to the south exit of Hollywood Speedway. In a further statement of his reasons for the opinion given by him that the use of plaintiffs' property as a gasoline station would be detrimental to the properties in the neighborhood, this witness testified, "Because this property is part of a large residential district which is located southerly and westerly of Cahuenga Boulevard, and up to the present time, other than the business uses already established at the intersection of Highland and Cahuenga, there have been no other business encroachments in that area, until you get further south on Cahuenga Boulevard, where there is a business zone."

[1, 2] We shall first give consideration to respondents' claim that actions such as this, for declaratory relief, cannot be maintained against municipal corporations. It is true that in the cases of Bayshore Sani-

tary District v. San Mateo County, 48 Cal. App.2d 337, 119 P.2d 752, and Irvine v. Sacramento, etc., Drainage District, 49 Cal. App.2d 707, 122 P.2d 320, it was held that section 1060 of the Code of Civil Procedure, relating to actions for declaratory relief, does not authorize the bringing of such an action against the state or its political subdivisions; but respondents' contention that the legal status of a municipal corporation is akin to that of a county cannot be sustained either upon reason or authority. As was tersely stated in County of San Mateo v. Coburn, 130 Cal. 631, 636, 63 P. 78, 80, 621, "A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government." And again, section 1 of article XI of our state Constitution provides, "The several counties, as they now exist, are hereby recognized as legal subdivisions of this State." It is the free consent of the persons composing them that brings into existence municipal corporations, and they are used for the promotion of their own local and private advantage and convenience, while it is the sovereign will which brings into being counties as local subdivisions of the state; and the establishment of such political subdivisions of the state is accomplished without the solicitation, consent or concurrent action of the people residing within them. Cities, therefore, are distinct individual entities, and are not connected political subdivisions of the state. As a matter of fact, municipalities, and particularly charter cities, are in a sense independent political organizations and do not pretend to exercise any functions of the state. They exist in the main for the purposes of local government. Subject only to the restriction that no suit shall be brought on any claim for money or damages against the city of Los Angeles until a demand for the same has been presented, the charter of said city provides for the right and power of the municipality to sue and be sued. The action with which we are here concerned cannot be classed as a claim for money or damages against the city, and by reason of what we have herein said we are persuaded that the municipality enjoys no dispensation from being sued under section 1060 of the Code of Civil Procedure in an action for declaratory relief.

[3] In considering the instant case, we may assume that the zoning ordinance in question is valid, generally speaking, so far as its intended purposes are concerned, and the question presented to us is whether the application of the ordinance to appellants' property is unreasonable, arbitrary and discriminatory. In Hagenburger v. City of Los Angeles, 51 Cal.App.2d 161, 124 P.2d 345, 346, the court, speaking through Mr. Presiding Justice Nourse, said, "When a zoning ordinance of this type is under attack it is not necessary for the court to consider the validity of the ordinance as a whole, but it may direct the attack to the reasonableness of the enforcement of the ordinance against the particular property involved."

The trial court based its findings and conclusion that the enforcement of this ordinance against appellants' property was not unreasonable, upon evidence that the establishment, maintenance, conduct and operation of a gasoline station upon such property would seriously interfere with the traffic and travel upon Cahuenga Boulevard and would create a potential traffic hazard thereon; that appellants' property is improved with a single family residence; is being used and occupied for that purpose, and is reasonably usable and useful for such purpose. Further, that while the establishment and operation of a gasoline station upon appellants' property would enhance the value thereof, such use of the property would prove in a material way detrimental and injurious to other property and improvements in the district where it is situated.

[4-7] Even though we concede that the zoning of appellants' property for residence purposes only depreciated its value, that fact is not of controlling significance. As was said in Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, 394, "Every exercise of the police power is apt to affect adversely the property interest of somebody." It was not a denial of plaintiffs' constitutional right to the equal protection of the laws for the city of Los Angeles to discriminate against plaintiffs by granting variances to some property owners and refusing a variance grant to plaintiffs in the same district. The zoning ordinance here in question, like most such ordinances, contains provisions under which

an owner may apply to an administrative board for permission to put his land to a non-conforming use. Such procedure has been devised and approved as a means of minimizing the admitted evils of "spot zoning" by amendment of the ordinance. When special conditions arise which give force to the claim that unnecessary hardship would ensue from a literal enforcement of the restrictive features of the ordinance, relief is afforded by the granting of a variance. But the granting or refusal of such variance rests largely in the discretion of the administrative body charged with enforcement of the ordinance. Where, as in the instant case, the ordinance authorizes the board to grant a variance "upon such terms and conditions as the board may deem proper," a refusal to grant such a variance will not be disturbed by the courts in the absence of a clear and convincing showing of an abuse of the discretion vested in such board. Rubin v. Board of Directors, 16 Cal.2d 119, 124, 104 P.2d 1041. Where, as in the case at bar, the evidence is in conflict, thereby indicating that reasonable minds not only might, but in fact do, disagree as to the wisdom and propriety of denying the variance sought by plaintiffs, the determination of the administrative board is conclusive. As was said in this regard by our Supreme Court in Acker v. Baldwin, 18 Cal.2d 341, 115 P.2d 455, 457: "It is now settled beyond question that although a court may differ from the determination of the legislative body, unless a zoning measure is clearly oppressive, it will be deemed to be within the purview of the police power. There will always be difference of opinion as to the means of accomplishing a particular end, but if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, a zoning ordinance to accomplish that purpose will be upheld. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388. * * * Moreover, it is not necessary, in order to sustain such legislation, to show that the public welfare demands the exclusion of business uses for each individual lot in the area zoned. Rehfeld v. San Francisco, 218 Cal. 83, 21 P.2d 419; Jones v. City of Los Angeles, 211 Cal. 304, at page 309, 295 P. 14."

[8, 9] Appellants finally assert that it constituted an unreasonable and unwarranted exercise of the police power of the city to refuse to grant them a variance so that they could make the highest and best use of their property. This contention cannot be upheld. The adaptability and suitability of appellants' property for business purposes is not controlling—the best interest of the entire district is the controlling factor. The mere fact that damage resulted to plaintiffs' property from the application of the ordinance thereto in no way affects the validity of the legislative or administrative board's action. When the exercise of the police power is proper and reasonable, ensuing damage to one's property is one of the prices the individual must pay as a member of society, to the end that the general welfare of the community may be served. Reynolds v. Barrett, 12 Cal.2d 244, 250, 83 P.2d 29.

[10, 11] The findings of the trial court, while based on conflicting evidence, are nevertheless supported by substantial evidence to justify the conclusions arrived at. Unless the application of a zoning ordinance is clearly oppressive, it will be deemed to be a proper exercise of the police power; and this is true even though a court may differ from the determination of the zoning authorities. Just as in the instant case, there will always be a difference of opinion as to the proper means of accomplishing a particular end; but if there be a reasonable basis for the belief that the restriction of the use of the property to residence purposes has a substantial relation to the public health, safety, morals or welfare, the zoning ordinance, or its administration, to accomplish that purpose must be upheld. Nor is it necessary as a basis for sustaining such legislation or the enforcement thereof to show that the public welfare demands the exclusion of business uses as to each individual lot in the area zoned. Rehfeld v. San Francisco, 218 Cal. 83, 21 P.2d 419; Jones v. City of Los Angeles, 211 Cal. 304, 309, 295 P. 14.

The attempted appeal from the order denying plaintiffs' motion for a new trial is dismissed, and for the reasons herein stated the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

MATHER v. MATHER et al.*

Civ. 13266.

District Court of Appeal, Second District, Division 1, California.

June 17, 1942.

Hearing Granted Aug. 13, 1942.

1. Judgment ⚷326

The entry of a final judgment nunc pro tunc to correct separate partial judgments erroneously entered in a single cause of action was unauthorized as constituting an attempt to correct "judicial error" which can only be remedied by motion for new trial, by appeal, or by motion under the statute dealing with the vacation of judgments. Code Civ.Proc. §§ 473, 663.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Error".

2. Appeal and error ⚷78(1)

An order granting entry of judgment nunc pro tunc was an intermediate ruling of the court and not an "appealable order". Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

3. Appeal and error ⚷74

An appeal would not lie from an order denying motion to vacate judgment where the grounds upon which it was sought to vacate the judgment were available on appeal from the judgment, and existed before the entry thereof.

4. Appeal and error ⚷15

Where appeal was taken from a judgment, an attempted appeal from an order denying vacation of the judgment was unauthorized as a repetition of the appeal from the judgment.

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Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by A. W. Mather against Anna Inez Mather and others for rescission of a property settlement agreement between plaintiff and named defendant, wherein Edna Greenfield, as administratrix, etc., and another, filed answer in the nature of an interpleader. From a judgment nunc pro tunc in favor of named defendant, from order granting motion for entry thereof nunc pro tunc, and from an order denying motion to set aside such judgment, and the order granting entry thereof, plaintiff and certain defendants appeal.

Judgment reversed and appeal from order granting motion for entry of final judgment nunc pro tunc and from the order denying motion to set judgment aside dismissed.

For prior opinion, see 124 P.2d 625.

Marcel E. Cerf, Robinson & Leland, of San Francisco, for plaintiff and appellant.

Gavin McNab, Schmulowitz, Akins & Wyman, of San Francisco, for defendants and appellants.

Don Lake and James R. Jaffray, both of Los Angeles, for respondents.

DORAN, Justice.

Plaintiff and certain defendants appeal from a final judgment, from an order granting a motion for entry thereof nunc pro tunc, and from an order denying a motion to set aside the said judgment and the order granting entry thereof. The action was one brought by plaintiff for rescission of a certain property settlement agreement between plaintiff and the defendant Anna Inez Mather, plaintiff's wife at the time. The complaint contained three counts for rescission, the first two based upon fraud and misrepresentation, and the third upon the alleged invalidity of the agreement because of its having been made in the Territory of Hawaii at a time when according to plaintiff's allegations, the laws of that territory did not permit a wife to make a contract with her husband. The other defendants here appealing were joined in the action as administrators of the estate of Louis R. Greenfield deceased, against which it was alleged plaintiff held an approved claim with an unpaid balance of $38,699, together with accrued interest. Part of the property transferred by the aforesaid agreement to the defendant Anna Inez Mather was a one-half interest in this claim. These defendant administrators filed an answer to the complaint herein to the effect that they held on account of the claim in question, and for whom it might concern, the sum of $12,549.60; and that various assignments and notices of assignment had been served upon these defendants affecting the said fund, defendant Anna Inez Mather, also known as Dorothy Devore Mather, being among the claimants to said fund. The defendant administrators then averred in their answer that they were holding the said sum subject to the order and direction of the court, and asked that they might be dismissed with their costs and released from all further liability toward the parties to the action and towards all claimants to the fund. This answer was in the nature of an interpleader. Successive demurrers to the third count of the complaint were sustained; and upon sustaining the fourth such demurrer the court denied plaintiff's request for leave to amend further. Thereafter, and before trial of the other counts, a purported judgment was entered January 4, 1935, upon the order sustaining the demurrer to the third count. On February 7, 1935, plaintiff filed notice of appeal from this purported judgment. The separate appeal from this judgment was dismissed on the ground that such a judgment was not final and hence not appealable. Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174. The action then proceeded to trial upon the first and second counts, findings thereon were made and a judgment entered March 14, 1935, which judgment was based upon the first and second counts of the complaint only. An appeal was taken from this latter judgment, but that appeal was dismissed by the Supreme Court for failure to file a transcript. See Greenfield v. Mather, 14 Cal.2d 228, 231, 93 P.2d 100, 102, wherein it is also stated that at the time of the decision as to the first judgment the appeal from the second judgment had already been dismissed on the grounds above noted. The judgment upon the first and second counts was in favor of respondent Anna Inez Mather and against appellant A. W. Mather. Thereafter, as appears from the opinion in Greenfield v. Mather, supra, the estate of Greenfield commenced an action in interpleader in the Superior Court of the City and County of San Francisco to try the issue as to the respective rights of appellant and respondent to the sum of $12,549.60 above mentioned. In this latter action appellant and respondent joined issue by cross-complaints and answers. The issues thus raised were the same as those in the instant action. In the San Francisco action the trial court concluded that the prior judgment in the instant action was final and appellant's plea in bar to respondent's defense was well taken; and, accordingly the court made findings and rendered judgment directing distribution of the fund in question to respondent Anna Inez Mather and to those defendants claiming under her. Appellant, A. W. Mather, appealed. Greenfield v. Mather, supra, is concerned with the appeal there taken. In Greenfield v. Mather the court held that the judgment in the instant action entered upon the first and second causes of action of the complaint, was, like the judgment previously entered upon demurrer to the third cause of action, only a partial judgment, and that therefore no final judgment had been entered in the instant action which could constitute a bar to raising the same issues in a subsequent action. The Supreme Court there stated: "* * * if both the judgment of January 4th and that of March 14th were partial, each disposing of a fraction of the case, then the prior action [i. e.: the instant action] was still pending, and appellant was at liberty to proceed in that action, or in the present action. * * * He had previously filed a cross-complaint in the present action."

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* Subsequent opinion 134 P.2d 795.

[1] The decision of the Supreme Court in Greenfield v. Mather was handed down August 21, 1939. On December 7, 1939, respondents made a motion in the instant action for entry of a final judgment, nunc pro tunc as of March 14, 1935, which motion was granted; and such a judgment was so entered on December 12, 1939. It is from this judgment that the appeal herein is taken. Appellant contends, among other things, that the entry of the judgment nunc pro tunc was improper in that it constituted an attempt to correct judicial error. In the course of the oral argument upon rehearing of this cause, respondents conceded that the entry of separate, partial judgments in the instant case was a mistake; but respondents plainly indicated by their concession that the entry of such judgments was intentional. This mistake, then, must necessarily be held a judicial error. The Supreme Court in Greenfield v. Mather, supra, appears to have viewed the procedure adopted by the trial court in the instant action as one of judicial error stating: "The erroneous procedure adopted in attempting to make piecemeal disposition of the prior cause was not of appellant's instigation, and he should not be penalized for it. He at no time waived his right to object to the splitting of the action. He contended throughout that he was entitled to test the sufficiency of his third cause of action before an appellate court. To permit a litigant to deprive his adversary of an opportunity for full appeal by erroneously procuring the entry of successive purported partial judgment [sic], and then

having appeals from all save the last of said judgments dismissed on the ground that the cause should not have been split would be unfair."

Since judicial error is virtually conceded, the error is not correctible under Section 473, Code of Civil Procedure, but must be remedied by a motion for a new trial, by appeal, or by a motion under Section 663, Code of Civil Procedure, in the class of cases there specified. 14 Cal.Jur. 1022, and cases cited. Respondents' efforts in procuring entry of a judgment nunc pro tunc in the instant case cannot be placed in any of the foregoing categories. The situation is one in which the trial court did not do something it might have done and should have done, and that it failed to do, not because of clerical error or misprision, but because of error in judgment and as to the applicable law. The subsequent entry by the court of a final judgment nunc pro tunc was "'* * * the attempt by the court, not to correct a clerical misprision, not to supply omitted evidentiary matter, but at a later date to enter a judgment which originally it had never contemplated entering, but which at the time of giving the original judgment it might have caused to be entered.'" Albori v. Sykes, 18 Cal.App.2d 619, 622, 65 P.2d 84, 85. The decision of the Supreme Court in Greenfield v. Mather, supra, holding in effect that no final judgment had ever been entered in the instant action, prior to entry of the judgment nunc pro tunc, does not aid respondents. The fact remains that the trial court, at the instance of respondents, attempted to dispose of the case by two erroneous or imperfect judgments. If the court has rendered an imperfect or improper judgment it has no power to remedy such errors by ordering an amendment nunc pro tunc of a proper judgment. Albori v. Sykes, supra, and authorities there cited. The trial court in the instant case therefore erred in entering the judgment here in question.

It is not necessary to pass upon the other points raised.

[2-4] The order granting entry of judgment nunc pro tunc, being an intermediate ruling of the court, is not appealable. As to the order denying the motion to vacate the judgment, under the settled law of this state an appeal will not lie from such an order if the grounds upon which the moving party sought to have the judgment vacated were available on appeal from the judgment and existed before the entry thereof. Lawson v. Guild, 215 Cal. 378, 381, 10 P.2d 459; Barker v. Ackers, 29 Cal.App.2d 162, 176, 84 P.2d 264. It is obvious that appellants' attempt to appeal from the order denying vacation of the judgment merely constitutes a repetition of their appeal from the judgment. The attempted appeals from the order granting the motion for entry of the final judgment nunc pro tunc and from the order denying the motion to set the said judgment aside are dismissed.

The judgment nunc pro tunc, being void for the reasons above given, is hereby ordered vacated.

YORK, P. J., and WHITE, J., concurred.

52 Cal.App.2d 725

Ex parte SILVERSTEIN.

PEOPLE v. SILVERSTEIN.

Crim. 3569.

District Court of Appeal, Second District,
Division 1, California.

June 16, 1942.

1. Habeas corpus 🔑83

In habeas corpus proceeding for release from sheriff's custody on charge of violating parole from state penitentiary, where the People proceeded with hearing pursuant to statute and stipulated to the facts, petition for writ should be treated as traverse or answer to return, so as to preclude reversal of order discharging petitioner on ground that superior court had no authority to proceed with hearing because no question as to sufficiency of return or documents attached thereto was raised by traverse. Pen. Code, § 1484.

2. Habeas corpus 🔑1

A writ of "habeas corpus" may be resorted to in order to afford review of law question which cannot otherwise be raised or where ordinary procedure would prove inadequate because of importance of issue involved.

See Words and Phrases, Permanent Edition, for all other definitions of "Habeas Corpus".

3. Habeas corpus ⚷23

Where one paroled from state prison challenges right of State Board of Prison Terms and Paroles to retake him while he was also on parole from federal penitentiary, he may resort to habeas corpus for discharge from custody, in absence of any other available procedure to test validity of his incarceration. Pen.Code, §§ 3040, 3056, 3060.

4. Pardon ⚷9

A prisoner on parole is constructively a prisoner of state in legal custody and under control of board of prison directors.

5. Pardon ⚷14

Rules and regulations for conduct of paroled prisoner are rules and regulations of prison.

6. Pardon ⚷9

One placed on parole from state prison to be delivered to federal authorities for prosecution on charge of violating federal laws remained constructively a "state prisoner" until expiration of such parole, subject only to such rights as federal authorities might have and assert in conformity with rule of comity between federal and state sovereignties. Pen.Code, §§ 3040, 3056.

See Words and Phrases, Permanent Edition, for all other definitions of "State Prisoner".

7. Pardon ⚷14

The State Board of Prison Terms and Paroles acted lawfully in retaking one violating terms of his parole from state prison, though he was also on parole from federal penitentiary, in absence of objection by federal government. Pen.Code, §§ 3040, 3056, 3060.

8. Pardon ⚷14

The question of priority of jurisdiction over prisoner on parole from both state and federal penitentiaries is one of "comity" between state and federal sovereignties and not a personal right in prisoner, who cannot complain of federal authorities' implied acquiescence by silence in retaking of his custody by State Board of Prison Terms and Paroles for violation of terms of state parole. Pen.Code, §§ 3040, 3056, 3060.

See Words and Phrases, Permanent Edition, for all other definitions of "Comity".

9. Pardon ⚷14

The United States may waive its right to custody of paroled federal penitentiary prisoner, and such "waiver" may be evidenced by its failure to take some affirmative action or to intervene and its silence when state asserts jurisdiction over prisoner by taking him into custody for violation of terms of parole from state prison. Pen.Code, §§ 3040, 3056, 3060.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

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Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Proceeding by Hyman Silverstein for a writ of habeas corpus to secure his release and discharge from the custody of the Sheriff of Los Angeles County. From an order granting the writ and discharging petitioner, the People appeal.

Reversed, and petitioner remanded to custody.

Earl Warren, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for appellant.

Mark F. Jones, of Los Angeles, for respondent.

WHITE, Justice.

Alleging that he is illegally confined and restrained of his liberty by the sheriff of Los Angeles County, petitioner (hereinafter referred to as respondent), through an application for a writ of habeas corpus filed in the Superior Court of Los Angeles County, seeks to secure his release and discharge. After hearing, the superior court granted the writ of habeas corpus and ordered the respondent discharged from custody. From such order the People prosecute this appeal.

The facts set forth in the petition for the writ are not controverted, and in brief are as follows: On December 18, 1940, the Board of Prison Terms and Paroles of the State of California released respondent from San Quentin prison on parole to the United States authorities, said state parole term to expire on June 18, 1942. Pursuant to such release, respondent was by the said authorities taken before the United States district court in the state of Louisiana, where, on January 17, 1941, he was sentenced to serve a year and a day in the federal penitentiary at Atlanta. On November 6, 1941, respondent was paroled from the federal penitentiary, to remain upon such parole until January 17, 1942. On January 15, 1942, two days before the expiration of his federal parole, the Board of Prison Terms and Paroles of the State of California caused respondent to be arrested and confined in the county jail for an alleged violation of the rules of the state Board of Prison Terms and Paroles, which violations occurred while respondent was under federal as well as state parole.

The sheriff's return to the writ of habeas corpus shows that respondent was delivered into custody by a state parole officer on a charge of violation of parole. The return further alleged that while respondent was on parole he violated the terms thereof in the manner and form as charged in the order of the Board of Prison Terms and Paroles revoking his parole and ordering his return to the state prison. The reasons advanced by the state Board of Prison Terms and Paroles for the revocation of respondent's parole and upon which the order for his arrest and return to prison was predicated are:

"1. That the respondent left Kern County on January 6, 1942, and came to Los Angeles County without the permission of his supervising officer.

"2. On January 15, 1942, he operated a motor vehicle in the City of Los Angeles in violation of Rule 2 of his Ticket of Leave.

"3. On January 16, 1942, he violated Rule 6 of his Ticket of Leave by visiting his former wife, in direct violation of a court order."

At the hearing on the habeas corpus proceeding in the superior court, the factual situation hereinbefore narrated was stipulated to, as was the further fact that under the terms and conditions of respondent's parole from the federal penitentiary, he was permitted "to go anywhere he wanted in the Southern District of California while he was still amenable to the Federal authorities and keeping in touch with the Federal probation officer."

[1] Appellant first contends that issue was not joined, and that by reason thereof the court was without authority to proceed under section 1484 of the Penal Code to hear such proof as might be presented to justify or invalidate the imprisonment and detention of respondent. This claim is grounded upon the fact that the return to the writ sets out in haec verba the reasons for revoking respondent's parole, together with the warrant issued for his arrest, and that no question was raised by traverse on the part of respondent as to the sufficiency of the sheriff's return or any of the documents attached thereto. In this contention appellant cannot be sustained. We are persuaded to hold that in view of the conduct of appellant in the lower court in proceeding with the hearing pursuant to section 1484 of the Penal Code and stipulating to the facts of the case, the petition should be treated as a traverse or answer to the return—a course that has frequently been followed in the courts of this state. In re Collins, 151 Cal. 340, 342, 343, 90 P. 827, 91 P. 397, 129 Am.St.Rep. 122.

[2, 3] It is next contended by appellant that because, pursuant to the provisions of section 3060 of the Penal Code, the Board of Prison Terms and Paroles of this state possessed full power to retake a prisoner on parole, and because the sheriff's return set forth what on its face was a properly executed and valid order of the board for the arrest of respondent, the court was bereft of jurisdiction to order his discharge on habeas corpus. It has been held that habeas corpus may be utilized to test the procedure in a petitioner's trial even though the trial court has jurisdiction to try him. Ex parte Bell, 19 Cal.2d 488, 493, 122 P.2d 22. The same writ may be resorted to in order to afford a review of a question of law that cannot otherwise be raised, or where because of the importance of the issue involved, ordinary procedure would prove inadequate. Ex parte Bell, supra, 19 Cal.2d page 494, 122 P.2d 22. So in the instant case, we are disposed to hold that where petitioner challenged the right of the state Board of Prison Terms and Paroles to retake him while he was on parole from the federal authorities, and where he was without recourse to any other procedure to test the validity of his incarceration, he could resort to habeas corpus. The reason for the liberality of this rule is thus tersely

and effectively stated by Chief Justice Hughes in Bowen v. Johnston, 306 U.S. 19, 26, 27, 59 S.Ct. 442, 446, 83 L.Ed. 455: "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. * * * the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."

[4-7] We come now to a consideration of the main and final question involved in this appeal, viz., the authority of the state Board of Prison Terms and Paroles to revoke respondent's parole and return him to prison notwithstanding that he was at the same time on parole from a federal penitentiary. It is the law that a prisoner on parole is constructively a prisoner of the state in the legal custody and under the control of the board of prison directors. In re Heckman, 90 Cal.App. 700, 266 P. 585. In fact, it has been held that rules and regulations for the conduct of a paroled prisoner are rules and regulations of the prison. Matter of Stanton, 169 Cal. 607, 147 P. 264. Even though respondent was placed on parole to be delivered to the federal authorities for prosecution on a charge of violating the laws of the United States, he was nevertheless, so far as he was concerned, constructively a prisoner of the state of California until the expiration of his parole on June 18, 1942, subject only to such rights as the federal authorities might have and assert in conformity with the rule of comity existing between the federal and state sovereignties. Section 3040 of the Penal Code empowers the state Board of Prison Terms and Paroles to allow prisoners imprisoned in the state prison to go upon parole outside the prison walls and enclosures, while section 3056 of the same code places such parolees under the legal custody of the board and makes them subject at any time to be taken back within the enclosure of the prison. It therefore follows that in retaking respondent the board acted within its legal rights.

[8, 9] There can be no doubt but that at the time respondent was retaken by the California prison board he was under the jurisdiction of the federal authorities, subject to their orders under the federal parole statutes; but only the federal authorities were entitled to complain if in their judgment the action of the California prison board amounted to an interference with the federal jurisdiction and constituted a violation of the rule of comity between the federal and state jurisdictions. The fact that respondent was subject to the terms of his federal parole does not exempt him from being retaken by the California prison authorities where no objection to such procedure is made by the federal government. The question of priority of jurisdiction is one of comity between the respective sovereignties, and is not one of personal right in respondent. United States v. Marrin, D.C., 227 F. 314. That the federal authorities did not urge their control over respondent under his federal parole, but by their silence impliedly at least acquiesced in the action taken by the state Board of Prison Terms and Paroles, is not a matter about which the parolee can complain. The United States could waive its right to the custody of the prisoner (Cato v. Smith, 9 Cir., 104 F.2d 885), and such waiver may be evidenced, as in the instant case, by a failure to take some affirmative action or intervention, and by standing mute in the face of asserted jurisdiction by another sovereign. Where a person has violated the laws of two different sovereignties, it is for such interested sovereigns, and not the criminal, to settle which shall inflict the punishment, and by the same token, where a prisoner is on parole from two sovereigns, it is for the latter, and not the prisoner, to determine priority of jurisdiction over him in connection with such paroles. United States v. Farrell, 8 Cir., 87 F.2d 957.

For the foregoing reasons, the order of the superior court discharging respondent on habeas corpus is reversed, and he is remanded to custody.

YORK, P. J., concurred.

52 Cal.App.2d 597

TURNBULL v. WILHELM.

Civ. 13180.

District Court of Appeal, Second District, Division 1, California.

June 10, 1942.

1. Contracts 🔑108(2)

Where stockholders of bankrupt corporation wrote bankruptcy referee requesting advice, referee advised attorney to arrange with auditor to answer stockholders' inquiries, such suggestion was carried out, and auditor and attorney agreed that after payment of expenses from fund collected from stockholders remainder should be divided equally between auditor and attorney as compensation for services in effecting reorganization, the agreement was not contrary to "public policy" and did not violate state bar rules. St.1939, p. 355, §§ 6076, 6077.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Contracts 🔑350(1)

Where attorney and an auditor agreed that after payment of all expenses from fund collected from stockholders for effecting reorganization of bankrupt corporation remainder should be equally divided between attorney and auditor for services rendered, in attorney's action against auditor to recover on agreement, evidence justified judgment directing payment out of moneys that might be due or unpaid to auditor on account of the reorganization services.

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Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action to recover money by Rupert B. Turnbull against R. L. Wilhelm. From the judgment for plaintiff and from an order denying motion for new trial, defendant appeals.

Appeal from order denying new trial dismissed and judgment affirmed.

Stephenson, Gingery & Rowe, of Los Angeles, for appellant.

Rupert B. Turnbull, in pro. per., of Los Angeles, for respondent.

WHITE, Justice.

This action was brought to recover a certain sum of money allegedly due plaintiff from defendant. The cause of action embraced two counts. The first count sought a recovery of $2,871 claimed to have been "had and received for the use and benefit" of plaintiff by defendant. The second count was to recover the same amount, which it was charged defendant had "promised and agreed to pay" to plaintiff. The cause was tried before the court sitting without a jury, and resulted in a judgment for plaintiff on count two, while the allegations contained in count one were determined to be untrue. This appeal is by defendant from the judgment and the order denying his motion for a new trial.

So far as the factual situation forming the background of this litigation is concerned, we find in the record substantial evidence that there was pending in the federal court, before the Honorable Samuel W. McNabb, referee in bankruptcy, a certain bankruptcy proceeding entitled "International Cinema, Inc., a corporation, Bankrupt." A prior reorganization proceeding under section 77B of the Bankruptcy Act, 11 U.S.C.A. § 207 had failed, and bankruptcy adjudication ensued. Referee McNabb sent for the respondent, who was an attorney at law practicing his profession in Los Angeles and who had theretofore been a referee in bankruptcy in the Southern District of California. When in response to the invitation of the referee, respondent called upon him, the latter stated that he had a peculiar situation in the aforesaid case pending before him; that there was a modern film plant in Los Angeles which had been built at a cost in excess of $200,000 contributed by the stockholders thereof; that certain stockholders had written him many letters asking if there were not some method by which they could, at least in part, salvage their investment. Referee McNabb stated to respondent that he could not answer the letters because he was acting as a judge in the matter, which precluded him from giving legal advice or offering an opinion on legal matters. He suggested to respondent that the latter get in touch with the stockholders and do something about the matter. Respondent told Referee McNabb that he did not wish to be in the position of soliciting business as an attorney, whereupon the referee advised him to get in touch with appellant, Wilhelm, who was an auditor, and had theretofore engaged in such reorganization work, and to arrange with Wilhelm to answer the letters of the inquiring stockholders.

In August, 1938, respondent sent word to appellant that he desired to see him. Pursuant to this invitation, appellant came to respondent's office, at which time respondent detailed to appellant his previous conversations with Referee McNabb, after which it was agreed between them that appellant should read the letters written by the stockholders to the referee and attempt to effect a reorganization plan with such stockholders, appellant to handle the auditing, bookkeeping and technical work, and respondent to take care of such legal work as might arise. Thereupon respondent advanced Wilhelm twenty-five dollars to obtain a permit from the commissioner of corporations of this state which would allow Wilhelm to contact the stockholders for the purpose of effecting a reorganization plan. Upon obtaining the permit, appellant went to San Francisco where the majority of the stockholders resided, and contacted a number of them. As a result, a stockholders' protective association was formed, with a governing committee of three of the majority stockholders. At appellant's request, respondent then went to San Francisco and appeared before this committee. After making an investigation of respondent, and being satisfied of his ability to handle the legal aspects of the reorganization plan, the committee employed him as an attorney to obtain a continuance of the bankruptcy sale and to work out a plan by which the property might be salvaged and turned back to the stockholders as an operating concern. The stockholders' committee sent a notice of this action to the various stockholders, advising of the plan, which was to organize a new corporation called Cinema Laboratories, Inc., composed of the California stockholders of the bankrupt International Cinema, Inc., and to buy up the assets of the bankrupt company.

Pursuant to this plan, the Commissioner of Corporations of the State of California issued his permit, dated December 30, 1938, which in part reads: "* * * applicant proposes to sell and issue an aggregate of not to exceed 300,000 shares of applicant's common stock to the stockholders of International Cinema, Inc., at 30 cents per share, for cash, of which 5 cents thereof is to be paid for expenses, legal fees and remuneration to R. L. Wilhelm to complete the formation of said corporation and turning over of the business and assets of International Cinema, Inc. * * *" The permit then proceeds to grant such authority to the applicant, Cinema Laboratories, Inc. The commissioner subsequently authorized the issuance of 60,000 shares of preferred stock of the new California corporation. Under the amended plan, certain of the larger creditors of the bankrupt corporation sold their claims, receiving in payment therefor the preferred stock of the new corporation, and in addition were paid thirty cents on the dollar in cash. In this manner the new corporation, through appellant, R. L. Wilhelm, as fiscal agent, acquired in excess of ninety-eight per cent of the creditors' claims against the bankrupt corporation and was thereby enabled to purchase the assets of such bankrupt corporation. These assets were then delivered by appellant to the new California corporation, Cinema Laboratories, Inc., and that corporation was then in possession of assets controlled entirely and operated by the officers and board of directors which the old stockholders of International Cinema, Inc., participating in the new corporation, then elected. In this manner the result originally intended was accomplished, that is to say, the payment of the creditors of International Cinema, Inc., and the salvaging of the equity of the bankrupt corporation for its investors.

At a meeting of the stockholders of the defunct corporation who were to become stockholders of the new Cinema Laboratories, Inc., attended by appellant and respondent, it was agreed that each stockholder was to deposit five cents for each share of stock received by him in the reorganized corporation, and if the proposed plan of reorganization went through there would be an additional assessment of twenty-five cents per share upon each stockholder, the proceeds of which were to be deposited in escrow, and in the event appellant and respondent were successful in buying from the bankruptcy trustee the plant of the International Cinema, Inc., and all of its tangible assets and possessions and delivering the same to the new company, the trust fund of thirty cents per share was to be utilized to compensate respondent for his services as attorney for the reorganization committee and appellant for his services in handling the business end of the negotiations in connection with the activities and objectives of the reorganization committee. Neither appellant nor respondent had any agreement with the stockholders' protective committee in regard to their respective compensation other than that it was to come out of the so-called "nickel fund" and that neither appellant nor respondent was to demand any compensation from any source other than the last named fund.

There is a sharp difference in the contentions of appellant and respondent as to the terms of their agreement in connection with the payment of their respective compensation from the said fund. Appellant contends that he was to receive one-half of such funds so collected from such stockholders as his own fees for acting as promoter and organizer; that out of the other half he was to pay all expenses, and from the balance he was to compensate respondent for his fees as attorney for the stockholders. On the other hand, respondent contends that the agreement between him and appellant was that all expenses should be deducted from the total of this fund collected from the stockholders; that after the payment of such expenses the remainder should be divided equally between respondent and appellant. The trial court resolved this conflict in favor of respondent's contention.

[1] In urging a reversal of the judgment herein, appellant first asserts that the agreement between himself and respondent upon which the latter seeks to recover is contra bonos mores, against public policy, illegal, void, and therefore unenforceable. In support of this argument appellant contends that pursuant to the provisions of the State Bar Act of California (now chapter 4 of the Business and Professions Code St.1939, p. 347 et seq.), the board of governors of the State Bar, with the approval of the Supreme Court, is empowered to formulate and enforce rules of professional conduct for all members of the State Bar (Business & Professions Code, § 6076); that when such rules of professional conduct are adopted and approved as aforesaid, they are binding upon the lawyers of the state, and wilful violation thereof may be punished by suspension of the right to practice law. Business & Professions Code, § 6077. We are then referred by appellant to certain rules adopted by the State Bar, approved by the Supreme Court, and allegedly breached by respondent. In that connection, it is contended that respondent's conduct was contrary to the provisions of rule 3, which inhibits an attorney from employing another to solicit or obtain professional employment for him and from sharing with an unlicensed person any compensation arising out of or incidental to any professional employment. It is further urged that respondent's conduct was in violation of rule 10 of the State Bar, which forecloses a member thereof from advising the commencement, prosecution or defense of a case unless he has been consulted in reference thereto, except where his relation to a party or subject matter is such as to make it proper for him to do so.

Assuming, as contended by appellant, but not so deciding, that these rules of professional conduct are binding upon all members of the State Bar because they are rules of court, and that such rules of professional conduct represent the ideas and attitude of the legal profession as a whole as to what conduct of an attorney is against public policy, nevertheless we find in the record before us no warrant for the assumption or conclusion that respondent's conduct was either violative of the rules in question or in any manner contrary to the public policy of this state. Respondent's initial connection with the bankruptcy proceeding which resulted in the reorganization plan toward which he contributed his legal services was occasioned not by any act of appellant, but arose by reason of the suggestion made by the referee in bankruptcy to respondent that the latter contact appellant with reference to aiding the stockholders of the corporation then harassed with financial difficulties in the bankruptcy court to salvage as much as they could of their investment. While it is true respondent advised the reorganization plan to Mr. Wilhelm at the suggestion of the referee and further recommended it to the stockholders at the meetings in San Francisco, he was nevertheless consulted in reference thereto by stockholders of the corporation, and in fact was called to San Francisco to appear before them for the very purpose of discussing his employment by them to handle the legal aspects of the problems confronting them. The fact that this invitation from the stockholders was transmitted to respondent through appellant does not alter the situation.

There is no merit whatever in appellant's contention that respondent's conduct violated the aforesaid rule 3, which prohibits the payment of compensation or the splitting of fees with an unlicensed person who procures the lawyer's employment. Respondent distinctly and unequivocally advised appellant, "I am not splitting fees with you," and that the respective fees agreed upon by appellant and respondent with the stockholders were to be paid to them separately and individually out of what was referred to as the "nickel fund." Furthermore, appellant and respondent each had their separate work to do, and each was to receive one-half of the net accumulation of the "nickel fund." The portion of such fund that came to appellant did not arise out of any fees claimed or received by respondent. Appellant received that money for services as an auditor and organizer which he was to render to the stockholders. The evidence in this case clearly justifies the finding of the trial court that there was no evidence whatever to sustain appellant's contention that the agreement entered into by respondent was against public policy, while the evidence amply supports the finding that "the agreement between the plaintiff and the defendant was one by which a measure of the compensation to be paid to the plaintiff was fixed and that the same was not contrary to public policy, improper, illegal, or unethical."

[2] Appellant's next contention is that the action was prematurely instituted by respondent, in that at the time of the commencement thereof respondent had been paid all moneys due him up to that time. This contention is apparently grounded upon the claim that at the time the action was commenced appellant had not received all the moneys payable to him from the "nickel fund," and therefore under his agreement to pay respondent one-half of the net amount received by him, he could not be sued for the money collected but not delivered to him. This claim is without merit. Cinema Laboratories, Inc., by an instrument in writing consisting of a letter addressed to appellant, and admitted in evidence, conceded an indebtedness to him in the sum of $4,022.30. The record further shows that thereafter payment of the last-mentioned amount less certain claimed deductions was offered to appellant. During the course of negotiations between appellant and Cinema Laboratories, Inc., looking toward a settlement of their differences, the former agreed to accept from the latter the net sum of $2,775, with the proviso, however, that "It is a further provision of this offer to settle, that no one affiliated with, connected with or representing Cinema Laboratories or the Pathe Corporation shall discuss with or advise the said Rupert B. Turnbull of these negotiations or the outcome thereof. In the event such information is procured by Turnbull from any of the above mentioned sources, this offer is withdrawn forthwith." The apparent reason for the language just quoted from the letter in question is supplied by other parts of the communication, which indicate that at the time it was written appellant was seeking to compromise with respondent on the amount of money due the latter from the former. The court was warranted in concluding from the foregoing letter that appellant tried to collect the money unknown to respondent, thereby indicating a breach of good faith on appellant's part. A further and complete answer to appellant's contention is found in the fact that the court did not direct a personal judgment against appellant, but decreed that the judgment was to be paid only out of moneys that might be due or unpaid to appellant by the interested corporations on account of the reorganization services rendered in connection with International Cinema, Inc., and from no other source. The record further shows, and it is undenied, that the judgment herein was in fact satisfied in full by the sheriff from the aforesaid sources as directed by the court in its judgment. We need not concern ourselves with the question raised as to whether or not appellant by his conduct prevented the collection by him of the moneys in question, because the fact remains that the corporations holding the money due appellant conceded the indebtedness due him, and as heretofore stated, the judgment was satisfied therefrom. This was in accord with the agreement entered into by appellant with respondent. The record presented to us justifies the assertion that the judgment of the court was both legal and equitable. Appellant was attempting surreptitiously to acquire for himself certain of the funds out of which the court later directed payment in favor of respondent. The evidence amply supports the conclusion arrived at by the trial court that the amount agreed to be paid to appellant was the sum of $5,742, one-half of which amounted to $2,871, and

that since the filing of the action appellant had paid to respondent $274, leaving a balance due and owing as of March 6, 1939, of $2,597, which with interest to the date of the judgment amounted to the sum of $2,870.

The attempted appeal from the order denying a new trial is dismissed and the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

52 Cal.App.2d 710

MORRIS v. MORRIS.

Civ. 13559.

District Court of Appeal, Second District, Division 1, California.

June 14, 1942.

Hearing Denied Aug. 13, 1942.

1. Divorce ⇨133(3)

In husband's divorce action on ground that wife had deserted husband through persistent refusal to have reasonable matrimonial intercourse when health or physical condition did not make refusal reasonably necessary, evidence was insufficient to corroborate testimony concerning wife's refusal. Civ.Code, §§ 96, 130.

2. Divorce ⇨127(4)

Under statute declaring that no divorce can be granted on the uncorroborated testimony of the parties, there must be evidence in support of cause of action on which divorce was granted in addition to evidence of either or both of the parties, and the testimony of one party cannot be taken in corroboration of that of the other. Civ.Code, § 130.

3. Appeal and error ⇨1011(1)

Even though trial court erred in finding for husband on his uncorroborated cause of action for divorce on ground of desertion, findings against wife's counts for separate maintenance based on conflicting evidence could not be disturbed. Civ.Code, §§ 96, 130; Code Civ.Proc. § 2055.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge pro tem.

Action for divorce by John D. Morris against Wilma H. Morris, wherein defendant filed a cross-complaint for separate maintenance. From an interlocutory judgment of divorce for plaintiff, defendant appeals.

Reversed.

John B. Petermann and George J. Hider, both of Los Angeles, for appellant.

D. A. Boone and James T. Satchell, both of Long Beach, for respondent.

DORAN, Justice.

In an action for divorce the wife appeals from an interlocutory judgment of divorce granted the husband as plaintiff and cross defendant. The husband amended his complaint to conform to the proof offered at the trial, and the interlocutory decree was granted upon the cause of action thus added by amendment, namely, that the wife had deserted the husband through persistent refusal to have reasonable matrimonial intercourse, when health or physical condition did not make such refusal reasonably necessary. Sec. 96, Civil Code. The wife's cross complaint was for separate maintenance based upon separate counts of extreme cruelty, wilful desertion, habitual intemperance and adultery; and upon all of such counts the court found against the wife as cross complainant and in favor of the husband, upon evidence which the record reveals to have been conflicting. The wife, as appellant, contends that the court erred in granting an interlocutory decree in favor of the husband because the testimony of the husband as to the wife's refusal to have reasonable matrimonial intercourse was not corroborated; and further, that the evidence presented upon the causes of action set up in the cross complaint supported the allegations thereof, and that the court erred in making findings contrary thereto.

[1, 2] Appellant in her testimony, given on behalf of respondent under section 2055, Code of Civil Procedure, admitted that she and respondent had not had matrimonial intercourse for a period of nearly two years prior to the filing of the complaint, giving as the reason therefor that respondent was indifferent and was troubled with a nervous ailment or sciatica.

The only evidence in the record which might be classed as corroborative of the state of the matrimonial relationship of appellant and respondent was given by a witness on behalf of respondent, as follows:

"Q. Did you notice whether her attitude was pleasant towards him, or was it otherwise? A. It seemed very normal. Just the same as always.

"Q. How soon after that request was made did you leave? A. I couldn't tell you that.

"Q. Ever have any conversation with Mr. Morris about their relationship? A. No, sir.

"Q. Never spoke to him about it? Never made any comment on it? A. No, sir.

"Q. Then from your observation and your opinion were the Morrisses ideally suited for each other? A. Well, that is a hard question to answer. I didn't think so.

"Q. Have you any opinion on that, have you ever drawn any opinion concerning that? A. Yes, I have.

"Q. Is it your opinion that they are or that they are not? A. Are not what?

"Q. Suited for each other. A. No, I don't think they are.

"Q. What prompts that opinion on your part? A. The fact that I was asked to go to the home of Mrs. Morris the first of August and stay with her.

"Q. That was the first of August of last year or this year? A. 1939. It was my month of vacation and I stayed there off and on during the whole month and then I had to go back to school—stayed there off and on at her request, and Mr. Morris also told me he was very, very glad I came out there to stay, that she needed me. I could not figure out what he meant.

"Q. During that time you did not note any unpleasantness between them? A. No.

"The Court: Did you ever notice any unpleasantness between them? A. I don't know. Mrs. Morris has lots of reserve and she certainly did not raise any fuss, but there were lots of things happened that would have caused her to.

"Q. Never heard any fuss raised then? A. He was not home enough.

"Q. What? A. He wasn't home enough to raise much.

"Q. Who was not home enough? A. Mr. Morris.

"Q. Were you there continuously during that period of time? A. On the first of August I went up and then June decided she needed me to stay—wanted me to stay, and I went down and stored my goods from my apartment, and then I went back up and I stayed off and on until the first of September.

"Q. What I mean is, were you there daily during that period of time? A. We both were at school. I stayed there nights.

"Q. You lived there? A. Yes.

"Q. Did Mr. and Mrs. Morris go out together during that time? A. I can't remember whether it was during that period of time or not.

"Q. Do you recall any occasion during that time when they went out together then? A. No, not definitely. I couldn't say.

"Mr. Satchell: That is all."

All that this testimony reveals is that the witness stayed at the home of the parties for a month, that the witness concluded from the circumstances under which, or the manner in which she was invited to stay at the home of the parties for that period, and from a remark made by the husband, that the parties were not suited to each other. The testimony is hardly sufficient to constitute corroboration of a refusal on the part of the wife to have reasonable matrimonial intercourse, particularly when viewed in the light of authorities upon the subject. See: Ingraham v. Ingraham, 40 Cal.App. 578, 181 P. 234; Lemberger v. Lemberger, 55 Cal.App. 231, 203 P. 786; Ritter v. Ritter, 103 Cal. App. 583, 284 P. 950: "We are not unmindful of the fact that the secrets of the bedchamber are very frequently hard to substantiate by other witnesses than the parties themselves. Nevertheless, the parties to a divorce action are not thereby relieved from the necessity of complying with the mandate of the law." Ingraham v. Ingraham, supra [40 Cal.App. 578, 181 P. 235]. In denying a hearing in the Lemberger case, supra [55 Cal.App. 231, 203 P. 788], the Supreme Court said: "The opinion of the District Court of Appeal appears to assume that in an action for divorce the testimony of one spouse may be accepted as sufficient corroboration of the testimony of the other for the purpose of making a cause of divorce for either. We think this assumption is contrary to the rule laid down in section 130 of the Civil Code. That section declares that no divorce can be granted upon the uncorroborated testimony of the parties. We understand this to mean that there must be evidence in support of the cause of action upon which a divorce is granted, in addition to the evidence of either or both of the parties to the action, and that the testimony of one party cannot be taken in corroboration of that of the other for the purpose of proving a cause of divorce."

Respondent contends that there is circumstantial evidence corroborative of the testimony of the parties. There is, however, a complete absence of any such corroborating circumstances in the record. Respondent also contends that the case of Newman v. Newman, 122 Cal.App. 298, 9 P.2d 894, is most closely applicable to the facts of the instant case. In the Newman case both the husband and wife testified that they had lived separate and apart after the husband left the home nearly two years prior to the trial, and a witness testified that he and the husband lived at the same hotel and that from about a month after the separation down to the time of trial the wife was not living at the hotel with her husband. In the instant case the husband and wife continued to live together under the same roof, and the only testimony touching upon their relations was that of a friend of the wife who had stayed at the home "off and on" for a month. It is readily seen that the testimony given in the instant case does not even remotely approach the evidence in the Newman case. Goucher v. Goucher, 82 Cal.App. 449, 255 P. 892, and Fulton v. Fulton, 220 Cal. 726, 32 P.2d 634, cited by respondent, do not support his contentions. In the Goucher case the court stated that the necessary corroboration of the positive and uncontradicted testimony of both parties had been amply supplied by the numerous circumstances fairly arising from the mass of testimony given by other witnesses in support of the causes urged for a divorce. In the Fulton case it was not the testimony of the defendant which was taken as corroboration of plaintiff's cause for desertion, but the undisputed fact that defendant left plaintiff's house and went out of the state, and, after remaining away for some time, returned the next year to the state but did not return to plaintiff's home; and these facts do not appear from the case to have been established by the testimony of the parties alone.

[3] While the court erred in finding for the respondent husband upon his uncorroborated cause of action on the ground of desertion, the findings against the appellant wife's counts for separate maintenance, based as they are upon conflicting evidence, may not be disturbed.

For the foregoing reasons the interlocutory judgment of divorce is reversed.

YORK, P. J., and WHITE, J., concurred.

52 Cal.App.2d Supp. 841

CALIFORNIA EMPLOYMENT COMMISSION v. BOWDEN et al.

No. 108207.

Appellate Department, Superior Court,
San Diego County, California.
June 12, 1942.

1. Master and servant 🔑78

The fact that administrative difficulties may have influenced Legislature in exempting "agricultural labor" from provisions of Unemployment Insurance Act does not authorize courts or commissions to restrict operation of such general exemption to such classes of farm labor as would be seriously involved in such difficulties if subjected to provisions of act. Gen.Laws 1937, Act 8780d, §§ 7(a), 90.

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

2. Taxation 🔑219

Services performed by citrus grove operators' and managers' employees in tilling soil, pruning, irrigating and spraying *held* "agricultural labor", excepted from term "employment" in Unemployment Insurance Act, so as to exempt such employers from payment of contributions under such act on account of wages paid such employees. Gen.

Laws 1937, Act 8780d, §§ 6.5, 7(a), 40; Gen. Laws Supp.1939, Act 8780d, § 45.

> "Agricultural" means "of or pertaining to agriculture; connected with, or engaged in, tillage", and "agriculture" is defined as "art or science of cultivating the ground, including harvesting of crops and rearing and management of live stock; husbandry; farming"; and in broader sense, the science and art of production of plants and animals useful to man, including to variable extent the preparation of such products for man's use, in which sense, it includes farming, horticulture and forestry, butter and cheese making, sugar making, etc.
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural" and "Agriculture".

3. Statutes 🔑225

Since Unemployment Insurance Act parallels similar provisions of Federal Social Security Act, it should be given similar construction. Gen.Laws 1937 and Gen.Laws Supp.1939, Act 8780d; Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.

4. Master and servant 🔑78

The limitation in third paragraph of Employment Commission's rule providing that "services hereinabove set forth" do not constitute "agricultural labor", excepted from operation of Unemployment Insurance Act, unless performed by employee of owner or tenant of farm on which raw materials were produced, applies only to services described in second paragraph in drying, packaging, transporting and marketing materials produced on farm and not to those described in first paragraph, defining agricultural labor as including all services performed on farm in connection with cultivation of soil, raising and harvesting of crops, etc. Gen. Laws 1937, Act 8780d, §§ 7(a), 90.

5. Master and servant 🔑78

The provision of Unemployment Insurance Act that Employment Commission shall adopt rules and regulations for administration of act does not authorize rule limiting express statutory exemption of "agricultural labor" from operation of act, as such limitation would amount to legislation by commission. Gen.Laws 1937, Act 8780d, §§ 7(a), 90.

6. Officers 🔑103

Administrative bodies having statewide functions are devoid of judicial powers, in absence of constitutional provision therefor.

7. Master and servant 🔑78

The State Employment Commission's rules are valid only in so far as they are in line with terms of Unemployment Insurance Act and are impotent to change clear meaning of such terms. Gen.Laws 1937, Act 8780d, § 90.

◆

Appeal from Municipal Court of San Diego, San Diego County; A. F. Molina, Judge.

Action by the California Employment Commission against H. P. Bowden and another, individually and as copartners doing business as "Bowden Orchard Service," and others, for the amount of delinquent contributions assessed under the Unemployment Insurance Act. Judgment for defendants, and plaintiff appeals.

Affirmed.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., and Maurice P. McCaffrey and Samuel L. Gold, both of Sacramento, for appellant.

von Seggern & Hawkes, of Escondido, for appellees.

James B. Abbey, of San Diego, amicus curiæ.

PER CURIAM.

The Unemployment Insurance Act, Deering General Laws, Act 8780d, originally enacted in 1935 and extensively amended in 1939, Supp.1939, provides a general scheme "For the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum."

It is stated in section 2 that: "The imposition of the tax herein imposed upon California industry alone, without a corresponding tax being imposed upon all industry in the United States, would, by the corresponding penalty upon California industry, defeat the very purposes of this act set forth in section 1. Therefore this act shall take effect only if and when there is enacted legislation by the United States Government providing for a tax upon the payment of wages by employers in this State, against which all or any part of the contributions required by this act may be credited." This section also provides that: "Whenever such legislation enacted by the

United States Government is repealed, amended, affected or otherwise changed in such manner that no portion of the contributions required by this act may be thus credited, then upon the date of such change, the provisions of this act requiring contributions and providing for payment of benefits shall cease to be operative and any assets in the unemployment fund or unemployment administration fund shall in the discretion of the State Treasurer be held in the then existing depositaries or otherwise in the State treasury. In the case of the unemployment administration fund, such moneys may thereafter be dealt with by the State Treasurer pursuant to the conditions of the grant thereof to the State by the United States Government or agency thereof."

The administration of the act is by its terms committed to a body created by it known as the California Employment Commission.

Section 6.5 of the Act provides that: "'Employment,' subject to the other provisions of this act, means service * * * performed for wages or under any contract of hire, written or oral, express or implied."

It is, however, provided in Section 7 (Subdivision "a") that the term "unemployment" does not include "agricultural labor".

The Act establishes in the State Treasury an "unemployment fund" designed to furnish the means necessary to pay benefits to persons coming under its provisions suffering involuntary unemployment, and requires contributions from both employers and employees, the latter to be deducted by the employers from their wages (Section 40) for the maintenance of the fund.

Sections 45 and 45.1 of the Act are as follows:

Section 45. *"Default of employer: Liability for interest: Action for collection.* If an employer fails to make any payment required of him, or fails to pay to the commission the contributions of his workers, in accordance with the provisions of this act and of the rules and regulations adopted by the commission, he shall become additionally liable for interest on such payments at the rate of 1 per cent per month or fraction thereof from and after the date of delinquency until paid. Such employer and worker contributions, interest and the penalties hereinafter provided for shall be collectible by civil action in the name of and by the commission against the defaulting employer, in addition to any other procedures prescribed by this act."

Section 45.1. *"Actions by and against commission: Preference on calendar: Evidentiary effect of certificate.* In any civil action brought by or against the commission, all of the courts of this State shall give preference to such action on their calendar over all civil litigation except equity cases, cases involving extraordinary writs, or summary proceedings. In any such action a certificate attested to by the commission or its duly authorized agent showing the delinquency shall be prima facie evidence of the payment by the employing unit of the amount of wages for employment by employers set forth therein; of the levy of the contributions; of the delinquency; and of the compliance by the commission with all the provisions of this act in relation to the computation and levy of the contributions specified in such certificate."

The California Employment Commission, undertaking to act under Section 90 of the act, has adopted a rule numbered 7.1 as follows:

"Rule 7.1. *Agricultural Labor Defined.*—The term 'Agricultural Labor' includes all services performed:

"(1) By any employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops; the raising, feeding, management of livestock, poultry and bees; which includes, among others, the spraying, pruning, fumigating, fertilizing, irrigating and heating which may be necessary and incident thereto;

"(2) By an employee in connection with the drying, packaging, transporting and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Such services, however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations.

"As used herein the term 'farm' includes, among others, stock, dairy, poultry, fruit and truck farms, plantations, ranches, ranges, orchards and vineyards.

"Forestry and lumbering are not included within the exemption of agricultural labor."

Section 90, when this rule was adopted, so far as applicable, read:

"*Duties and powers of commission.* The commission, in addition to all other duties imposed and powers granted or implied by the provisions of this act:

"(a) Shall adopt and enforce rules and regulations which to it seem necessary and suitable to carry out the provisions of this act.

"(b) Shall make such rules and standards on or before December 1, 1935, and thereafter as needed."

It has since been amended so that subdivision (b) reads as follows: "Shall adopt, amend or rescind regulations for the administration of this act, which shall become effective in the manner and at the time prescribed by the commission. Rules or regulations heretofore adopted shall continue in effect until amended or rescinded in accordance with the procedure prescribed by this section."

The present action was instituted by a complaint filed by the Commission in the Municipal Court wherein it is alleged that the defendants were, at the time involved, employers within the meaning of the act, that as such they made payment of certain wages in the years 1938, 1939 and 1940, on account of which contributions were assessed against them aggregating $308.96 which have become delinquent and resulted in penalties aggregating $6.22, for which sum, less a $10 credit, judgment is sought, together with interest at one per cent per month on the delinquent amounts from the dates of the respective delinquencies as set out in a Schedule attached to the complaint.

The answer denies generally that any such contributions ever became due or delinquent and claims in addition that sundry of the items involved are barred by certain specified provisions of the statutes of limitations.

There appears to be no dispute about the amount of wages paid nor the contributions that have become due and delinquent if payable at all, nor the amount of interest and penalties accrued, if any have accrued at all.

The gist of the controversy turns on the question whether the defendants' employees have been engaged in agricultural labor within the meaning of the exemptions of that type of labor from the provisions of the act.

According to the testimony of one of the defendants: "We operate a citrus grove and also rent agricultural equipment to other growers and ranchers who don't wish to invest in expensive equipment for smaller ranches. We also furnish operators and laborers to these same growers. These men are sometimes under the direction of the grower, sometimes supervised by me. I personally act as foreman or manager on some groves for which services I'm paid a fee."

He also testified that the defendants do discing, plowing and other farm work in the production of crops. Their work is principally tilling the soil, pruning and irrigating in citrus groves and spraying for the control of insect pests. All their work has to do directly with the production of crops.

They do not fumigate. One of the partners has a small laboratory of his own at his home but the employees of the firm do not work there except in rare instances when his son or brother (the other partner) helps him in "field work". The average ranch hand cannot do this sort of thing. Their employees do not pick or pack fruit or engage in trucking or handling the crop. They sometimes pick and haul their own fruit, but do not operate their truck for others nor have any "for hire" permit. Their employees do no processing or marketing of crops. The packing house handles the processing and marketing of the fruit. The partners are engaged in land development, orchard maintenance, agricultural contracting, orchard management, soil analysis or soil surveys, appraisals and moisture control but such services are of an advisory or technical nature and performed by one of the partners only and no employees are involved. Defendants' employees do not handle any of such services or matters. In 1938 the partnership performed no work on its own land but in 1939 twenty-five per cent of the work was performed on its own land and seventy-five per cent on the lands of others; the partners owned in 1939, twenty-four acres of which about twenty-two were in orchard. A considerable part of the work was done by two minor sons of one of the partners.

It was the view of the trial court that the expression "agricultural labor", which is excepted from the term "employment" in Section 7 of the act, is broad enough to include all of the services performed by the employees of the defendants, and that all of the services performed by such employees were "agricultural labor", and thus, the wages paid to such employees were excepted from the terms of the act, whether the services were performed upon a ranch or farm owned or operated by the defendants, or upon some other ranch owned or operated by third parties.

It was also the view of the trial court that the third unnumbered paragraph of the above-quoted rule 7.1 does not apply to paragraph 1 of said rule but only to the kinds of services described in paragraph 2 thereof, but that if such unnumbered third paragraph of the rule were intended to apply to the class of services described in paragraph 1 of the rule, then the rule itself would amount to unauthorized legislation by the Commission, in that it would purport to restrict the meaning of the expression "agricultural labor" as used by the legislature in the act itself, and would be to that extent beyond the powers of the Commission and void.

With all of these conclusions we are in accord.

[1,2] As is said in the brief of the amicus curiae, "the problem presented in this action is one of definition", and the main question is what is meant by "agricultural labor". By "agricultural" according to Webster's New International Dictionary is meant: "Of or pertaining to agriculture; connected with, or engaged in, tillage; as the agricultural class; agricultural implements.

Agriculture is there defined as follows: "Art or science of cultivating the ground, including harvesting of crops and rearing and management of live stock; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use. In this broader sense it includes farming, horticulture and forestry, together with such subjects as butter and cheese making, sugar making, etc."

It is urged in behalf of the Commission "that the business of respondents does not constitute agriculture but instead is of a commercial or industrial nature". Our attention is directed to the obvious fact that the Act is intended to operate in connection with the Federal Social Security Act (Public Law No. 271, 74th Congress, 1935, 42 U.S.C.A. § 301 et seq.) and that the exemption of agricultural labor parallels a similar exemption in the Federal Social Security Act, and it is suggested that the report of the Senate Committee on Finance recommended the exemption on the ground, chiefly of administrative convenience, in that farm labor tends to be transient and migratory, that farms are widely scattered, farmers generally do not keep accurate books, and that their employees are often paid in part in board and lodging so that their wages are not easily ascertainable, and that for all these reasons the enforcement of this type of legislation if applied to ordinary farm labor would be productive of administrative difficulty; but that none of these difficulties in administration have any application to the operations of independent contractors who perform services for various farmers and get their remuneration not from the sale of crops but from a stated compensation for services furnished, and our attention is called to the expression in Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513, 57 S.Ct. 868, 874, 81 L.Ed. 1245, 109 A.L.R. 1327, to the effect that: "Administrative considerations may explain several exemptions. Relatively great expense and inconvenience of collection may justify the exemption from taxation of domestic employers, farmers, and family businesses, not likely to maintain adequate employment records, which are an important aid in the collection and verification of the tax."

Though it be conceded, however, that administrative difficulties may have influenced the Legislature in exempting agricultural labor from the provisions of the act, it does not follow that where, as here, such an exemption has been made in general terms, it may by courts or commissions be restricted in its operation to only those classes of labor on farms and ranches which, if subjected to the provisions of the act, would be seriously involved in such difficulties. To do this would be to confine the expression "agricultural labor" within limits unwarranted by the words themselves. This may not be done. There is nothing in the evidence tending to characterize labor here involved as other than "agricultural" within the meaning of that word as illustrated by the above-quoted definitions. The case of Helmuth v. Industrial Accident Commission, 59 Cal.App. 160, 210 P. 428, 429, is not in point. There an employee was engaged in blasting holes to break up hardpan on land intended to be subsequently used for planting vines and trees. An award by the Industrial Accident Commission of compensation for injuries sustained by him in such blasting was upheld. The court said: "His work was only incidentally, in this instance, connected with the farm. Blasting of holes might as well be done for the planting of telegraph poles, or in mining or building operations and in many other connections. It is not, inherently farm work * * *."

Contrariwise, in the case at bar the work done is inherently farm work and if it is to be excluded from the exemption such exclusion would be based, not on the inherent character of the work, but only on the method of employment.

In United States v. Turner Turpentine Co., 5 Cir., 111 F.2d 400, there was considered the 1939 amendment of the Federal Social Security Act expressly specifying what the term "agricultural labor" as used therein should include, and containing very elaborate definitions.

The court said of these definitions at pages 404, 405 of 111 F.2d: "As to the 1939 amendment of the Social Security Act, we agree with appellees, that it is to be regarded as interpretative and explanatory of the term as it was used in the original act, and that it is itself a binding and final congressional declaration of what was meant by the term 'agricultural labor' as there used. It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor', it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates."

In Kleck v. Wayland, 53 Ariz. 432, 90 P.2d 179; Wayland v. Kleck, Ariz., 112 P.2d 207, 209, it was held that one engaged in clearing and preparing land for planting, digging ditches, and fashioning dams, using farm machinery which employees repaired, and trucks to transport oil and repair parts, though he did his work for various farmers throughout his county and the state, was, with his employees, engaged in "agricultural labor" rather than "commercial" or "manufacturing" activities and hence was not liable for contributions to the Unemployment Compensation Fund. The court inter alia commented upon United States v. Turner Turpentine Co., supra, quoting the language which we have quoted and further said: "What plaintiff's employees were engaged in was largely the clearing and preparation of land for the planting of crops, getting the land in shape or condition, and the planting and sowing of the seed; the digging of ditches and fashioning of earth dams to impound water for watering stock. To do these things the employees operated farm machinery and implements and when these got out of repair they repaired them on the farm or in a shop maintained for that purpose. They used trucks to transport fuel oil, lubricants and repair parts. The plaintiff had a central office and kept books of account on his employees and their occupations. The evidence shows that the plaintiff at times used as many as ten or a dozen tractors in preparing the land and planting the seed, but, whether he used tractors or plows drawn by horses, it was agricultural labor. About the only thing plaintiff did not common among farmers was in the keeping of books of account, and we cannot see wherein that fact changed the character of the labor. What he was doing was not commercial, for he sold nothing. It was not manufacturing, for he made no article out of the raw materials taken from or grown on the farm."

In Chester C. Fosgate Co. v. United States, 5 Cir., 125 F.2d 775, there were involved services rendered by a company in cultivating crops of citrus fruit under contract with landowners, and the services were held under the Federal Social Security Act to be "agricultural labor", rendered in connection with the cultivation of the soil, even though landowners did not directly hire laborers but dealt with the company, which in turn put laborers to work and the company was held to be entitled to recover back social security taxes with references paid to these laborers.

This decision was not, however, based on the 1939 amendment to the Federal Social Security Act, the wages involved having apparently been, in part at least, paid before that amendment was enacted. As concerned the effect of that amendment, indeed, the court limited the effect of its prior decision in United States v. Turner Turpentine Co. supra, saying at page 777 of 125 F.2d: "The Company asserts that the amendment of the Social Security Act of Aug. 10, 1939, [42 U.S.C.A. § 302 et seq.] states the meaning of 'agricultural labor' which should here be applied, it being a mere clarification of the original Act, citing United States v. Turner Turpentine Co., 5 Cir., 111 F.2d 400. We think otherwise. The cited case involved only the question whether labor in producing turpentine gum from pine trees was in 1937 agricultural labor. It was held so to be, much weight being given to the general understanding in the States in which such work was carried on. The amendment of 1939 was said to be interpretative and explanatory of the original Act, but the statement must be limited to the matter before the Court. A careful examination of the legislation and its history leads us to say that so far as it relates to the present case it was expressly intended to change existing law from a date fixed in the future, and was not declaratory of the old law and operative retroactively."

The original act however excepted agricultural labor from its provisions and it appears that prior to the enactment of the 1939 amendment the Commissioner of Internal Revenue, Treasury Department, pursuant to authority in the original Act to make administrative regulations, promulgated a set of rules which included as Article 206 the following:

"The term 'agricultural labor' includes all services performed—

"(a) By an employee on a farm in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding or management of live stock, bees and poultry; or

"(b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation or marketing of those materials or articles. Such services do not constitute 'agricultural labor', however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such packaging, transportation or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"As used herein the term 'farm' embraces the farm in the ordinary accepted sense and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges and orchards.

Forestry and lumbering are not included within the exceptions."

In deciding the case before it, the Circuit Court of Appeals, in Chester C. Fosgate Co. v. United States, independently of the amendment of 1939 to the Act and basing its ruling under the Original Act as interpreted in subdivision "a" of said Article 206 of the said regulations went on to say at page 778 of 125 F.2d: "We approve the district court's conclusion that the services which Fosgate Company rendered in cultivating crops of fruit for others were rendered on a farm in connection with the cultivation of the soil, and were under Art. 206 (a) agricultural labor, although the owner of the crops did not directly hire the laborers, but dealt with the Company, which in turn put the laborers to work. The labor was done in cultivating the soil, the literal etymological meaning of agriculture. The Company was entitled to recover back the taxes with reference to these wages."

In McAllister v. Cobb, 237 App.Div. 674, 263 N.Y.S. 349, 351, in a proceeding under the Workmen's Compensation law which excluded "farm laborers" from its provisions, an award in favor of a farm hand injured while cranking a tractor furnishing power for a buzz saw used to saw wood for his employer's neighbor was held to be unauthorized. It was intended by both the injured person's employer and the neighbor that when the sawing was done it should be paid for in return work or in money; and it was in fact paid for in part by each of these. The Court said that it was "constrained to hold that at the time of the accident the employer was not engaged in the business of wood sawing but in that of a farmer, and that the claimant was a farm laborer * * *."

Various cases from outside this state have been cited in appellant's behalf in the effort to show that the services performed by respondents were not merely incidental to farm labor. Some of these seem to us to be distinguishable in their facts from the case at bar. With others, we are not in agreement.

[3] Coming now to the case at bar we agree with appellant that the very fact that the California Unemployment Insurance Act parallels the similar provisions of the Federal Social Security Act of 1935 argues that it should have a similar construction. But the latest construction given that Act by a federal court, as appears from the Fosgate case, makes it plain that to give the California Act a similar construction is to include the defendants' operations in the expression "agricultural labor".

[4] It is claimed, however, that a different situation is created by reason of Rule 7.1 of the California Unemployment Commission above quoted. In this connection we are struck by the similarity of that rule to the said Article 206 of the Federal Regulations. It will be observed that a limitation similar to that involved in the (unnumbered) third paragraph of the California Rule is contained in the second sentence of subdivision "b" of Article 206 of the Federal Regulations. It is clear that in the latter case it is not intended to qualify the definition of agricultural labor contained in said division "a" of that section and it is the necessary conclusion from the Fosgate case that it does not qualify that definition. Since the California rule was patently based on this Federal regulation, it is our opinion that the limitation in its said third "unnumbered" paragraph must be construed as applicable only to the situations described in its second paragraph which immediately precedes the limitation and not to the definition contained in its first paragraph, which is the analogue of subdivision "a" of paragraph 206 of the Federal regulations.

[5-7] What we have said is in itself decisive of this case, but we may add that we cannot accept the proposition that the authority contained in Section 90 of the State Act for rule making by the Commission can go so far as to authorize any rule limiting an exemption expressly made by the terms of the Act. We agree that such a limitation would amount to legislation and transcend the Commission's authority. The regulations promulgated by the Commissioner of Internal Revenue under authority of the Act of Congress are obviously in line with the intent of the Act. It would be otherwise with Rule 7.1 of the California Employment Commission if it were so construed as to limit the expression "agricultural labor" in the manner in which appellant claims to have limited it. We do not think such authorities as e. g. Butte A. & P. Railway v. United States, 290 U.S. 127, 54 S.Ct. 108, 110, 78 L.Ed. 222, militate against this view. There the Interstate Commerce Commission, pursuant to Congressional authority, allowed a claim of the complainant railway for a deficit incurred while under federal control during the first World War. Subsequently the government sought to recover money paid under this award on the theory that the Commission had too liberally interpreted the word "deficit". The Supreme Court of the United States held the Government bound by the Commission's action saying that: "the Commission would necessarily act in a quasi judicial capacity. If it misconstrued the term 'deficit,' it committed an error; but it did not transcend its jurisdiction," and since Congress had provided no method of review, neither the Commission nor a court had power to correct the error after payment had been made pursuant to the award. The difference between this situation and that involved in the making of rules by the California Employment Commission is obvious. In the absence of constitutional provision therefor it is now settled that administrative bodies in this State having state-wide functions are devoid of judicial powers. The Commission's rules are valid in so far as they are in line with the terms of the Act and no farther. They are impotent to change the clear meaning of such terms.

Undoubtedly where a legislative act invests a board or other administrative agency with authority to make rules in aid of the enforcement of the act, and its enforcement involves the definition of some term used in the act, such for example as "agriculture", which, as used by lexicographers, has alternate meanings, one broader than the other, what is described in Rochester Telephone Corporation v. United States, 307 U.S. 125, 59 S.Ct. 754, 761, 83 L.Ed. 1147, as the "doctrine of administrative finality" might justify treating as conclusive the adoption by such agency of the narrower rather than the broader meaning, as for example by excluding from its use of the word "agriculture" the mere cultivation for purposes of enjoyment of shrubs or flowers. But such conclusiveness must stop short of an interpretation purporting to restrict the term to be defined beyond all limits known to recognized usage.

We may further add that our attention has been called to the case of Unemployment Reserves Commission v. St. Francis Home Association (unreported), decided on April 1st of this year by the Appellate Department of the Superior Court of the City and County of San Francisco. That case seems to us distinguishable from the present one. The association there involved was a non-profit corporation composed of the landowners of a residential tract who by the purchase of property became members of the association. Its purpose was to cultivate and care for grass, flowers, trees and shrubs on the lots owned by the association and on the curb strips fronting on the properties of the members. The association was maintained by the assessment of the property owners and constantly employed seven gardeners. The Commission contended that it was liable under the Unemployment Insurance Act for the tax imposed on its payroll. It claimed exemption under Sections 7(a) and 7(b) respectively covering agricultural labor and domestic service in a private home. Specifically the association claimed that because, in its broader sense the term agriculture includes horticulture and its employees were, among other things, engaged in cultivating the ground, their activities were included within the exemption of "agricultural labor." The court held that the essential purpose of the association was to enhance the attractiveness of the residential tract, to beautify its parks and curb strips and that even though the association's employees were engaged in horticultural work they were not agricultural laborers nor were their wages exempt from taxation as coming within the exemption of domestic service about private homes. It was the court's view that, although agricultural labor in some instances includes horticulture, this must, to be so included, be practiced in cultivating the ground or raising or harvesting crops on a farm. Farms would include ranches devoted to orchards, vineyards, fruit raising, truck farming, dairying and the raising of stock and poultry. It is apparent that the activities of the association did not amount to farming and were therein widely different from the operations of the defendant in the case at bar.

We find no error in the determination of the Municipal Court and its judgment is therefore affirmed.

MUNDO, J., not participating.